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Marketing sent by banks to e-mail address in compliance with the law

Abstract

This article covers considerations on the e-mail marketing of financial products and services aimed at consumers. The research paper presents the practice of banks used by those institutions in the e-marketing; basic concepts such as information, offer, advertisement, communication or spam have been considered. The article addresses in particular relevant problems linked to sending advertising materials by e-mail, i.e. specifying what types of messages a bank may send to its customers, whether a bank may send such messages to all its customers, whether a bank may send such messages only to its customers, what the consumers rights with respect to receiving unwanted and unsolicited commercial information are. The research paper took into consideration current judicature and views of legal writers.

Keywords: advertising law, marketing, consumer protection, spam, data protection, mailing

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Introduction

Due to high competition on the financial services market, it is obvious that marketing plays an important and sometimes crucial role for the banks. There are various forms of marketing, and one of them is to send offers to an e-mail address, which is referred to as mailing. Receiving such messages is a nuisance for recipients, because every day they are flooded with a large number of unwanted messages. Consumers often automatically delete such messages without wondering where the sender found their address or whether they were legally allowed to send them the information. Therefore, it is so important to specify what kinds of messages a bank may send to its customers, whether a bank may send such messages to all its customers, whether a bank may send such messages only to its customers, what the consumers rights with respect to receiving unwanted and unsolicited commercial information are.

Commercial information – A communication or advertisement?

Some of the messages on e-mail boxes of bank customers represent commercial information, advertising and spam. It is important from the legal point of view to determine the legal nature of such messages, which will make it possible to determine when the law is breached.

The concept of commercial information has been regulated by Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.² According to Article 2f of the Directive, commercial communication is any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications: information allowing

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ EU L 178, 17.7.2000.

direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address, communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.

Under the Polish law, commercial information is defined in the Act of 18 July 2002 on the provision of services by electronic means (Journal of Laws of 2002, No. 144, item 1204, as amended) (hereinafter referred to as "APSEM"), which implements Directive 2000/31/EC and Directive 98/34/EC³ amended by Directive 98/48/EC⁴ in the part concerning the term "information society services", which is an analogy of "services provided by electronic means".⁵ According to APSEM, commercial information should be understood as any information designed to promote, directly or indirectly, the goods, services or image of a company or person pursuing a profession whose right to exercise the profession depends on the fulfilment of the requirements set out in separate acts, excluding information enabling communication using electronic means of communication with a specific person and information on goods and services that do not serve the purpose of achieving a commercial effect desired by the entity that commissions its dissemination, in particular without remuneration or any other benefits from producers, vendors and service providers.⁶

Directive 2000/31/EC uses the term "commercial communication" meaning any form of promotion that promotes, directly or indirectly, goods, services or the image of a company, excluding any available means to obtain information about such entities (such as e-mail address or domain) and information about goods and services the aim of which is not to increase the effectiveness of the commercial purpose of such an entity. "Commercial communication" has been construed by the Polish legislation as "commercial information", which was criticised by the legal writers⁷ because the material field of application of commercial information is much broader than advertising, which may raise doubts among recipients.

Advertising is another concept of major importance from the customer's point of view. However, the concept of advertising may be found in individual special acts

³ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998.

⁴ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations OJ L 217, 5.8.1998.

⁵ W. Chomiczewski et al., *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw*, Warszawa 2011.

⁶ G. Rączka, *Ochrona usługobiorcy usług elektronicznych*, Toruń 2007, pp. 52–53.

⁷ X. Konarski, *Ustawa o świadczeniu usług drogą elektroniczną*, Warszawa 2004, p. 19.

on specific products (such as the Act of 26 October 1982 on education in sobriety and counteracting alcoholism,⁸ the Act of 9 November 1995 on protection of health against the consequences of using tobacco and tobacco products,⁹ the Act of 6 September 2001 – Pharmaceutical Law,¹⁰ the Act of 11 January 2001 on chemical substances and preparations¹¹), however, the legal definition is not known in the Polish legal system, therefore the explanation should be sought in the jurisprudence. One of the first definitions of advertising that appeared in Polish legal literature explains that advertising includes every statement aimed at stimulating the sale of goods and services.¹² As an example, the authors of the definition indicated street ads, leaflets or prints. According to B. Jaworska-Dębska, advertising may be defined in a broad and in the strict sense.¹³ In the former, advertising applies to all the efforts aimed at disseminating information in order to popularise it and attract the attention to it. In the strict sense, it shows real information about goods or services to appeal to the recipient.¹⁴ Other legal writers point out persuasion as one of the elements of advertising that defines it.¹⁵ In German literature, the unspecified number of recipients of advertising and its propagating function are pointed out. The task of shaping the demand was also emphasised.¹⁶ The European Court of Justice has expressed an opinion that advertising is a service within the meaning of Article 49 of the EC Treaty and plays mainly an information function.¹⁷ This way of understanding advertising is in line with its definition contained in the European Convention of 5 May 1989 on Transfrontier Television, which was ratified by Poland.¹⁸ The Polish legislator also applies the quoted definition of advertising.¹⁹ Article 4(17) of the Act of 29 December 1992 on radio and television²⁰ stipulates that advertising means a commercial message originating in a public or private entity, associated with its business or professional activity, aimed at promoting the sale or use of goods or

⁸ Journal of Laws of 2018, item 310, as amended.

⁹ Journal of Laws of 2017, item 957, as amended.

¹⁰ Journal of Laws of 2017, item 2211, as amended.

¹¹ Journal of Laws of 2018, item 143, as amended.

¹² I. Wiszniewska, R. Skubisz, *Środki zapobiegania nieuczciwej reklamie w projekcie ustawy o zwalczaniu nieuczciwej konkurencji*, "Państwo i Prawo" 1992, Book 4, p. 55.

¹³ B. Jaworska-Dębska, *Wokół pojęcia reklamy*, PUG 1989, 12, p. 21.

¹⁴ M. Namysłowska, *Reklama. Aspekty Prawne*, Warszawa 2012, p. 399.

¹⁵ J. Szwaja et al., *Ustawa o zwalczaniu nieuczciwej konkurencji, komentarz*, Warszawa 2006, p. 642.

¹⁶ G. Rączka, op. cit., p. 54.

¹⁷ ECJ judgment of 9.07.1997 in joint cases C-34/95, C-35/95 and C-36/95, ECR [1997], I-3843.

¹⁸ Journal of Laws of 1995, No. 32, item 160.

¹⁹ G. Rączka, op. cit., p. 55.

²⁰ Journal of Laws of 2018, item 650, as amended.

services against payment; advertising also covers self-promotion. The Polish judiciary has also had impact on the definition of advertising. The Supreme Administrative Court should be pointed out, which has repeatedly commented on advertising in tax matters. Thus, the Supreme Administrative Court's concept of advertising covers the dissemination of information about the services and goods themselves and, additionally, information about places and opportunities to buy goods or services. Moreover, advertising is everything containing additional information that is not necessary to make an offer or conclude a contract.²¹

Explanation and distinction of the concept of advertising from commercial information can be found in the judgement of 4 December 1996, III SA 955/95 (not promulgated). The distinction between advertisement and commercial information emphasised by case law is confirmed in the jurisprudence. It is pointed out that the goal of the advertisement is to encourage people to buy goods or services whereas the goal of commercial information should be to provide data on the provided services or goods.²² It is also noted that commercial information is considered to be messages that do not raise doubts whether they are true and can be verified.²³

The next message type that consumers may receive from financial market institutions is communication. Communication and advertisement are in a sense related to each other because every advertisement is information, but not every information is advertisement.²⁴ This persuasive dimension makes it possible for an average recipient to distinguish the nature of these two messages.²⁵ Information should not provide customers with the knowledge about services or products, encourage them to buy them, it should have a simple form and provide specific data.²⁶ Such information will be, for example, a change to the regulations or a change in the currently applicable tariff. Information is defined in our legal system and in the legal systems of other countries. The legal definition of information in the 21st century, in the era of globalisation, computerisation and integration, seems impossible. It seems necessary to create an interdisciplinary definition, avoiding industry-specific terms.²⁷

It is not easy to evaluate messages received in the e-mail account. There is a thin line between commercial information and advertising. In order to determine the

²¹ Judgement of the Supreme Administrative Court, Branch Office in Katowice of 8.04.1997, I SA/Ka2976/95, promulgated in "Monitor Podatkowy" 2000, 2, p. 3.

²² B. Jaworska-Dębska, op. cit., p. 22.

²³ G. Rączka, op. cit., p. 57.

²⁴ E. Traple et al., *Prawo reklamy i promocji*, Warszawa 2007, p. 640.

²⁵ D.E. Harasiumiuk, *Zakaz reklamy towarów w prawie europejskim i polskim*, Warszawa 2011, p. 52.

²⁶ B. Jaworska-Dębska, op. cit., p. 22.

²⁷ P. Fajgielski, *Ochrona danych osobowych w Polsce*, Lublin 2008, p. 7.

nature of the received information, it is necessary to analyse whether the received message has features making it possible to classify a given message as commercial information.

Personal data – Protection and use in marketing

The right to protection of personal data has its roots in the right to privacy. Because of the technological development and the automation of data processing, it was necessary to secure the right to privacy.²⁸ The first law on the protection of personal data was adopted in 1970 by the parliament of the German State of Hesse, whereas the first state law was the Swedish law of 1973. The Council of Europe Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 has become the main act of international law in this regard, and it was ratified by Poland in 2002²⁹ after the adoption of the relevant law in 1997. Until 1997, there were no legal provisions in Poland that would comprehensively protect the personal data of consumers. It was as late as with the Constitution of the Republic of Poland of 1997 that the right to privacy and its specific form – the protection of personal data – were introduced.³⁰ Article 76 imposes an obligation on public authorities to protect consumers from activities that may threaten their privacy. Article 51 of the Constitution introduces the right for a natural person to non-disclosure of information about themselves (referred to as the right to silence), to have access to official documents and data collections, but the law may be restricted to the extent specified by the Act, to demand the correction or deletion of false or incomplete data or data collected in breach of the Act. In Article 51(5) of the Constitution of the Republic of Poland, there is a reference to the rules and procedure for the collection and disclosure of information for the Act.³¹

The basic implementing act of this reference is the Act of 29 August 1997 on the protection of personal data³² (hereinafter referred to as APPD). Article 6(1) of this Act defines the concept of personal data, which is understood as all information on an identified or identifiable natural person. Later in Article 6, it was clarified that an identifiable person is a person whose identity can be identified directly or indirectly, in particular by reference to an identification number or one or more specific

²⁸ E. Traple et al., *op. cit.*, p. 553.

²⁹ Journal of Laws of 2003, No. 3, item 25, as amended.

³⁰ Articles 45, 47, 53 and 76 of the Constitution.

³¹ E. Traple et al., *op. cit.*, p. 555.

³² Journal of Laws of 2018, item 138, as amended.

factors defining its physical, physiological, mental, economic, cultural or social characteristics. Importantly, it was pointed out that it is not considered to enable the identification of a person if it would require excessive costs, time or efforts. It should be noted that only simultaneous fulfilment of all conditions makes it possible to recognise specific information as information constituting personal data.³³ The Act does not contain any catalogue of information that can be considered personal data. It seems impossible to set a such a catalogue in a top-down procedure. In its judgement of 17 November 2000, the Supreme Administrative Court recognised that personal data include name, surname, address, personal ID number (Polish: PESEL) and tax ID (Polish: NIP), and the rest of the data contains information about the person. The assessment of the nature of information should be made each time on a case-by-case basis for the needs of the entity that processes the data.³⁴

Personal data refer only to natural persons, which results directly from Article 6(1) of the APPD. Therefore, information about entrepreneurs seems to require a solution because entrepreneurs can also be natural persons³⁵ in accordance with the provisions of the Entrepreneurs' Law.³⁶ A popular view among the legal writers is that information about natural persons running a business represents personal data (if they meet the statutory definition), therefore the APPD applies to them.³⁷ However, the Inspector General for the Protection of Personal Data is of a different opinion. According to the Inspector General for the Protection of Personal Data, the APPD does not apply to an entrepreneur who may be a natural person.³⁸ The Supreme Administrative Court stated similarly in the judgement of 28 November 2002, in which it ruled that if the entrepreneur's company data cover the entrepreneur's personal data, and such data are identical, such a natural person must not demand that their personal data be protected. They are used not as personal data but as company data.³⁹ As long as a given company is considered a natural person, the information about it may be personal data, with the proviso that they make it possible to identify such a company. The fact that such data are generally available is irrelevant here.⁴⁰ Given the APPD provisions, it will be difficult to properly clas-

³³ P. Podrecki, *Prawo internetu*, Warszawa 2004, p. 219.

³⁴ II SA 1860/2000.

³⁵ P. Podrecki, op. cit., p. 220.

³⁶ Journal of Laws of 2018, item 646.

³⁷ Inter alia: A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2001, p. 25; J. Barta, R. Markiewicz, *Ochrona danych osobowych. Komentarz*, Kraków 2002, p. 310.

³⁸ E. Kulesza, *Pewność obrotu gospodarczego*, "Rzeczpospolita" 27.10.1999, 252.

³⁹ II SA 3389/2001 "Monitor Podatkowy" 2003, 3, p. 99.

⁴⁰ P. Podrecki, op. cit., p. 221.

sify the e-mail address. Can such an address be considered personal data? Opinions among legal writers are divided. Some lawyers are of the opinion that every e-mail address is information covered by personal data.⁴¹ Such an inclusion of the e-mail address in the personal data is determined by the objective possibility of identifying the e-mail address owner. The other are of the opinion that only the e-mail addresses that have explicit elements identifying their owners can be considered personal data.⁴² However, when looking at the legal definition contained in Article 6 of the APPD, it should be assumed that an e-mail address will be personal data to the one who processes it together with other data with which the address can be linked, thus leading to the full identification of the natural person. However, if such an entity had only the e-mail address, then such information would not represent personal data because identifying the e-mail address owner would involve excessive cost, time or effort. This is a general rule, but assessments should always be made on a case-by-case basis, which is confirmed by the Inspector General for the Protection of Personal Data.⁴³

In 2002, the Polish legislator implemented detailed regulations on the processing of personal data in the Act on electronic services (hereafter referred to as APSEM).⁴⁴ According to Article 16(1) of the APSEM, this Act is a *lex specialis* in relation to APPD, unless the regulations provide for otherwise. The basic act on the processing of personal data will be APPD.⁴⁵ The issue of the legal nature of e-mail has been resolved in the APSEM. According to Article 18(1)(6), e-mail addresses of service recipients are considered personal data. However, due to the further-reaching protection of personal data under the APSEM in comparison with the provisions of the APPD, this classification should not be extended to the provisions of the APPD.⁴⁶

A concept that is important for consumers is the concept of processing of personal data, which is defined in Article 7(2) of the APPD. According to the legal definition, the processing of personal data is any operation performed on personal data. Such operations include: collecting, saving, storing, processing, modifying, disclosing and deleting personal data.⁴⁷ The Act does not define any closed catalogue of ope-

⁴¹ W. Zimny, *Czy adresy e-mailowe są danymi osobowymi?*, "Ochrona Informacji, Biuletyn TISM" 2002, 3.

⁴² J. Ożegalska-Trybalska, *Adresy e-mailowe a dane osobowe*, "Biuletyn Administratorów Bezpieczeństwa Informacji" 2001, 12.

⁴³ Activity report of the Inspector General for the Protection of Personal Data for 2000, www.giodo.gov.pl, p. 11.

⁴⁴ Journal of Laws of 2017, item 1219.

⁴⁵ M. Chudzik, *Prawo handlu elektronicznego*, Bydgoszcz 2005, p. 171.

⁴⁶ P. Podrecki, *op. cit.*, p. 223.

⁴⁷ A. Mednis, *op. cit.*, p. 27.

rations considered data processing, it only uses a set of activities, recognising any operations that may be performed on personal data as processing of personal data.⁴⁸

The body, institution, organisational unit, entity or person who determines the purposes and means of processing of personal data is the personal data controller.⁴⁹ The data controller is a person with actual authority in relation to the data being processed.⁵⁰ However, not every administrator of personal data may be the personal data controller, but only the one who has the actual ability to control the data and can determine the purposes and means of data processing.⁵¹ The APPD allows the processing of any data, but only if one of the conditions referred to in Article 23 in conjunction with Article 27 is met. It is a closed catalogue. Each of the conditions is an individual and independent condition.⁵² These conditions include: consent of the person in question,⁵³ authorisation under the law, necessity to perform or take pre-contractual measures with the data subject, necessity to carry out legal tasks in the public interest, necessity to protect the interests of the data subject, or necessity to meet the legally justified purposes of the data controller.

Legally legitimate purpose, consent to marketing

A popular means of presenting offers by banks is to send messages to customers via e-mail (e-mail marketing). This is a direct form of marketing and takes place with the consent of the recipient.⁵⁴ Article 10 of the APSEM stipulates that it is forbidden to send unsolicited commercial information addressed to a designated recipient who is a natural person by means of electronic communication, in particular via e-mail. Commercial information is considered ordered if the recipient has agreed to receive such information, in particular if they have provided their e-mail address that identifies them. On the other hand, the Act of 16 July 2014 – Telecommunications Law (Journal of Laws of 2004, No. 171, item 1800) (hereinafter referred to as the “TL”) in the new wording of Article 172(1) stipulates that it is forbidden to use telecommu-

⁴⁸ P. Podrecki, *op. cit.*, p. 223.

⁴⁹ Article 7(4) of the APPD.

⁵⁰ A. Mednis, *op. cit.*, p. 29.

⁵¹ Judgement of the Supreme Administrative Court of 30 January 2002, II SA 1098/2001, “Monitor Podatkowy” 2002, 6, p. 243.

⁵² J. Barta, R. Markiewicz, *op. cit.*, p. 381.

⁵³ Judgement of the Voivodeship Administrative Court of 12 August 2016, II SA/Wa 337/16, M.Pr.Bank. 2017/4/39-45, LEX No. 2137465.

⁵⁴ K. Dobosz, *Handel elektroniczny*, Warszawa 2012, p. 62.

nications terminal equipment and automated calling systems for the purpose of direct marketing, unless the subscriber or end user has previously agreed to it. The purpose of this provision is to provide measures to protect consumers from intrusion into their privacy.⁵⁵ Therefore, entrepreneurs who want to send their commercial information to their potential customers must first ask for consent. The amendment to the TL consisted in adding a prohibition on the use of “telecommunications terminal equipment” for direct marketing purposes. What is the equipment? Such equipment includes all the devices that can be used to connect to the Internet or a telephone network (e.g. a telephone, smartphone, computer, laptop, tablet, smart watch). The subscriber or end-user is anyone who is a party to the agreement on the use of telecommunications services or actually uses them. It should be pointed out here that obtaining consent is also required from corporate customers.

The concept of consent to the processing of personal data is defined in Article 7(5) of the APPD, according to which the consent is understood as a declaration of will, the content of which is the consent to the processing of personal data of the person making the statement; the consent must not be implicit or implied from a declaration of will with a different content;⁵⁶ consent may be cancelled at any time.⁵⁷ The consent is the fullest manifestation of an entity to ensure its “right to decide for itself to disclose information about itself to others and the right to exercise control over such information held by other entities”.⁵⁸ The interpretation of the consent should comply with the provisions of the Civil Code because it is a declaration of will. Article 60 of the Civil Code stipulates that the will of a person can be expressed by any behaviour of such a person that reveals their will in a sufficient manner. This principle has been modified by Article 7(5) of the APPD, by implementing additional stringent conditions (the consent must not be implicit or implied from a declaration of will with a different content). Such a principle was also adopted in Article 4(1) of the APSEM and Article 174 of the TL.⁵⁹ In the judgement of the Supreme Administrative Court of 4 April 2003, it was emphasised that consent must

⁵⁵ A. Malarewicz, *Konsument a reklama. Studium cywilnoprawne*, Warszawa 2009, p. 224.

⁵⁶ J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz*, 6th ed., Warszawa 2015, p. 96.

⁵⁷ Pursuant to the Regulation of the European Parliament and of the Council (EU) 2016/679 of 27/04/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) in force from 25/05/2018, consent must be freely given, informed and with unambiguous indication of the data subject’s agreement to the processing of personal data. It will be required for instance to tick a separate checkbox with consent to sending commercial offers and a separate one for newsletter subscription.

⁵⁸ Judgement of the Constitutional Tribunal of 12 November 2002, SK 40/01, OTK-A 2002/6/81.

⁵⁹ E. Traple et al., op. cit., p. 575.

be express, and the person in question, when granting it, must be aware of what this concept means.⁶⁰ The person that grants the consent should be aware of the entity authorised to process personal data as well as the purpose and scope thereof. It is unacceptable to use provisions referring to conditions not presented to person granting the consent. According to Article 2(h) of Directive 95/46/EC, the consent must be freely given. Although the Polish regulations were modelled on the above-mentioned article, they lack the legal definition of this element – unforced consent.⁶¹ A common method of acquiring consent to marketing by financial institutions is to create one universal consent consisting of various consents. This way, the consumer is not able to freely control their statements and has no freedom to choose the purposes for which their personal data will be processed. Such a practice is unacceptable, as the Supreme Administrative Court pointed out in its judgement of 11 April 2003, in which it was stated that in the case of a declaration of will concerning various purposes of processing personal data, consent should be clearly expressed under each of these purposes of processing.⁶² The 2004 report of the Inspector General for the Protection of Personal Data states that the consent to the processing of personal data for promotional and commercial purposes and to the transfer of data to other entities is often forced.⁶³ The Inspector General for the Protection of Personal Data is of the opinion that consent to marketing should be collected from consumers irrespective of consent to the processing of data for the purpose of executing the concluded contract.⁶⁴

In addition to the customer's consent to such activities, a legally justified purpose is required for the legal processing of personal data for marketing purposes (Article 23(1)(5) of the APPD). This clause is intended to make it possible for entities to process personal data without a need to have other grounds. Based on the clause, an entity may process customer data, unless the customer opts out).⁶⁵ However, the use of Article 23(1)(5) of the APPD is contingent on the occurrence of two elements: the first is the processing of personal data for a legally legitimate purpose (the point is that the controller should process it in accordance with the nature of the activity, a lawful activity, rules of social coexistence or morality – Article 23(4) of the APPD);

⁶⁰ Judgement of the Supreme Administrative Court of 4 April 2003, IISA 2135/02 ("Wokanda" 2004, 6, p. 30).

⁶¹ E. Traple et al., *op. cit.*, p. 575.

⁶² Judgement of the Supreme Administrative Court of 11 April 2003, IISA 3942/02 (not promulgated).

⁶³ Report by the Inspector General for the Protection of Personal Data for 2004, p. 198, www.giodo.gov.pl.

⁶⁴ Report by the Inspector General for the Protection of Personal Data for 2001, s. 252–253, www.giodo.gov.pl.

⁶⁵ E. Traple et al., *op. cit.*, p. 577.

the second is the inviolability of the rights and freedoms of the data subject. When processing personal data, what is at risk to the greatest extent is the right to privacy, which is protected by the clause in question. As stated in Article 7(f) of Directive 95/46/EC, data processing on this basis is permissible only if the interests of the data subject are not overridden by the legitimate interests of the data controller or a third party to whom the data are disclosed.⁶⁶ The Inspector General for the Protection of Personal Data is of the opinion that a violation of rights and freedoms that prevents the reference to the premise of legally justified purpose takes place when the legal situation of the data subject is deteriorated, in particular when the information obligation is not properly met (consumers are deprived of effective control of the processing of their personal data, which they enjoy under the law).⁶⁷ For marketing activities of a bank, it is important to determine whether the legally justified purpose clause may constitute the legal basis for data processing by a third party. In the decision of 29 April 2004,⁶⁸ the Inspector General for the Protection of Personal Data ruled out such a possibility because it would violate the rights and freedoms of the data subject. The Inspector General has also divided internal marketing into –“own” and “third party” (external) marketing. “Third party marketing” covers data processing for the promotion of goods or services of another controller, but without disclosing data to it, e.g. sending an offer of another controller. It also includes the disclosure of personal data to other controllers for their subsequent processing for their own needs.⁶⁹

What should be pointed out at this point are the rights of a natural person, as specified in the APPD in Chapter 4. They are included by the legislator in the collective category of rights to control the processing of personal data. The data subject’s activity can be divided into information and correction measures. An information measure is the right to obtain information about the content of data and about the processing thereof. A request does not have to be submitted with a justification and may be submitted in any form. On the other hand, correction measures are aimed at updating, restoring the correct state or providing the entity with the instructions for one’s personal data, e.g. rejection to marketing.⁷⁰

⁶⁶ Ibidem, p. 578.

⁶⁷ Report by the Inspector General for the Protection of Personal Data for 2003, p. 162.

⁶⁸ GI-DP-868/00/1119.

⁶⁹ Judgement of the Supreme Administrative Court of 4 March 2002, II SA 3144/01 (not promulgated).

⁷⁰ E. Traple et al., *op. cit.*, p. 591.

Spamming

The problem of spam has existed essentially from the beginning of the Internet. The term “spam” is usually used in an online environment and is related to any e-mail that is not desirable for by its recipient.⁷¹ The term comes from the abbreviation for “stupid persons advertisement”.⁷² It should be pointed out that spam is unsolicited, unwanted and worthless mail. It is also important to point out that it attempts to encourage us to purchase a given service or goods.⁷³ Spamming is also met in legal language, where it is used interchangeably with the term “unsolicited commercial information”.⁷⁴ What should be pointed out at this point is the person sending such information – the spammer. Spam is currently a common practice of entrepreneurs, including the banking services sector, which is used to popularise their products and services. Spam has become an advertising medium.

Spamming was regulated for the first time in the European law in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.⁷⁵ It was adopted in the Directive that an e-mail address is personal data, and it is the basic act in this respect.⁷⁶ Further, reference should be made to Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector,⁷⁷ which regulated the use of automatic calling machines and facsimile machines for direct marketing purposes. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts⁷⁸ provides for that an e-mail is not included in the distance communication catalogue, the use of which is subject to prior consumer consent.⁷⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the

⁷¹ D. Kasprzycki, *Spam, czyli niezamawiana komercyjna poczta elektroniczna: zagadnienia cywilnoprawne*, Zakamycze 2005, p. 30.

⁷² P. Pszczel, *Spam – „nowe możliwości”*, [in:] Zasepa T. (ed.), *Internet. Fenomen społeczeństwa informacyjnego*, Częstochowa 2001, p. 329.

⁷³ M. Sieradzka, M. Zdyb (eds.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, 2nd ed., Warszawa 2016, p. 363.

⁷⁴ J. Kurek, *Ochrona przed niezamówioną korespondencją w komunikacji elektronicznej*, Warszawa 2013, p. 45.

⁷⁵ OJ EU L 281, 23.11.1995, p. 0031–0050.

⁷⁶ J. Gołaczyński (ed.), *Prawo umów elektronicznych*, Kraków–Zakamycze 2006, p. 98.

⁷⁷ OJ EU L 201, 31.07.2002, p. 0037–0047.

⁷⁸ OJ EU L 144, 04.06.1997, p. 0019–0027.

⁷⁹ P. Podrecki, op. cit., p. 498–501.

protection of privacy in the electronic communications⁸⁰ stipulates that Member States should prohibit the sending of unsolicited commercial messages in the form of e-mails or via internet-based IT systems.⁸¹ The regime for sending commercial communications has been described in the section devoted to personal data of this article.

Polish legislation lacks a separate regulation on security in the network – anti-spam regulations are scattered in several laws. Legal sanctions for sending unsolicited commercial information to an end recipient are governed by civil, criminal and administrative law. To begin with, there is Article 16 of the Act of 16 April 1993 on combating unfair competition (Journal of Laws of 1993, No. 47, item 211), which covers the issue of unfair advertising. In the statutory sense, unfair advertising is an onerous advertisement that is privacy-intrusive. Spam entails a threat to personal rights, including the right to privacy. Protection against unsolicited mail is the responsibility of the following authorities: the President of the Office of Electronic Communications, the President of the Office of Competition and Consumer Protection and the Inspector General for the Protection of Personal Data.⁸² Pursuant to Article 10(1) of the APSEM, it is not allowed to send unsolicited commercial information to natural persons via electronic means of communication.⁸³ Such practices will be tantamount to spam, which is punishable by a fine (Article 24 of the Act) and constitute a petty offense (Article 24(1) of the Code of Petty Offences).

It is a real challenge for the banking sector and alike to formulate the content of a marketing consent and consent to the processing of personal data, so that it is as precise as possible – extensive, but understandable and possibly short at the same time. When looking at the suggested consents included in forms or online surveys, you can often find that all checkboxes, including the consent to the processing of personal data, are automatically ticked, which is a prohibited practice. Other practices include hiding consent in regulations without a checkbox and forcing consent – the customer is not able to go to the next page without ticking the checkbox. This is a mistake because consent should be informed and given freely by the consumer (which does not rule out that granting of such consent could be obligatory for participation in, for example, a competition or a promotion campaign). The principle “one statement – one checkbox” should be complied with. It should be pointed out that it is not necessary to obtain customer consent for the purposes of direct mar-

⁸⁰ OJ EU L 201, 31.07.2002, p. 0037–0047.

⁸¹ D. Kasprzycki, *op. cit.*, p. 103.

⁸² J. Kurek, *op. cit.*, p. 41.

⁸³ E. Nowińska, K. Szczepanowska-Kozłowska, *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2018, p. 162.

keting of own services and products.⁸⁴ Yet, consent to sending commercial information by electronic means is required, and it must not be combined with consent to the processing of personal data, but such a practice can still be met. Article 10(2) of the APSEM stipulates that “commercial information is considered ordered if the recipient has agreed to receive such information, in particular if they have provided their e-mail address that identifies them”. In practice, you can see that the above-mentioned provision is often circumvented. It happens that the sender sends a request via electronic means for consent from the recipient to receive a commercial offer. Sending such messages should be considered unacceptable despite fairly frequent use. What should be pointed out is the classification of sending unusual content, such as birthday or Christmas wishes or newsletters, guides and tips. This type of mailing is also tantamount to advertising, and therefore the consent of the customer will be required.

Summary

Advertising is a trade tool. Banks advertise their products and services using various advertising media: TV commercials, leaflets, posters, banners or radio spots. Nonetheless, it is e-mailing that seems to have the most powerful appeal as it is usually directed to a specific group of recipients, thanks to which it is possible to adjust a given product to a given customer. Mailing is also a relatively cheap form of advertising, it is fast and provides a wide range of opportunities to present the offers. However, pursuant to the Polish and European legislation, the institutions of the banking sector must not use this type of advertising at will. Given all restrictions related to the processing of personal data, acts of unfair competition, telecommunications laws and the Financial Supervision Authority measures related to the rules of creating good advertising, banks may send commercial information to e-mail addresses only with the consent of the recipient. However, these restrictions do not apply to information e.g. about changes to the regulations or the tariff of fees. In order for the sent information to be in compliance with the law, it requires prior consent of the recipient. The consent must not be implicit or implied. The consent may be withdrawn by the recipient at any time. In addition to obtaining the consent under the Act on the provision of services by electronic means and Telecommunications Law, entities acquiring customer data must remember to obtain consent for the processing of personal data.

⁸⁴ Article 23(1)(5) of the APPD.