THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 05

of December

2019

DECISION

ZKE.440.49.2019

Based on Article. 104 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), Art. 160 sec. 1 and 3 of the Act of 10 May 2018 on the protection of personal data (Journal of Laws of 2019, item 1781), art. 12 point 2 and art. 22 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and Art. 6 sec. 1, art. 57 sec. 1 lit. a), lit. f) and art. 28 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general regulation on the protection of personal data) (Journal of Laws UE L 119 of 04.05.2016, p. 1 and Journal of Laws UE L 127 of 23.05.2018, p. 2), in connection with Art. 105 paragraph. 4 and art. 105a paragraph. 4 and 5 of the Act of August 29, 1997. Banking law (Journal of Laws of 2018, item 2187, as amended), following administrative proceedings regarding the complaint of Ms M. K., against unauthorized processing by P. S.A. their personal data for marketing purposes and their disclosure to D. Sp. z o.o., President of the Personal Data Protection Office,

refuses to accept the request

JUSTIFICATION

The Office of the Inspector General for Personal Data Protection (currently: the Personal Data Protection Office) received a complaint from Ms M. K. (hereinafter also referred to as the "Complainant") about unauthorized processing by P. S.A. (hereinafter referred to as "the Bank"), their personal data for marketing purposes and their disclosure to D. Sp. z o.o. (hereinafter referred to as: the "Company").

In the content of the complaint, the complainant demands that the data protection authority undertake actions aimed at:

1) the Bank no longer processes the personal data of Ms M. K. for marketing purposes;

2) cessation of processing by D. Sp. z o.o. the complainant's personal data for marketing purposes.

In the course of the proceedings conducted in this case, the President of the Personal Data Protection Office established the following facts.

1. On […] October 2013, Ms M. K. concluded with the Bank an agreement for a checking and savings account […], electronic banking services and a debit card ([…]), - account number: […].

2. Bank and D. Sp. z o.o. processed the complainant's personal data for marketing purposes.

3. The bank cooperated with D. Sp. z o.o. on the basis of a framework agreement of […] July 2015 and an agreement for entrusting the processing of personal data of […] July 2015 (copies of the above-mentioned agreements are attached). The cooperation between the Bank and the Company consisted in contacting the Bank's clients by an employee of the Company, whose data the Company obtained from the Bank, in order to present a proposal to use the Bank's product offer.

4. Personal data of Ms M. K. provided by the Bank to D. Sp. z o.o. were in the database of the Company from [...] September 2015 to [...] October 2015. At that time, the Company's employees made attempts to contact the Complainant by phone in order to advertise the Bank's product offer, but to no avail.

5. The account number: […] was closed by the Bank on […] January 2016.

6. On [...] January 2016, Ms M. K. submitted to the Bank an objection to the processing of her personal data referred to in Art. 32 sec. 1 point 8 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), hereinafter: "the Personal Data Protection Act of 1997".

7. The objection was accepted by the Bank, which was also noted in the Bank's IT system.

8. Currently, the complainant's personal data are not processed for marketing purposes, neither by the Bank nor by the Company.

After analyzing the evidence collected in the case, the President of the Office for Personal Data Protection states as follows.

On May 25, 2018, the provisions of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2019, item 1781) entered into force.

Pursuant to Art. 160 sec. 1-3 of the Act on the Protection of Personal Data of 2018, proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before the date of entry into force of this Act, are conducted by the President of the Personal Data Protection Office on the basis of the Personal Data Protection Act of 1997, in accordance with with the rules set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018,

item 2096, as amended). At the same time, the activities performed in the proceedings initiated and not completed before the effective date of the provisions of the Personal Data Protection Act of 1997 remain effective.

From May 25, 2018, also Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95 / 46 / EC (general regulation on the protection of personal data) (Journal of Laws UE L 119 of 04.05.2016, p. 1 and Journal of Laws UE L 127 of 23.05.2018, p. 2), hereinafter referred to as the "Regulation 2016/679 ".

Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks specified under this regulation, each supervisory authority on its territory monitors and enforces the application of this regulation (point a) and considers complaints submitted by the data subject or by - in accordance with Art. 80 by Regulation 2016/679 - the entity, organization or association, to the extent appropriate, conducts proceedings on these complaints and informs the complainant about the progress and results of these proceedings within a reasonable time (point f).

It should be noted here that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the actual state of affairs at the time of issuing this decision. As the doctrine points out, “the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that a public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (...). Settlement in administrative proceedings consists in applying the applicable law to the established factual state of an administrative case. In this way, the public administration body implements the goal of administrative proceedings, which is the implementation of the applicable legal norm in the field of administrative and legal relations, when such relations require it "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure, M. Jaśkowska, A . Wróbel, Lex., El / 2012). Also the Supreme Administrative Court - in the judgment of May 7, 2008 in case no. Act I OSK 761/07 stated that: "when examining the legality of the processing of personal data, GIODO is obliged to determine whether the data of a specific entity are processed as at the date of issuing the decision on the matter and whether it is done in a legal manner".

Pursuant to the wording of Art. 23 sec. 1 of the Act on the Protection of Personal Data of 1997, in force during the period covered by the Complainant's complaint, the processing of personal data was permissible when: the data subject consents to it, unless it concerns the deletion of data relating to him (point 1), it is necessary to exercise the right or fulfill the obligation

resulting from a legal provision (point 2), it is necessary for the performance of the contract when the data subject is a party to it or when it is necessary to take action before concluding the contract at the request of the person, to whom the data relate (point 3) is necessary to perform the tasks specified by law for the public good (point 4), it is necessary to fulfill legally justified purposes pursued by data controllers or data recipients, and the processing does not violate the rights and freedoms of the person whose the data relates to (point 5). The provision of art. 23 sec. 4 of the Act on the Protection of Personal Data of 1997 provided that for the legally justified purpose referred to in Art. 23 sec. 1 point 5, it shall be considered in particular direct marketing of the controller's own products or services.

Art. 32 sec. 1 point 8 of the Act on the Protection of Personal Data of 1997 granted the data subject the right to object to the processing of his personal data in the cases specified in art. 23 sec. 1 points 4 and 5. This means that the data subject could object to the data controller against the processing of their personal data for marketing purposes. At the same time, at the disposal of Art. 32 sec. 3 of the Personal Data Protection Act of 1997, it resulted that after such objection was noted, further processing of the questioned data was unacceptable.

Pursuant to the provisions currently in force (from May 25, 2018, i.e. from the date of application of the provisions of Regulation 2016/679), the processing of personal data is lawful if the data controller has at least one of the provisions of Art. 6 sec. 1 of Regulation 2016/679, the material premises for the processing of personal data. According to the above-mentioned provision, the processing of personal data is lawful only if one of the following conditions is met: a) the data subject has consented to the processing of his personal data for one or more specific purposes; b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; c) processing is necessary to fulfill the legal obligation incumbent on the controller; d) processing is necessary to protect the vital interests of the data subject or of another natural person; e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where these interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection of personal data, in particular when the data subject is a child.

In the light of recital 47 of Regulation 2016/679, for actions performed in the legitimate interest referred to in art. 6 sec. 1 lit. f), it is necessary to recognize, inter alia, the processing of personal data for the purposes of direct marketing.

On the other hand, the provisions of Art. 21 sec. 2-3 of the Regulation 2016/679, analogically to the previously applicable regulation of art. 32 sec. 1 point 8 and art. 32 sec. 3 of the Act on the Protection of Personal Data of 1997, provide for the right of the data subject to object to the processing of his personal data for the purposes of direct marketing of the administrator, resulting in inadmissibility of further processing for this purpose.

Regarding the transfer by the Bank of the complainant's personal data to D. Sp. z o.o., as an entity referred to in art. 28 sec. 3 of the Regulation 2016/679, by analogy to the previously applicable art. 31 of the Act on the Protection of Personal Data of 1997, it should be stated that the legal provisions in force do not limit the Bank's possibility of entrusting services by another entity, in this case by D. Sp. z o.o. to the Bank, services consisting in conducting a telephone conversation with persons whose data comes from the database provided by the Bank, and the purpose of which is to present the Bank's product offer.

A framework agreement was concluded between the Bank and the Company on [...] July 2015 and an agreement of [...] July 2015 entrusting the processing of personal data referred to in Art. 31 of the 1997 Act, which is the equivalent of Art. 28 of the Regulation 2016/679.

It is therefore necessary to indicate that D. Sp. z o.o. in accordance with Art. 28 sec. 3 of Regulation 2016/679, was entitled to process the complainant's personal data on the basis of the personal data processing agreement concluded with the Bank on [..] July 2015.

In the present case, the Bank's obligation resulting from the above-mentioned regulations was therefore to appropriately record in its IT systems and databases information about the applicant's objection to the processing of her personal data for marketing purposes and, consequently, to stop processing her personal data for these purposes, both by the Bank and by the Company.

As established in the present case, the objection raised by Ms MK to the processing of her personal data for marketing purposes was recorded in the Bank's IT system and both the Bank and the entity entrusted with the processing of the complainant's personal data, i.e. the Company stopped processing her personal data in these goals. It should also be noted that the complainant's personal data has not been processed by the Company since [...] October 2015.

However, the legal act containing detailed regulations regarding the processing of personal data of bank customers in connection with banking activities is primarily the Act of August 29, 1997 - Banking Law (Journal of Laws of 2018, item 2187), hereinafter referred to as "Banking law".

Pursuant to Art. 105a paragraph. 1 of the Banking Law, processing by banks, other institutions legally authorized to grant loans

and institutions established pursuant to art. 105 paragraph. 4 (eg BIK), information constituting banking secrecy with regard to natural persons may be performed, subject to Art. 104, 105 and art. 106-106c, for the purpose of creditworthiness assessment and credit risk analysis. The information contained in BIK is to be used by banks, as institutions of public trust, to fulfill their statutory obligations related to the need to exercise special care in ensuring the safety of stored funds, as well as the need to properly examine creditworthiness, from which existence - in accordance with art. 70 paragraph. 1 of the Banking Law - the bank makes granting a loan conditional. Creditworthiness testing, which includes the ability to repay obligations and creditworthiness, is an extremely important element of the bank's operations. The Credit Information Bureau was established precisely in order to reduce the risk of granting difficult loans, accelerate and simplify loan procedures, and support bank decisions regarding granting loans.

As is clear from the factual findings, the Bank is currently processing the complainant's personal data resulting from the savings and checking account agreement [...], electronic banking services and debit card ([...]) solely for the purpose of using internal statistical methods, to which it is entitled pursuant to Art. . 105a paragraph. 4 of the Banking Law, pursuant to which the Banks and institutions referred to in Art. 105 paragraph. 4, may process information constituting banking secrecy regarding natural persons after the expiry of the obligation resulting from the agreement concluded with the bank or other institution authorized by law to grant loans, without the consent of the person to whom the information relates, for the purposes of using the statistical methods referred to in Art. 128 sec. 3.

In connection with the findings, it should be noted that the continuation of administrative proceedings by the President of Personal Data Protection, initiated by a complaint about irregularities in the processing of the complainant's personal data by the Bank and the Company, aimed at issuing an administrative decision pursuant to Art. 18 sec. 1 of the Personal Data Protection Act of 1997 is unfounded.

According to the wording of the above-mentioned of the provision, in the event of a breach of the provisions on the protection of personal data, the President of the Personal Data Protection Office ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the lawful state, in particular: removing the deficiencies (1), supplementing, updating, rectifying, disclosing or failure to provide personal data (2), application of additional security measures for the collected personal data (3), suspension of the transfer of personal data to a third country (4), data protection or transfer to other entities (5) or deletion of personal data (6). From the wording of Art. 18 sec. 1 of the Act on the Protection

of Personal Data of 1997, and at the same time by the definition of an administrative decision - as an act deciding in an authoritative manner about the rights and obligations of the parties to the proceedings in the factual and legal status established and up-to-date at the time of its issuance - it follows that the personal data protection authority does not evaluation of past events, not continued at the time of the judgment. The decision of the President of the Personal Data Protection Office (UODO) is an instrument to restore lawfulness in the data processing process carried out at the time of issuing the decision.

Summing up, it should be stated that there are currently no grounds for formulating an order referred to in Art. 18 sec. 1 of the Personal Data Protection Act of 1997, because the complainant's personal data are no longer processed by the Bank and the Company for marketing purposes. The Bank is currently processing the complainant's data only for the purpose of using internal statistical methods, which is in line with the applicable provisions of law and does not require the complainant's consent. Due to the above, the administrative proceedings in the present case should have been concluded with a decision refusing to grant the applicant's request.

In this factual and legal state, the President of the Personal Data Protection Office resolved as in the sentence.

Based on Article. 127 § 3 of the Code of Administrative Procedure, the party has the right to file an application for reconsideration of the case within 14 days from the date of its delivery to the party. If a party does not want to exercise the right to submit an application for reconsideration of the case, he has the right to lodge a complaint against the decision with the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party. The complaint is lodged through the President of the Personal Data Protection Office (address: ul. Stawki 2, 00-193 Warsaw). The fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

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