OFFICE FOR PERSONAL DATA PROTECTION

Lt. Col. Sochora 27, 170 00 Prague 7

tel .: 234 665 111, fax: 234 665 444

posta@uoou.cz, www.uoou.cz

* UOOUX00CQXFJ *

Ref. UOOU-05291 / 17-44

DECISION

Chairwoman of the Office for Personal Data Protection as an appellate body competent pursuant to § 2, § 29 and § 32 of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain acts, and according to § 10 and § 152 paragraph 2 of Act No. 500/2004 Coll., Administrative Procedure Code, decided on 27 September 2018 according to § 152 par. 6 let. b) of Act No. 500/2004 Coll. thus:

Appeal filed by the accused, the company

based

against the decision of the Office for Personal Data Protection

Ref. UOOU-05291 / 17-38 of 5 June 2018, is rejected and the contested decision is upheld.

Justification

based

Administrative proceedings for suspicion of committing offenses pursuant to § 11 para. a) points 1 and 2 of the Act No. 480/2004 Coll., on certain information society services and on the amendment of certain acts, was initiated by order no. UOOU-05291 / 17-33 of February 26, 2018, who was charged company (hereinafter referred to as the “accused”), delivered on 27 February 2018. The Office for Personal Data Protection (hereinafter only the “Office”) as an administrative body of first instance found the accused guilty of the commission offenses according to § 11 par. 1 let. a) points 1 and 2 of Act No. 480/2004 Coll., for which he imposed a fine on it in the amount of 118,125 CZK.

The basis for initiating the proceedings was the inspection protocol ref. UOOU-05291 / 17-31 of 23 January 2018 acquired pursuant to Act No. 255/2012 Coll., Control Rules, by the Inspector of the Office Ing. Joseph Vacula as part of the inspection of the accused, which took place from 3 November 2017 to 8 February 2018, including the file material collected as part of this inspection. Defendant's lawyer filed a counterclaim against the above order within the statutory time limit, which by letter dated 16 March 2018 was supplemented by a closer statement, the essence of which was mainly a controversy with a legal opinion Office.

The administrative body of the first instance subsequently issued a decision no. UOOU-05291 / 17-38 of June 5, 2018 (the "Decision"), which found him guilty of a misdemeanor according to § 11 par. 1 let. a) point 1 of Act No. 480/2004 Coll., as it repeatedly disseminated business communication to the electronic address specified in the statement, without having the consent to send them or they were customers in the sense of § 7 paragraph 3 of Act No. 480/2004 Coll., and further from the offense according to § 11 par. 1 let. (a) point 2, because the commercial communications identified in the statement were disseminated without proper designation in the sense of § 7 par. 4 let. a) of Act No. 480/2004 Coll. For the above At the hearing, the accused was fined CZK 80,000, with moderation above the administrative authority of the first instance justified the fines by taking into account the documented tax return from the income of legal entities, which shows that at the end of 2016, the accused was at a loss of CZK 191,274.

The decision was delivered to the defendant's lawyer on 7 June 2018 and 21 June 2018 a proper dissolution was filed. The appeal was thus filed within the statutory time limit.

The accused challenges the decision in its entirety and considers it to be wrong assessment of the act and the fine imposed is disproportionate. He therefore proposes to annul the decision and stay the proceedings or annul the decision and refer the case back to the administrative authority of first instance for a new hearing. In support of that assertion, it puts forward essentially identical arguments which: already applied in the statement of 16 March 2018 kept in the file under ref. UOOU-

05291 / 17-36. The accused considers, in particular, the opinion of the Office on liability
the client for disseminating commercial communications is in conflict with the Charter of Fundamental Rights and Freedoms,
because it is very extensive. Moreover, as the defendant further states, the Office's opinions are not general
binding and the Office itself is with regard to the judgment of the Municipal Court in Prague ref. 5 A 82 / 2014-
45 of 27 September 2017 in the interpretation of the question in question is not constant. It further refers to
professional literature, which is supposed to testify to the opinion that the accused cannot be described as a disseminator or
sender of commercial communications and therefore cannot be the responsible person. In this context
states that the terms "dissemination" and "dissemination by electronic means" used by law should be distinguished
which is narrower, as it is complemented by a form of dissemination.
In the opinion of the accused, the only entity responsible can be its partner, the company
(further
only the “partner”) and the Office is hereby to transfer the supervisory activity to the accused, as
no administrative proceedings were initiated with the partner. The accused further disagrees with the allegation
administrative authority of the first instance that it has not taken reasonably foreseeable steps to:
Check with your partner to see if they have valid legal titles to send business messages in her
benefit. In this regard, the accused considers that she has fulfilled the obligations since the contract
on marketing cooperation enshrined the obligation of the partner
. After being notified from
In addition, there was to be a meeting between the accused and her partner, where she was
the need for legal action was repeated, and the accused received assurances that the consents
has. This should be in good faith, as the partner is referring to the general provisions
of the Civil Code by an expert in the field acting with the necessary care and knowledge and accused
so she rightly expected the partner to follow the contract.
based
In view of all the above and the definition of the offense presuming guilty conduct,
the accused considers that she cannot be a party to the proceedings in question and if the Office places her in this case

position, deviates from decision-making practice, which is not fair in terms of legal certainty
in the consistency of public administration decision-making.

In the opinion of the accused, the mass or repeated distribution was not met, namely
due to the fact that its communication of the basis for the commercial communication was only against
partner, not to entities protected by law. Similarly based on professional literature
further comes to the opinion that it cannot be punished even according to § 11 par. 1 point 4 of Act No. 480/2004 Coll.,
as strict liability is absurd and the Office thereby de facto hinders normal business.

The accused also comments on the question of the proportionality of the fine. He believes that the fine is even after
moderation of the administrative body of the first instance is still disproportionate, even liquidating, and in proof of that
documents a copy of the tax return for 2017, according to which it is in a total loss for this year
CZK. He thus proposes its further moderation.

In conclusion, the defendant points to some, in her view, mitigating circumstances
which the administrative authority of the first instance did not take into account. First of all, it states that decision at all
does not contain the considerations which he followed in determining the amount of the fine, resp. did not take into account the
existence
contract and its content, cooperation during the procedure, termination of cooperation with the partner after
receipt of the order, as well as the fact that the participant was not a spreader or consignor
communication.

The appellate body examined the contested decision in its entirety, including the process which
preceded its publication, and reached the following conclusions.

The Appellate Body first states that the offense is in accordance with Section 5 of Act No. 250/2016 Coll.,
on liability for misdemeanors and proceedings against them, a socially harmful offense which is
explicitly marked in the law as an offense and which shows the characteristics stipulated by law, if not possible
about the crime. While in the case of liability of natural persons the law as one of the features
requires a culpable infringement, the administrative liability of legal persons is based on

principle of strict liability with the possibility

liberation. It does not take into account the circumstances

subjective nature. It is only required that there be an infringement which

attributed to the legal person, its negative consequence and the causal link between these actions

and consequence.

Based on the file documentation, it is evident that there was a foreseeable harmful law

consequence, namely an intrusion on the privacy of the addressees of commercial communications, resp. their harassment.

This was due to the mass or repeated dissemination of commercial communications by electronic means

funds in favor of the accused, without the consent of the addressee, resp. without proper designation as

business communication.

As for the objection of the non-existence of the alleged conduct fulfilling the statutory "dissemination

by electronic means ", it must be stated that the administrative body of the first instance is also here

did not doubt. It is apparent from the file that the accused entered into a contract with her partner

she ordered him to send out a commercial message which the accused would upload to her in a special application.

The graphic design of the commercial communications provided by the individual complainants also agrees

communications which the accused ordered to send in specific cases. The appellate body thus in

with the administrative authority of the first instance shall be deemed to have proved that the actual dispatch

the commercial communications took place precisely at the will of the accused on the basis of the order to send them. Yippee

it is undecided which predominant type of contract the parties have concluded since this contract

between parties. Although the accused cannot be denied authorization

undertakes exclusively

act

in private matters freely at its discretion, public law including administrative

liability for misdemeanors is applied separately and independently, and the contract may not have against

no effect on the supervisory authority.

At the same time, the legislator himself assumes that the disseminator can disseminate commercial communications not only on his own forces, but also through another entity. According to the provisions of § 7 par. b) of the Act No. 480/2004 Coll. a contrario, each commercial communication must contain information about the consignor, on whose behalf the communication takes place, resp. in whose favor the commercial communication is disseminated. Only such an interpretation is, in the view of the Appellate Body, Euroconform and in line with the purpose of the law. As the title of Directive 2002/58 / EC of the European Parliament and of the Council on the processing of personal data and the protection of privacy in the electronic communications sector also referred to as the “Directive”), as well as its preamble, this Directive protects the privacy of individuals and complements others personal data protection regulations. The reason for its adoption was mainly special increased privacy risks that are undoubtedly associated with the use of the Internet and electronic means of communication. Due to the importance of the protected interest and a very high level threats, the Directive provides for a high level of protection, including that among protected entities also includes legal entities, in contrast to the standard regulation of personal data protection.
At the same time, it must be emphasized that privacy is not the only protected public interest.
The volume of commercial communications can cause network problems in some cases electronic communications and terminal equipment, it should also be emphasized that with regard to increasingly easy to disseminate commercial communications in large volumes and with increasingly extensive annexes their acceptance is often associated with an ever-increasing burden of time as well as financial. Reality, that the meaning of the directive and therefore of Act No. 480/2004 Coll. is to protect addressees from subjects, in whose favor the commercial communication is disseminated, resp. that this entity is the consignor also from its Article 13, paragraph 4. The Czech version of the above-mentioned article is in principle similar to the above cited in § 7 par. 4 let. b) of Act No. 480/2004 Coll. Perhaps this conclusion is even clearer from the English version of the Directive, which provides in Article 13 (4): “In any event, the practice of sending electronic mail for the purposes of direct marketing disguising or concealing the identity

of the sender on whose behalf the communication is made, (…), shall be prohibited. “Spojení

on whose behalf can also be translated in this context as on whose behalf or in whose favor

communication is in progress.

The defendant testifies in favor of the conclusion

and the systematics and purpose of the law

No. 480/2004 Coll. The provisions of § 7 and § 11 of Act No. 480/2004 Coll. it is necessary to perceive not

separately, but in the context of especially Act No. 101/2000 Coll., on the protection of personal data

and amending certain laws. As is clear from the submitted file documentation, commercial

notices should not be addressed exclusively to legal persons, and therefore in the light of the judgment

Of the Supreme Administrative Court ref. 9 As 34 / 2008-68 is required for electronic details

the contact as personal data. It follows from the marketing cooperation agreement that

the accused commissioned the partner to promote its products and services, inter alia, by sending

communication to e-mail addresses (clause 3.1.3 of the marketing cooperation agreement). Accused so

determined both the purpose and the means of processing personal data, thus fulfilling the definition of a controller

personal data in the sense of § 4 letter j) of Act No. 101/2000 Coll. Because it is primarily

it is the duty of the controller to ensure that the processing complies with the legal conditions

administrator, who bears the main responsibility for any violation of the law.

One of the key principles of personal data protection, namely law, can be pointed out

the data subject to access the information. This right is applicable in particular to the administrator

personal data, as he is responsible for the lawfulness of the processing and for the person who disposes of it

personal data of a particular entity and therefore it is necessary to be aware of the identity of the controller.

This is the only way to invoke the right to access, change or destroy personal data. From this

For this reason, the legislator enshrined the obligation to state identity in every commercial communication

the sender - the person for whose benefit the commercial communication is disseminated. If possible by contract

transfer responsibility for the illegal dissemination of commercial communications to another entity, including

entities outside the local jurisdiction of state authorities, the above rights and principles of protection
personal data, as well as privacy in the general sense, would be completely annulled, for
the current profit of the sender of the business message that initiated the factual mailing process
and drove. In situations where Directive 2002/58 / EC, resp. Act No. 480/2004 Coll. were just received
in order to increase the security and protection of personal data, taking into account the specific risks of the Internet
and electronic communications, such a conclusion would be absurd and completely against the meaning of presumption
a reasonable legislator who intended to ensure the highest possible level of protection.
It is then necessary to add to the whole procedure that § 11 par. 1 of Act No. 480/2004 Coll. is constructed on
on the basis of strict liability, ie liability for the legal situation, when in relation to the legal
there is no need to examine the person's fault in the illegal situation. That's why
and in order to fulfill the will of the legislator, ie to protect privacy as far as possible, it is necessary
shall also consider as disseminators of commercial communications those persons who have granted the factual dispatch
instruction, order, entered into a contract, or otherwise de facto sending a commercial message
initiated. Therefore, it is necessary for disseminators of commercial communications, whether it be the contracting authority
(customer) or de facto shippers, have always sufficiently checked whether the addressees of the business
messages have given their consent for such sending, resp. in general, whether the distribution is lawful
way. The administrative body of first instance in this considered it proven that for the above
e-mail contacts the accused company did not have a legal title to disseminate commercial communications
nor has it verified in any sufficiently conclusive manner that such legal titles
has a partner with whom it has entered into a contract for the purpose of sending commercial communications.
The appellate body agrees with this conclusion, as in a situation where the accused was unlawful
shipments are repeatedly notified by the Office, a mere verbal assurance of the partner is not possible
consider it sufficient to fulfill the reasonably expected steps of verification and security
the legality of the further dissemination of commercial communications.
It can be added to the relationship between the liability of the accused and the partner that each of these entities bears its own
own share of responsibility for their actions fulfilling the characteristics of a misdemeanor. Distributor in the position of the client

therefore, it bears its own responsibility regardless of the obligations of other persons, and there is nothing left but to state that in terms of fulfilling the provisions of § 11 paragraph 1 of Act No. 480/2004 Coll. it was possible to punish the disseminator in the position of the client, ie the accused in this case company.

As regards the objection that the amount of the fine was disproportionately high, the Appellate Body concluded that in the present case, it has been established that the accused is the disseminator of the commercial communications in question, which, as duly justified by the administrative body of the first instance, was disseminated in violation of the law No. 480/2004 Coll. He was reasonably fined for this conduct. As for the amount saved sanctions, the appellate body states that the administrative body of the first instance considering the amount of the sanction he respected both the legal limit for imposing a fine and duly substantiated the imposed sanction.

The law allows for a fine of up to CZK 10,000,000 for the assessed conduct. Saved the fine thus moves at the very lower limit and can be considered more of a preventive sanction and disciplinary. The administrative body of the first instance assessed the economic situation of the accused, which documented its loss from 2016 with a copy of the corporate income tax return for 2016.

On the basis of this document, the administrative body of the first instance moderated the originally imposed sanction and reduced it to CZK 80,000. Although the accused objected to the appeal, she objected that she was in 2017 again at a loss, it must be stated that repression is not the sole function of the fine, but (above all) it is also a tool for preventing infringements. According to the file, the accused was informed of the illegality of the conduct in the pre-inspection proceedings, and subsequently she was satisfied with the mere verbal assurance of her partner and evidently ignored the illegality of the conduct. The consequence of inaction was the control proceedings and the subsequent infringement proceedings. Is so It is clear that the administrative authority of the first instance proceeded to the misdemeanor proceedings and imposed a fine until as the ultima ratio tool. Given the circumstances of the case, it is necessary to ensure sufficient

disciplinary and preventive function of the sanction, and also with regard to the authority of the accused to request on permission to delay the payment of the fine, resp. distribution into installments, in accordance with § 156 of the Act No. 280/2009 Coll., Tax Code, the appellate body did not find reasons for moderating the imposed fine.

The appellate body therefore rejected the defendant's arguments. After an overall review, then the appellate the authority notes that it did not find any errors in the procedure of the administrative body of the first instance.

On the basis of all the above facts, he therefore decided as stated in the statement of this Decision.

Lessons learned:

Pursuant to the provisions of Section 91 (1) of the Act, this decision shall be challenged No. 500/2004 Coll., Administrative Procedure Code, cannot be revoked.

Prague, September 27, 2018

For correctness of execution:

official stamp imprint

JUDr. Ivana Janů, v. R.

chairwoman