No. 9A 66/2019 - 92 The agreement with the original is confirmed by V. B. CZECH REPUBLIC JUDGMENT ON BEHALF OF THE REPUBLIC The Municipal Court in Prague decided in a panel composed of the president of the panel JUDr. Naděžda Řeháková and judge JUDr. Ivanka Havlíková and Mgr. Ing. Silvie Svobodová in the case of the plaintiff: B2M.CZ s.r.o., IČO 27455971 registered office in Prague 5, Šafránkova 3/1243, zip code 15500 represented by lawyer JUDr. Josef Aujezdským registered office Opletalova 1535/4, 110 00 Prague 1 against the defendant: Office for the Protection of Personal Data, IČO 70837627 registered office Pplk. Sochora 27, 170 00 Prague 7 on the lawsuit against the decision of the Chairperson of the Office for the Protection of Personal Data dated 4 April 2019, ID UOOU-01178/17-265 as follows: I. The lawsuit is dismissed. II. None of the participants is entitled to compensation for the costs of the proceedings. Reasoning: I. Subject of the proceedings 1. The plaintiff filed a lawsuit demanding a review of the decision of the President of the Office for Personal Data Protection dated 4 April 2019, no. UOOU-01178/17-265 (hereinafter referred to as the "contested decision"), which the plaintiff's motion was rejected and the decision of the Office for Personal Data Protection dated 30 November 2018, No. UOOU-01178/17-257 (hereinafter referred to as the "first-instance decision") was confirmed, by which the plaintiff was found guilty of committing an offense under § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., on certain services of the information society and on the amendment of certain laws (Act on certain services of the information society), as amended (hereinafter referred to as "Act No. 480/2004 Coll." or "Act on certain services of the information society"), which it committed by the fact that ID No. 9A 66/2019 Conformity with the original is confirmed by V.B. 2 repeatedly disseminated unsolicited commercial communications within the meaning of § 2 letter f) of Act No. 480/2004 Coll., when it sent commercial communications to the electronic addresses of the addressees listed in the statement of the first-instance decision, while the addressees of commercial communications did not give their consent to their sending, or were no longer customers of the plaintiff within the meaning of § 7 paragraph 3 of Act No. 480/2004 Coll., as they had previously refused to receive commercial communications, whereby the plaintiff violated the obligation set out in § 7, paragraph 2 of Act No. 480/2004 Coll., i.e. the obligation to use electronic contact details for the purpose of disseminating commercial communications by electronic means only in relation to users who have given their prior consent, for which in accordance with § 35 letter b) Act No. 250/2016 Coll., on liability for misdemeanors and their proceedings, as amended, and in accordance with § 11 paragraph 2 letter b) Act No. 480/2004 Coll. a fine of CZK 380,000 was imposed and an obligation to reimburse the costs of proceedings in the amount of CZK 1,000. II. The defendant's decision (challenged decision) 2. The defendant's reasoning for the contested decision was

based on the finding that the basis for initiating the proceedings was the inspection protocol dated 12 February 2018 (hereinafter referred to as the "inspection protocol"), including the file material collected as part of this controls, and also complaints from the addressees of business communications delivered to the defendant office by 23 May 2018. In the contested decision, the defendant dealt with the appeal objections as follows: 3. Regarding the plaintiff's objection regarding the insufficiently defined act, the defendant referred to the resolution of the extended panel of the Supreme Administrative Court of 15 January 2008, No. 2 As 34/2006-73, according to which the purpose of defining the subject of the proceedings in the statement of the decision is to achieve its irreplaceability. According to the defendant, the deed in the first-instance decision was specified by the date of sending and the address of the electronic contact of the sender and the recipient, in the statement of the decision, both the criticized legal action and the resulting consequence consisting in the violation of an interest protected by law were properly described, therefore, according to the defendant, the deed cannot be confused with another. 4. Regarding the plaintiff's objection that it is not clear from the first-instance decision on the basis of which regulations the first-instance decision was issued, the defendant stated that all applied legal regulations were properly indicated in the decision. From the diction of § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., as well as from the context of the decision, according to the defendant, it is clear that this is a collective offense consisting of multiple attacks against an interest protected by law. 5. To the plaintiff's objection against insufficient specification of the evidence and other documents on which the first-instance decision was based, the defendant pointed out that at the beginning of the first-instance decision it was stated that the basis for the initiation of administrative proceedings was the inspection protocol, including the inspection file material , and further complaints filed with the defendant until the delivery of the notice of initiation of the proceedings in question, i.e. until 23 May 2018. These documents are further specified in the text of the justification by names and numbers. In addition, the defendant emphasized that the plaintiff repeatedly used the right to inspect the file (see official records) and participated in the oral hearing, from which she received a copy of the protocol. The plaintiff thus obviously had to have an overview of all the actions of the defendant. 6. The defendant further commented on the nature of commercial communications, stating that the text of the contested decision clearly describes the definition of commercial communications, and it is thus obvious that the messages sent are commercial communications in nature. The defendant also wondered why the plaintiff was challenging the nature of her communications when the messages themselves contained the information that they were commercial communications. The complainants unanimously stated that they did not agree to the mailing and at the

same time they never registered, or they accepted the registration, however, they provided evidence of a previous refusal, and therefore the burden of proof of the existence of a legal title to the dissemination of commercial communications rested on page no. 9A 66/2019 The agreement with the original is confirmed by V.B. 3 plaintiff. In compliance with the principle of Euro-compliant interpretation of national law, or in this case, in accordance with Directive 2002/58/EC, on the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter referred to as "Directive 2002/58/EC"), it is necessary to state that consent to the sending of commercial communications must meet similar parameters such as consent to the processing of personal data, which specifically results from recital 17 of Directive 2002/58/EC, as well as from the normative part in Article 2 letter f) Directive 2002/58/EC, according to which the "consent" of the user or participant corresponds to the consent of the data subject according to Directive 95/46/EC. § 5 paragraph 4 of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain laws, as amended until 23 April 2019, then stipulates that the administrator must be able to prove the consent of the data subject to the processing of personal data throughout processing time. At the same time, consent must not only be demonstrable, but also free and informed. Already from the essence of the matter, the "consent" presented by the plaintiff, which was supposed to be granted by the act of registration itself, cannot be considered a valid legal title for the dissemination of commercial communications, since the provision of services itself would thus be impermissibly conditional on consent to sending unsolicited mail, which excludes the freedom to grant it . Any other special consent to the sending of commercial messages was not claimed or proven by the plaintiff. The first-instance authority thus proceeded correctly when, in the absence of free, separately granted and informed consent, it assessed cases through the lens of the provisions of Section 7, Paragraph 3 of Act No. 480/2004 Coll. The plaintiff further proved the customer relationship by entering it in the database. However, this record only contained information that could be found quite commonly on the Internet, and the submitted IP addresses did not unequivocally prove the registration by the customer (often these were identical IP addresses and not the identifier of the final addressee who was supposed to perform the registration). In many cases, the plaintiff did not provide concrete evidence to support her claim, e.g. service order, invoice, specific request, e-mail confirmation, etc. The fact that some of the addressees admitted that they may have registered with the defendant at some point in the past does not, according to the defendant, relieve the plaintiff of the obligation to prove the existence of a legal title. The so-called double opt-in would be a very common way to confirm the granting of consent without this confirmation message meeting the definition of a commercial communication. 7. The defendant

further dealt with the objection of the insufficiency of the eight-day period for implementing the request to unsubscribe from the further sending of business communications, when, according to the plaintiff, the period should have been set in the order of weeks, not days. According to the defendant, it is clear from the file documentation that customer data was processed in an electronic database, which in principle allows for relatively easy searches, therefore changing the parameter of the possibility of sending business messages cannot be considered as an unreasonably complex task that could not be completed in a few days. 8. Regarding the provability of the refusal, the defendant stated that part of the file are e-mail messages that were documented by individual complainants. Considering that part of every commercial communication according to § 7 paragraph 4 letter c) Act No. 480/2004 Coll. there must also be the existence of a valid address enabling a direct and effective unsubscribe from the next mailing, it can be reasonably assumed that the messages were deliverable to the accused. In the period under review, the option to unsubscribe was made possible precisely and only in the form of a reply to a delivered message. In addition, some of the complainants also documented other communications with the accused, who responded in some way to this message with a refusal. 9. Regarding the objection of non-respect of the eight-day period after refusal, the defendant stated that any sending at a time when the addressee has already clearly expressed his will that he does not wish for any further commercial communications, is contrary to the law and in fact fulfills the essence of the offense (if it is a repeated or mass distribution). The tolerance of a reasonable period to implement the request to unsubscribe from the dissemination of commercial communications therefore acts primarily as a corrective to the excessive harshness of the legal provision, but it cannot be equated with the legality or impunity of the conduct. Therefore, if ID No. 9A 66/2019 Conformity with the original was confirmed by V.B. 4, e.g. in the case of one addressee sending a commercial message on 03/04/2017, when it was proven in the proceedings that the contact user's refusal had already occurred 18/01/2017, this time certainly cannot be considered adequate to implement the opt-out request, and therefore the sending of this commercial communication cannot be considered to be in accordance with the law. 10. Regarding the objection of the inadequacy of the fine, the defendant recalled that the law allows a fine of up to CZK 10,000,000 to be imposed for the conduct under consideration. The imposed fine thus moves at the lower limit. 11. Regarding the plaintiff's objection that the defendant also took into account completely unrelated and, moreover, unsubstantiated facts, e.g. that she should have been warned about problems with the dissemination of commercial communications in the past, the defendant stated that the first-instance decision referred to a number of specific file marks under which the sending of commercial messages was dealt with repeatedly with the plaintiff, already since 2015,

which undoubtedly represents a fact that increases the social objectionability of the negotiations. Another element increasing the harmfulness was the plaintiff's professionalism in the field, which clearly results from the nature of the plaintiff's activity or the number of portals operated. 12. With regard to the above-mentioned facts, the defendant therefore decided as stated in the statement of the contested decision. III. Action 13. In the first point of action, the plaintiff accuses the contested decision of being incorrect, unreviewable and contrary to legal regulations. According to her, the defendant defined the deed in an incomprehensible way. According to the plaintiff, an act defined only as an e-mail sent from an electronic address to an electronic address on a given day cannot stand, as there could have been countless such e-mails in the given time period. According to the plaintiff, it is not at all apparent which e-mail message or messages the administrative body was deciding on. Such a broad definition of the act basically allows the defendant to penalize the plaintiff indefinitely, as nothing specifies what specific actions the plaintiff is being penalized for. According to the plaintiff, the defendant should have paid attention to the increased requirements for meeting the standards for the decision in a situation where he imposed an administrative sanction on the plaintiff, and that in a considerable amount. 14. In the second point of claim, the plaintiff objected that it is not clear from the contested decision and the first-instance decision what evidence the defendant relied on and how he evaluated it individually and in relation to each other. In the contested decision, the defendant states that it is clear that it is based on the control protocol and that the plaintiff had the right to inspect the file that she used, and is therefore familiar with the evidence. According to the plaintiff, it is the duty of the defendant to properly justify its decisions in a verifiable manner on the evidence supplied during the proceedings, then the defendant remains silent. To this end, the plaintiff referred to the judgment of the Supreme Administrative Court of 22 January 2004, No. 4 Azs 55/2003 (Coll. NSS 638/2005): "Decision of an administrative body, the reasons for which do not include the evidence on which the administrative body drew its conclusions, is unreviewable for lack of reasons. " 15. In the third point of claim (commercial communication), the plaintiff stated that in her statements she repeatedly disagreed with the administrative body's conclusion that all communications are of a commercial nature and are covered by Act No. 480/2004 Coll. According to the plaintiff, some of the communications were sent to clients on the basis of a contract for the provision of services. As evidence, the plaintiff attached sworn statements of the clients to the lawsuit. The plaintiff further stated that the fact that the reports contain information that they are business communications does not mean that they are fulfilled. No. 9A 66/2019 The agreement with the original is confirmed by V. B. 5 definition according to § 2 paragraph f) of Act no. 480/2004 Coll. Even if the contractual relationship is gratuitous, it is a contractual

relationship. 16. In the fourth point of claim (the nature of the consents to the sent commercial message), the plaintiff further stated that she has the consent of third parties to send commercial messages, which she proved to the defendant in particular by the records of individual user registrations on her website, when she provided the defendant with the date and time of registration and also IP addresses from which the registration was made, within the framework of which consent to the sending of commercial messages was also provided. In this context, the plaintiff stated that consent can be granted in any suitable way. In addition, addressees have the option to refuse this consent with each subsequent communication. The plaintiff considers it illegal that the defendant demands from her that the proven consent is in accordance with Directive 95/46/EC, which, according to her, does not have the capacity to impose obligations on her. In case of doubt, everything must be interpreted in favor of the plaintiff. The plaintiff objected that the defendant demanded from her an e-mail that repeatedly confirms consent, when sending a confirming e-mail message is already an unsolicited commercial communication. 17. In the fifth point of claim (impossibility of unsubscribing), the plaintiff stated that an e-mail message from the users could not be sufficient to terminate the provision of services, a termination of the services with all the necessary details was needed. The plaintiff further described that she does not understand why the defendant evaluates the claims of third parties as true, when he often does not know their identity, the persons were not instructed about the consequences of a false statement and delivered their opinions by e-mail, when the administrative body has not identified these subjects in any way. The defendant trusted the claims of third parties without further ado, although the plaintiff presented evidence that contradicted them. The defendant did not even investigate whether the e-mail messages with unsubscribes reached the plaintiff and whether she could respond to them. In case of doubt, the in dubio pro reo principle must be applied. The plaintiff further stated that she considers the eight-day period for unsubscribing to be unreasonably short with regard to the amount of e-mail messages that she is forced to evaluate due to the nature of the services provided - according to her, the period should be more in the order of weeks. The plaintiff also objected that the messages identified by the defendant as those of users opting out could not be matched to the e-mail address entered with the plaintiff, as opt-outs were being sent from other e-mail addresses, under a different name, by an unauthorized person, etc., as a result of which there was no proper manifestation of will. 18. Furthermore, in the sixth point of claim, the plaintiff commented on the individual cases described, in particular in the sense that the defendant stated a specific violation without reference to specific evidence and without the possibility for the plaintiff to comment on the given evidence. In one case, the plaintiff was criticized for confirming the user's opt-out, while the opt-out

confirmation cannot meet the definition of commercial communication. On the contrary, the defendant does not consider the e-mail sign-up confirmation to be a commercial communication. At the same time, the defendant does not explain what he sees as the boundary, what is and what is not a commercial message, as the content of the sent messages is quite identical (apart from the fact that one contains information about confirmation and one about unsubscribing). 19. The plaintiff in the seventh point of claim (legal assessment) stated that it was not clear to her how she should have fulfilled the stated factual essence of the offense according to § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., nor what regulations the defendant applied. 20. The plaintiff stated in the eighth point of claim (fine) that the sanction imposed is disproportionately high, its amount is not justified in any way, although the defendant was obliged to deal with individual criteria. The defendant also did not find mitigating circumstances, for example the plaintiff cooperated all the time, in the event of a complaint she tried to correct the given situation, when in particular she switched from manual log-out to automatic log-out in order to eliminate the error of the human factor. The plaintiff believes that certain circumstances are attributed to her twice - the sending of business no. 9A 66/2019 Conformity with the original is confirmed by V.B. 6 communication after its rejection is considered aggravating circumstances and at the same time fulfillment of the facts. The plaintiff also disputes that the defendant attributed to her the fact that she is the "administrator of the largest demand system in the Czech Republic and the Slovak Republic", which she considers to be an indisputable fact in this case. 21. With regard to the above-mentioned facts, the plaintiff proposed that the court cancel the challenged decision of the defendant for violation of legal regulations, or waive or reduce the punishment for the said administrative offenses, especially taking into account the consequences caused. IV. Defendant's statement on the lawsuit 22. In his statement on the lawsuit filed with the court on 10 July 2019, the defendant stated that the plaintiff in the filed lawsuit largely just repeats the arguments presented during the inspection and administrative proceedings, which have already been sufficiently settled. 23. Regarding the first claim that the deed was defined in an unclear manner, the defendant stated that the deed must be specified in the decision to the extent that it is not interchangeable with another, for which he referred to the judgment of the Supreme Administrative Court of 23/02/2005, no. j. 3 Ads 21/2004-55, according to which the failure to state the factual circumstances of the offense for which the administrative authority imposes a fine does not automatically establish the non-examination of the decision for lack of understanding within the meaning of § 76, paragraph 1 of the Code of Criminal Procedure. consider in particular such a decision, the statement of which is internally contradictory. Thus, the statement of the administrative decision is not internally contradictory if it enables its addressee to find out what specific

conduct is being blamed on him. The defendant is therefore convinced that the statement of the challenged decision is not internally contradictory and at the same time it is quite evident from the decision what specific actions the plaintiff is accused of. 24. According to the defendant, the plaintiff does not specify in any way which specific evidence or assertions should have been omitted regarding the second point of claim, regarding the complaint of insufficient substantiation of the decision. The plaintiff used the right to inspect the file, participated in the oral hearing, from which a protocol was drawn up and handed over to her. The plaintiff can therefore have no doubt as to what evidence the defendant used. 25. Regarding the third claim, that the messages sent are not commercial communications within the meaning of Act No. 480/2004 Coll., the defendant stated that he agrees with the plaintiff that the designation of a communication as a commercial communication does not automatically establish its nature as a commercial communication. In the case under consideration, however, the contents of the messages were offers of the plaintiff's services, including links to portals operated by the sender (i.e. the plaintiff). In addition, the plaintiff does not even indicate which of the characteristics of the definition of commercial communication should have been left unfulfilled. 26. With regard to the fourth point of claim, that during the administrative proceedings the plaintiff duly documented the existence of consents to the sending of commercial communications, which should have been granted by the act of registration on the website itself, the defendant pointed out that the complainants all stated that they did not agree to the mailing and at the same time they never registered, or they allowed registration, but they documented a previous rejection of the mailing. The burden of proof of the existence of a legal title to the dissemination of commercial communications therefore rested on the side of the plaintiff. The plaintiff was called upon to prove consent, or at least a customer relationship pursuant to Section 7, Paragraph 3 of Act No. 480/2004 Coll. The plaintiff proved the customer relationship primarily by entering it in the database. However, this registration only contained information that can be found on the Internet quite commonly, and even the submitted IP addresses did not prove the fact of registration in any credible way. At the same time, the plaintiff did not provide other concrete evidence to support her claims in a number of cases, i.e. e.g. order for services, invoice for services provided, etc. No. 9A 66/2019 The agreement with the original is confirmed by V. B. 7 27. Regarding the fifth point of claim regarding the impossibility of opting out, the defendant in particular referred to his decisions and commented only on the alleged inadequacy of the eight-day period for performing the opt-out and the lack of proof of the plaintiff's ability to respond to the opt-out. The defendant pointed out that during the period under review the plaintiff allowed opt-out precisely and only in the form of a reply to a delivered message, therefore it can be reasonably assumed that the messages were deliverable

to the plaintiff, and she was thus obliged to respect the will of the addressees. Regarding the length of the eight-day period for implementing the deregistration request, the defendant stated that from the point of view of Act No. 480/2004 Coll. the sending of a commercial message after the addressee's expression of disapproval is already an incriminated act, and therefore the plaintiff cannot equate any tolerance of the defendant beyond the scope of the law with the legality of the act. The length of the eight-day tolerable period was determined with regard to the administrative practice of the defendant, in order to remove the harshness of the law and in this case also with regard to the statement of the plaintiff at the oral hearing on 13/09/2018 that she usually deregisters within a week of receiving the request to deregister. Regarding the issue of the alleged de-registration by an unauthorized person, the plaintiff referred to pages 16-17 of the first-instance decision, where it is stated that even this de-registration had to be clearly identifiable for the de-registration to be carried out. In addition, it cannot be ruled out that one person uses multiple addresses, or loses access data "to the old one", therefore the means of expressing will cannot be limited to only one of the contacts. 28. Regarding the sixth point of claim, in which the plaintiff commented on the individual cases of sent business communications, the defendant stated that it is clearly stated from which evidence was drawn, nor can it be accepted that the plaintiff was denied the opportunity to familiarize herself with the evidence or comment on them when the evidence was presented by the plaintiff herself. 29. Regarding the seventh point of claim concerning the legal assessment, the defendant stated that the challenged decision is properly justified, fully corresponds to the defendant's administrative practice and fulfills all requirements according to § 68 of the Administrative Code. 30. The defendant objected to the eighth claim regarding the unreasonableness of the imposed fine, that there was no alleged double counting of the frequency of sending the commercial message to certain addressees. Repetition can be twofold – objective repetition consists in repeating an activity more than once, subjective repetition then consists in repeating the distribution of a commercial message to the same addressee several times. Sending a commercial message after a refusal is not part of the substance of the offence, as the absence of consent is sufficient to fulfill it. The defendant further emphasized that the plaintiff's professionalism in the field clearly results from the nature of her activity and the number of portals she operates. In conclusion, the defendant stated that the plaintiff must have been aware of the obligations associated with the dissemination of business communications, as the sending of business communications was repeatedly dealt with by her, as can be seen from the specific file marks mentioned in the defendant's decisions. 31. In view of the above-mentioned facts, the defendant proposed that the court file the lawsuit in accordance with § 78, paragraph 7 of Act No. 150/2002 Coll., the Administrative Code of Court, as amended (hereinafter

referred to as the "S.R.S.") ) rejected as unfounded. V. The plaintiff's reply to the defendant's statement 32. In her reply to the defendant's statement dated 7 August 2019, the plaintiff stated that she did not distribute any commercial communications without a proper legal title, as she proved during the inspection and subsequent administrative proceedings that the communications in question were for clients sent on the basis of a contract for the provision of services, when the plaintiff has the necessary consents of the clients, or is in a customer relationship with clients. Considering the number of the plaintiff's clients (in the order of hundreds of thousands), it is logical that some of these clients forget that they even registered on the plaintiff's website No. 9A 66/2019 Compliance with the original is confirmed by V.B. 8 (which then leads to submission of motions that the defendant dealt with in this case). Given that the plaintiff's clients were involved, the conduct in question was disproportionately less socially dangerous than in cases where so-called spam is sent. 33. Regarding the insufficient definition of the act, the plaintiff stated that the definition of the act performed by the defendant (such as sending e-mails from a certain address on a certain day) does not make it possible to determine exactly what act (i.e. what action) is in question when the plaintiff sends a huge amount of e-mail messages (this is the essence of its business). 34. With regard to the failure to provide proof through the control protocol, the plaintiff draws attention to the fact that the defendant's obligation to deal with all the evidence within the framework of the justification cannot be waived. 35. With regard to the insufficient justification of the fine imposed above, the plaintiff stated that the defendant did not properly justify the imposed sanction when he commented only on the objection of violation of the principle of double attribution, and then only in outline. 36. In view of the above-mentioned facts, the plaintiff proposed that the court cancel the contested decision of the defendant and return the case for a new hearing and decision. VI. Proceedings before the court 37. During the proceedings before the court, the representatives of the plaintiff and the defendant maintained their positions on the subject of the dispute. The plaintiff's representative referred to the filed lawsuit, the defendant's representative to the sufficiently established facts of the case and comprehensive file material. During the hearing, the court did not provide evidence by the 4 client affidavits presented by the plaintiff to prove the provision of services by the plaintiff, as it did not find their evidentiary value to the subject of the dispute, given that they relate to other persons and cannot be matched with the addressees of the communications in question, moreover, they were made and dated in 2019 and the court cannot take them into account, because according to § 75 paragraph 2 of the Civil Code it is based on the factual and legal situation at the time of the contested decision. This is compounded by the fact that the content of these submissions only proves the provision of services by the plaintiff. VII. Assessment of the case by the Municipal Court in Prague

38. The Municipal Court in Prague reviewed the contested decision, as well as the proceedings that preceded its issuance, pursuant to § 65 et seq. Act No. 150/2002 Coll., Administrative Code of Court (hereinafter referred to as the Administrative Code) within the limits of the claims. 39. The action is unfounded. 40. The court first emphasizes that sending commercial messages is widely used in the field of marketing, as the costs of the sender of such messages are minimal and the message sent by him can reach a large number of addressees. However, sending unsolicited commercial messages is generally undesirable, as it interferes with privacy and violates the protection of privacy against annoying messages. As the municipal court has already ruled (e.g. in judgment No. 14 A 242/2018 – 40), the protection of privacy in electronic communication is therefore ensured by a number of laws (in addition to those mentioned below, e.g. the Civil Code or the Act on the Regulation of Advertising). In the case of sending marketing offers via e-mail, other Internet communication systems, text messages to mobile phones, etc., the law on certain information society services must first be applied. From the point of view of Law no. 9A 66/2019 Conformity with the original is confirmed by V. B. 9 of privacy protection acts as a special law, which has application priority over the general law, i.e. over Act No. 101/2000 Coll., on the protection of personal data, which generally regulated the circumstances under which it is possible to process personal data for the purpose of offering business or services (see § 5 paragraph 5 of the cited Act). However, both of these laws regulated the protection of privacy against harassing communications, while the Act on Certain Information Society Services targets exclusively a narrow group of commercial communications disseminated by electronic means. However, the Personal Data Protection Act, as a general legal regulation also regulating the protection of individual privacy from annoying advertising and marketing communications, could not be ignored when interpreting the Act on Certain Information Society Services. 41. The Municipal Court in Prague already explained in judgment No. 14 A 242/2018-40 why, from the point of view of certain terms, in particular the term "dissemination of commercial communication", with which § 7 of the Act on Certain Information Society Services works, the meaning of the adjustment is necessary in this Act to be interpreted in accordance with the general principles on which the Act on Certain Information Society Services is based and with the general legal regulation contained in Act No. 101/2000 Coll., on the protection of personal data. The legal framework, including the norms of European law, corresponds to this. Directive No. 2000/31/EC and Directive No. 2002/58/EC were transposed into the legal system of the Czech Republic by the Act on Certain Information Society Services. Directive No. 2000/31/EC defined the basic rules regarding the sending of unsolicited commercial messages, and Directive No. 2002/58/EC established the protection of personal data of natural persons as well as

the legitimate interests of legal entities in connection with electronic communications. In the same way, the basic ideological premise of the Act on Certain Information Society Services is to strengthen the protection of the privacy of users of information society services, which can be any natural or legal person. The basic purpose of the adoption (not only § 7) of the Act on Certain Information Society Services was therefore the protection of the addressee against the sending of unsolicited commercial communications (including the proper identification of these communications and their originator), the prevention of costs related to unsolicited commercial communications, and at the same time a non-negligible goal - the transfer of obligations to their distributors (all while maintaining the possibility of electronic contracting). 42. The foregoing thus creates interpretive guidelines for the interpretation of § 7 and § 11 of the Act on Certain Services of the Information Society using Act No. 101/2000 Coll., on the Protection of Personal Data, as an interpretation that would deny their meaning and purpose cannot be accepted. The basic postulates of protection follow from the meaning and purpose of the cited statutory provisions of the Act: priority protection of privacy against the sending of unsolicited commercial communications and the responsibility of the disseminator of commercial communications for non-compliance with obligations relating to the dissemination of commercial communications by electronic means, combined with the burden of proof of compliance with these obligations to prove prior consent, i.e. record and respond to the refusal of consent to the use of electronic contact, namely such consent that is legally qualified in Section 7, Paragraph 2 of the Act on Certain Information Society Services in conjunction with Section 5, Paragraph 4 of the Act on Personal Data Protection. 43. The court proceeded from the following legal framework: 44. According to § 2 letter f) Act No. 480/2004 Coll. commercial communications are all forms of communications, including advertising and invitations to visit websites, intended to directly or indirectly support goods or services or the image of a business of a person who is an entrepreneur or performs a regulated activity. 45. Pursuant to § 7 paragraph 2 of Act No. 480/2004 Coll.: Electronic contact details may be used for the purpose of disseminating commercial communications by electronic means only in relation to users who have given their prior consent. No. 9A 66/2019 Conformity with the original is confirmed by V.B. 10 46. Pursuant to § 7 paragraph 3 of Act No. 480/2004 Coll. if a natural or legal person obtains from its customer its electronic contact details for electronic mail in connection with the sale of a product or service in accordance with the personal data protection requirements regulated by a special legal regulation, this natural or legal person may use these electronic contact details for the purposes of disseminating commercial communications regarding with its own similar products or services, provided that the customer has a clear and distinct option in a simple way, free of charge or at the expense of this natural or legal person, to

refuse consent to such use of his electronic contact even when sending each individual message, if he did not initially refuse this use. 47. According to § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll. a legal entity commits an offense by mass or repeatedly disseminating commercial communications by electronic means without the consent of the addressee. 48. According to § 11 paragraph 2 letter b) Act No. 480/2004 Coll.: A fine of up to CZK 10,000,000 can be imposed for an offense if it is an offense according to paragraph 1 letter and). 49. According to § 5 paragraph 4 of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain laws, as amended until 23 April 2019: The data subject must be informed about the purpose of the processing when giving consent and to which personal data consent is given, to which administrator and for what period. The administrator must be able to demonstrate the consent of the data subject to the processing of personal data throughout the processing period. 50. The court assessed the objections as follows: 51. Regarding the first objection, that the statement of the defendant's decision is incomprehensible and therefore unreviewable in terms of the deed - only as an e-mail sent from an electronic address to an electronic address on a certain day, the court states that in the given matter, this objection is not only factually unfounded, but also lacks relevance to the essential point, for which the certainty of the delineation of the factual conduct in the statement of the administrative decision is used. The extended panel in case no. 2 As 34/2006 - 73 ruled that in the interest of the accused's legal certainty, the deed must be described in the statement with sufficient certainty so that it cannot be confused with another deed. In this sense, the statement of the decision serves the constitutional value of legal certainty that the accused will not be repeatedly affected for the same act. As has already been judged by the Supreme Administrative Court, e.g. in judgment no. as long as it enables its addressee as a whole to find out what specific behavior he is accused of. In the trial case, in the factual sentences of the statement of the defendant's decision, the individual acts are described in sufficient detail for them to be subordinated to the individual features of the offense for which the plaintiff was affected. The illegality of actions with signs of an offense was unequivocally seen in the repeated dissemination of unsolicited commercial communications, which occurred on certain days of 2017 and 2018 mentioned in the statement, from a specifically marked electronic address to a specifically marked electronic address, while it is clear from the statement that always on the said day, there were no repeated negotiations in relation to the same outgoing and incoming electronic address, but only one specific negotiation. It is thus absolutely clear from the statement that the plaintiff is always affected only for sending a single commercial message on that particular day, and therefore, from the point of view of legal certainty, she cannot be affected again for another action on that particular day. In the above sense, therefore,

the statement of the first-instance decision cannot be accused of illegality, regardless of the fact that it does not cause the defect of incomprehensibility and non-examination. It would certainly be more accurate if the defendant specified the sending of the e-mail more closely in time, but if the period of time when each individual e-mail was sent, or delivered to the addressee, marked No. 9A 66/2019 The agreement with the original is confirmed by V.B. 11 on a certain day, in the event of another circumstance (marking of a single email on that certain day), such inaccuracy cannot cause uncertainty or a mistake about which e-mail messages the defendant decided. According to the court, it is also clear from the entire decision that the defendant made decisions about e-mail messages, which are all part of the file material to which the plaintiff had access, in particular, they are listed in the control protocol dated 12/02/2018, to which the defendant explicitly referred to in the decisions. In the generally formulated objection, the plaintiff did not even infer the interchangeability of the specified acts with other acts of the same day, namely that multiple e-mail messages would indeed have been sent on the given day, which would have created a risk of interchangeability. Therefore, the court does not agree with the plaintiff that only from the point of view of the claim of a huge number of e-mail messages, there could be a dispute about which specific objectionable e-mail messages are involved. The definitions of the facts in the sentence of the first-instance decision detailed in the justification of this decision cannot be considered incomprehensible, because in the sense of this term as procedural defects, these definitions are not internally contradictory, and furthermore not unreviewable, because the facts clearly described in the factual sentences in connection with their justification on pp. 11-64 of the first-instance decision give clear information about the actions for which the plaintiff was affected and how these actions were legally qualified. In addition to the fact that the plaintiff was fined for repeated communications, it is also clear from the contested decision that it was not a matter of repeated dissemination of commercial communications to the same addressee on the same day, but of repetition, which is a sign of the substance of the offense according to § 11 paragraph 1 letter . a) point 1 of the Act on Certain Information Societies as a qualification of a certain degree of illegality of such activity. The court therefore does not consider the first objection to be justified. 52. The plaintiff objected to the unreviewability of the contested decision in the second claim as well, when she claimed that it is not possible to ascertain from the decisions of the administrative bodies of both levels what evidence the defendant relied on and how he evaluated it. It is not clear to the court what the plaintiff's objections are based on, if the defendant in the first-instance decision described in detail not only every commercial communication with its informational content, found in the control proceedings, but also the plaintiff's statement on the given factual event in the control proceedings, as well as additions this

statement and subsequently the settlement and evaluation of the accusations and the defense of the plaintiff. Before that, the defendant presented his factual and legal insights into the factual and legal qualification of the commercial communications being sent, i.e. what the communications were about, from which relevant addresses they were sent, what is meant by qualified consent to the sending of commercial communications and that it is an information company that carries the burden of proof of proving qualified consent or the consequences of its refusal (5-11 of the first-instance decision). Furthermore, in the conclusion on pages 66-69 of the first-instance decision, the defendant dealt with the plaintiff's objections regarding the method of opting out of persons who refused consent to electronic contact, settled the contradictions in the plaintiff's claims regarding the acquisition of addressees and, based on the plaintiff's statement, evaluated the set up system for acquiring clients and their opt-out . During the review in the appeal proceedings, the defendant then found that the plaintiff continuously communicated with the defendant Office, used the right to inspect the file and participated in oral proceedings. Thus, the plaintiff was demonstrably continuously acquainted with the evidence and its evaluation by the defendant, both with the control findings and with the complaints of the addressees of business communications. According to the court, the defendant sufficiently justified the specific documents on which he based his decision, and allowed the plaintiff to familiarize herself with them, among other things, as part of the widely cited inspection of the file, oral meetings, and written and telephone communications. If the plaintiff cited in the action from the judgment of the Supreme Administrative Court of 22 January 2004, No. 4 Azs 55/2003 (Coll. NSS 638/2005), that the decision of the administrative body, in the justification of which no evidence is given, on on the basis of which the administrative body drew its conclusions, is unreviewable for lack of reasons, the court adds to this that the plaintiff neglected to quote the rest of the legal sentence from this judgment, according to which "if the evidence is not even contained in the administrative file, it does not have a factual situation that took the administrative authority for the basis of its decision, support in No. 9A 66/2019 Conformity with the original is confirmed by V. B. 12 of the file. The cited citation therefore refers to a procedural defect, which primarily consists in the fact that the factual situation is not supported in the file, is not supported by evidence, and therefore these are not even evaluated in the decision. However, such a procedural state did not occur in this matter. In the decisions at both stages of the proceedings, the defendant was based on the sufficiently established and evidenced factual state of the matter and duly justified this state of affairs in both of his decisions. The court reminds that the decision of the defendant Office and the contested decision of the defendant chairperson of the Office form a single whole, so the defendant was not obliged to repeat the arguments of the Office, which gave detailed

factual and legal reasons for the matter. In addition, to the generally formulated prosecution objection of non-examination and failure to provide evidence, it was not appropriate for the court itself to search for which specific evidence proposals were not implemented by the administrative authorities, or settled and how they affected the legality of the defendant's conclusions. The plaintiff's statements made during the inspection and during the administrative proceedings were resolved and the plaintiff did not present any evidence that would in individual cases qualify the consent of the addressees, i.e. consent pursuant to § 7 paragraph 2 of Act No. 480/2004 Coll. in conjunction with 5 paragraph 4 of Act No. 101/2000 Coll., lasting for the entire period of processing, proved. 53. Improper procedure or awareness of the plaintiff's obligations, or the contradictions in her claim are also confirmed by the objections in the third claim, in which the claimant objected that the messages were sent to clients on the basis of a contract for the provision of services as a provided service, even though they were marked as business messages and she attached evidence to this claim - submitted sworn statements clients and pointed to the documents in the file without identifying these documents in more detail. However, she subsequently stated in the lawsuit that the service provided in the sent messages consists in mediating business opportunities for clients using online tools, where the plaintiff creates opportunities for clients, thus it is a performance from the mediation service provided. The stated statements appear to be a certain contradiction, as the defendant also mentioned in his decision. In order to prove that it was an intermediary service provided and not a commercial communication, if the messages sent in this way can overlap in this sense, the plaintiff did not provide adequate evidence (contracts, invoices, etc.) that it was a simple performance. The plaintiff is responsible for compliance with obligations related to the dissemination of commercial communications by electronic means, while her responsibility for non-compliance with legal obligations cannot be related only to the conclusion of the contract, but to the entire process of dissemination of commercial communications by electronic means, including proof of when it is and when it is not commercial communication. It was the plaintiff's duty to ensure that commercial communications were disseminated in the above-mentioned way only on the assumption of prior and ongoing and directly identifiable consent of the user, i.e. in the presence of an obvious legal title relating to incentives and offers, materially distinguishable from the provision of services. 54. The court verified the individual communications in the file and compared them with the legal definition of commercial communications according to § 2 letter f) Act No. 480/2004 Coll. As the defendant correctly stated in the first-instance decision, in order to assess whether it is a commercial communication or not, it is exclusively necessary to take into account the content (character) of the sent message. The court subsequently found that the individual communications encourage visitors to visit

the plaintiff's website intended to support the services of the plaintiff, who is an entrepreneur (§ 420 of Act No. 89/2012 Coll., Civil Code), and moreover, these communications are also explicitly labeled as business communications by the plaintiff , either in the Czech or Slovak language (e.g. submission dated 6/4/2017, number SP-2017-048363, reference no. UOOU-1778/17-35, contain the statement "this business communication was sent to you at based on the entry of your request in the ePoptávka.cz system" or submission dated 9/1/2017, number SP-2017-047643, ID 1178/17-1, containing the statement "this business communication was sent to you based on registration in catalog of companies Hledat.cz"). The plaintiff did not refute which of the characteristics of the definition of a commercial communication the communications in question did not meet, and although the court agrees with the plaintiff that the designation "commercial communication" alone does not establish the nature of a commercial communication without further ado, the court has, from ID 9A 66/2019, confirms the agreement with the original V. B. 13 of the administrative file for the fact that the communication both formally and materially fulfilled all the legal features of commercial communications. As part of consumer protection, in addition to the legal diction, it is also necessary to take into account how the message is understood by consumers, who can reasonably be assumed to be based on the truth of the plaintiff's claim in the e-mails that it is a commercial message. Although the court does not deny that in some cases the plaintiff could and did conclude with her clients, as evidenced by 4 affidavits, a contract for the provision of services, she did not explain to the court how these specific statements relate to the communications in question, as the plaintiff did not comment on the attached affidavits and did not match the subject e-mail addresses of the complainants, which are not included in the affidavits. In addition, these statements, which the court did not take as evidence during the hearing for the reasons stated above, do not prove any other fact than that the plaintiff was in business, i.e. she concluded contracts for the provision of services, but in the given cases, moreover, free of charge, which either does not act in a credible way or they were not explained the reasons or context clarifying the plaintiff's accession to the gratuity of the performance, especially to the plaintiff's claims of what services she provides, what contacts and presentations she mediates regarding business opportunities for addressees. It can therefore be concluded that these documents could not be sufficiently relevant to the communications in question as evidence, and the defendant correctly assessed the communications in question as commercial communications in the sense of Act No. 480/2004 Coll. The plaintiff wrongly believes that proof of the agreed contractual relationship is sufficient and the plaintiff cannot be required to prove that the customers did not refuse the sending of any e-mails, as this is a negative fact. In the trial case, the defendant did not evaluate any e-mail messages, but those that

showed signs of a commercial communication, as he justified in the decision, while it was up to the plaintiff to prove a positive fact, namely that the nature of these messages is a provided service. 55. Regarding the fourth claim, generally formulated with the claim that the plaintiff has the consent of third parties to send commercial communications, the addressees have the option to refuse this consent with each subsequent communication and Directive 95/46/EC does not apply to the plaintiff, the court states that the plaintiff refuted the claims of the complainants by documenting commonly searchable information of user registrations on its website, conclusion of contracts, dates and times of registration and IP addresses from which the registration was made, when they were not, but could be documented, as the defendant also correctly stated, e.g. service orders, invoices for services provided, etc. Therefore, the court does not consider such acceptance of the burden of proof to be sufficient. If the plaintiff claims that the addressees have the possibility to withdraw their consent at any time, it is clear from the administrative file that in reality it was very difficult for many addressees of the communication to remove themselves from the plaintiff's database, as it required their repeated requests and even the intervention of the defendant. The court verified from the individual facts of the offenses and from the overview it made on the basis of the control protocol that commercial communications were sent from certain addresses to certain addresses, when either the legal title was not obvious from this correspondence (the addressees did not give qualified consent in accordance with § 5 par. 4 of the Act on the Protection of Personal Data) or the refusal of consent was repeatedly sent several times and the plaintiff did not respect this or respected it only in an unreasonable period of time or the date of cancellation of the sending of business communications followed the performed control. The court has no reason to question the plaintiff's opinion that she had the consent of her customers, but this opinion is based on an incorrect or careless understanding of the legislation, arising both from the Act on certain information companies and from the Act on personal data protection and from Directive 95/46/ EC, from which the binding national regulation of the obligations of information societies arose. Although the above directive is a guide to interpretation, it is not the only legal basis. For the plaintiff, the requirements of national law, the legal conditions for sending commercial communications, which include the condition that the addressee's consent to sending commercial communications must be shown at the same time as information about the purpose of the processing and to which personal data it is, are completely binding. 2019 Conformity with the original is confirmed by V.B. 14 given, to whom and for what period of time, while the refusal of consent must meet the possibility of providing space and the possibility of clear, distinct expression, in a simple way even when sending each individual message, which must last for the entire period of processing of his personal data . Since the

above depends on the initiative and the facts of the business relationships created by the information company, it is clear that in this case it is the plaintiff who has knowledge of the nature of business contacts, their legal titles and the content and meaning of e-mail messages, therefore the burden of proof rests on the plaintiff proving the fulfillment of obligations every time a commercial message is sent. 56. The court therefore agrees with the defendant's argument that the plaintiff did not bear the burden of proof of the existence of a legal title to disseminate commercial communications. The court does not consider the fourth objection to be justified. 57. From the fifth point of claim, in which the plaintiff also generally formulated objections to the assessment of sending commercial messages after the alleged de-registration of the customer, when she questioned the assessment of the exclusion of the customer (due to refusal of consent) by referring to the vague legal term "directly and effectively. ” This misunderstanding of the legal requirements of refusal of consent is evident from her argumentation about the mechanism of exclusion, about the fact that there is a delay between the inclusion of the request and the exclusion from the system. These are not vague legal concepts, but words of ordinary meaning, aimed at the immediate respect of the customer's will not to bother him with further commercial communications, when the removal of the customer from the database of recipients of commercial communications should not be a matter depending on the termination of the service or cause such delays between the entry and removal from system, as well as the repetition of messages that were found in individual cases in the control proceedings by the defendant. 58. Also, questioning the content of complaints by third parties (complainants) with objections to the falsity of their claims and failure to verify identity or lack of instruction on the consequences of false communication on the part of the defendant, with the fact that in case of doubt it is necessary to apply the principle of in dubio pro reo does not stand. Given that the complaints of the plaintiff's customers were one of the basis for the inspection and given their quantity and the verification process during the inspection (analysis of complaints, requests for statements sent to the complainant, statements of the complainants), but especially due to the own analysis of the headers and the content of e -e-mail messages from the defendant, it is not possible to enter into the objection of doubt about the veracity of the customers' complaints, if these complaints were the supporting basis from which the defendant drew his conclusions. Regarding the plaintiff's objection that the eight-day period for deregistration is unreasonably short and it was not possible to match customer deregistrations, the court points out that if the defendant in practice tolerates an eight-day period for performing deregistration, this period represents benevolence on the part of the defendant, which, as he also stated the defendant, acts primarily as a corrective to the excessive harshness of the legal provision, which already considers the sending of a commercial message to

be an incriminated act. Therefore, if the plaintiff objects to the inadequacy of the eight-day deregistration period, her objection cannot be upheld, as the plaintiff has no legal right to a longer period. If the plaintiff objects to the inadequacy of the eight-day period for unsubscribing with regard to the amount of e-mail messages that she is forced to evaluate due to the nature of the services provided, this objection cannot be upheld either, because from the point of view of the plaintiff's professionalism and the essence of her activity, it is not an unreasonable period. The large number of e-mail messages sent out by the plaintiff must also be matched by an adequately large amount of related administration including, among other things, continuous updating of the addressee list in order to fulfill legal requirements. The eight-day deadline for deregistering must be considered reasonable if it is clear that the plaintiff processed customer data in an electronic database, which in principle allows relatively prompt searches. In addition, it emerged from the plaintiff's statement at the oral hearing on 13 September 2018 that the plaintiff is usually able to deregister within a week of receiving the request to deregister. Regarding the objection of incompatibility of users with e-mail no. 9A 66/2019 The match with the original is confirmed by V.B. 15 addresses, the court found from the administrative file that the rejecting e-mails always contained a link to a "registered" e-mail address, therefore the court agrees with the defendant that the e-mail addresses in the subject communications were matchable. In the same way, the court confirms to the defendant that e-mail messages with opt-out can be considered deliverable when the plaintiff allowed opt-out in the period under consideration precisely and only in the form of a reply to the message delivered (see the plaintiff's obligation under § 7 paragraph 4 letter c) of Act no. 480/2004 Coll.). If the plaintiff objected to the sending of unsubscribes from other addresses, under a different name, by another person, it did not prevent the plaintiff from verifying the relevance of the unsubscribe and its compatibility with the e-mail address from which the unsubscribe was sent. Therefore, the court also did not find the fifth objection justified. 59. In the sixth point of claim, in which she commented on 6 cases of commercial communications, the plaintiff stated that the defendant stated a specific violation without reference to specific evidence and without the plaintiff being able to comment on the given evidence. The mentioned cases of commercial communications for customers are described in detail in the first-instance decision, and it is clear from them what kind of violation of legal obligations the plaintiff committed, and for all these cases, the plaintiff was not denied the opportunity to familiarize herself with the evidence or comment on it. In the case of the address of customer X, the descriptions of the facts show the conduct consisting in sending a commercial message on 24/01/2017, despite the customer's request to cancel the sending of commercial messages on 18/01/2017, taking into account the fact that to unsubscribe it did not happen until 18

April 2017, while in the meantime the business communication was repeatedly sent on dates after 24 January 2017. Although this is stated only by the contested decision, the said does not mean an expansion of the deed, but only an addition to the defendant's considerations in that despite benevolent 7-day period, the plaintiff continued to repeatedly act until she was deregistered on 18/04/2017. In the contested decision, the deed was therefore evaluated from the point of view of the period in which there was laziness on the part of the plaintiff and non-respect of the refusal of the consent granted, which continued even after 24/01/2017. In the case of customer "X", the defendant considered the time to log out to be similarly unreasonable. In the case of the e-mail address "X", the description of the deed shows the lack of title to send commercial messages, in the cases of users of the e-mail addresses "X", "X" and "X", when it was not decisive whether the users of these addresses were or were not the plaintiff's customers), as the plaintiff objects (contradictions were evaluated in this), but that the explicit request to cancel the sending of commercial communications was not responded to or the legal title for sending commercial communications was not proven, or the commercial communications were sent after a demonstrable refusal to send further commercial communications communication. In the cases disputed by the plaintiff in the lawsuit, some of which were already settled in the contested decision, the temporal and factual circumstances of the violation of legal obligations are clearly described and justified within the plaintiff's individual actions in the first-instance decision. Therefore, the court does not consider the sixth objection to be justified. 60. In the seventh claim, the plaintiff stated that it was not clear to her how she was supposed to fulfill the stated factual essence of the offense pursuant to § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll. In addition, the court states that the defendant defined in the first-instance decision that the plaintiff committed repeated dissemination of unsolicited commercial communications within the meaning of § 2 letter f) Act No. 480/2004 Coll. by violating the obligation stipulated in § 7 paragraph 2 of Act No. 480/2004 Coll., i.e. the obligation to use electronic contact details for the purpose of disseminating commercial communications by electronic means only in relation to users who have given their prior consent. The defendant then referred to this definition on page 4 of the contested decision. After all, the plaintiff herself even refers to this definition on page 2 of the lawsuit. The court thus considers it proven that the plaintiff must be clear as to how she should fulfill the factual essence of the offense. The court considers the seventh objection to be moot. 61. Regarding the objection of the disproportionate amount of the plaintiff's sanction in the eighth claim, that the imposed sanction is disproportionately high and its amount is insufficiently justified, the court examined whether the defendant No. 9A 66/2019 Conformity with the original is confirmed by V.B. 16 based on all relevant circumstances for the review of the administrative

discretion on the amount of the fine according to § 37 of Act No. 250/2016 Coll., on responsibility for offenses and proceedings concerning them, in the given matter in particular the nature and seriousness of the offence, the aggravating and mitigating circumstances and the nature of the plaintiff and her activities. He found that the defendant and thus the defendants in the contested decision did not ignore the criteria mentioned and sufficiently dealt with them. The court first expresses disagreement with the plaintiff's opinion that the information about the plaintiff's title as "administrator of the largest demand system in the Czech Republic and the Slovak Republic" would be completely unrelated, on the contrary, it assures the defendant that the plaintiff's professionalism in the field is a relevant, even significant fact for assessing the seriousness of the actions. The seriousness of the proceedings is, in addition to the above-mentioned point of view, also due to the high number of affected addressees, operated portals and the repetition of illegal activity - the dissemination of commercial communications in the sense that the plaintiff has already been warned of this violation several times (file no. UOOU-05268/15, sp. . stamp UOOU-10180/15, file stamp UOOU-11605/16. The defendant also took into account the fact that the privacy of the addressees was invaded in a rude manner within the meaning of § 38 letter c) of Act No. 250/2016 Coll., because some commercial communications, which the defendant specifically identified in the decision, were delivered despite the absence of qualified consent even after consent was refused, and that the dissemination of individual commercial communications took place for more than 16 months. The sending of commercial communications to the plaintiff after their rejection was not counted against her burden twice. First of all, the defendant stated in the first-instance decision that he did not find any aggravating or mitigating circumstances (p. 69 of the decision), he assessed the plaintiff's actions only from the point of view of their nature and seriousness, and in its factual essence - the sending of commercial messages without the consent of the addressee, which was a situation that after the refusal of consent still persisted. That was the essence of the offense itself. When considering all the circumstances, the defendant came out of the penalty rate according to Act No. 480/2004 Coll. which allows a fine of up to CZK 10,000,000 to be imposed for the conduct under consideration, therefore the imposed fine of CZK 380,000 corresponds to only 3.8% of the maximum legal rate, and is thus close to the lower limit. Following the above, the fine that the administrative authorities ultimately imposed on the plaintiff in the amount of CZK 380,000, which corresponds to only 3.8% of the maximum legal rate, cannot be considered disproportionate or disproportionate to the scope and intensity of the illegal conduct committed by the plaintiff. 62. For the claim about the liquidation amount of the fine, the court refers to the decision of the extended senate of the Supreme Administrative Court of 20 April 2010, No. 1 As 9/2008-133 "The administrative body

imposing a fine for another administrative offense is obliged to take into account the personal and property circumstances of the offender if, based on the person of the offender and the amount of the fine that can be imposed, it is clear that the fine could have a liquidating character, even in cases where the relevant law includes the personal and property circumstances of the offender in an exhaustive list of aspects decisive for determining does not specify the amount of the fine. When ascertaining personal and property circumstances, the administrative authority is based on the data documented by the participant in the proceedings, or from those that have resulted from the current course of the administrative proceedings or that it obtains independently without cooperation with the participant in the proceedings. If it is not possible to obtain accurate information in this way, the administrative authority is authorized to estimate it to the extent necessary. "The aforementioned conclusions can be fully applied to the present case, while the defendant was aware of the aforementioned decision of the Supreme Administrative Court. When determining the amount of the fine, the defendant was also based on the plaintiff's financial results according to accounting records from 2016, when the financial results were almost CZK 30 million. The plaintiff has in no way certified her property situation in such a way that it would be in liquidation, that she would be led or threatened with insolvency, or bankruptcy proceedings. The court thus concludes that the imposed fine cannot be considered liquidation. 63. With regard to the proposal to moderate the amount of the fine, the court points to the legal provision on the basis of which the imposed sanction can be moderated in review court proceedings, § 78, paragraph 2 of the Criminal Procedure Code. if the court decides on an action against a decision by which an administrative authority imposed a penalty for an administrative offense, the court may, if there are no reasons for annulment of the decision according to paragraph 1, but the penalty was imposed in an obviously disproportionate amount, waive it or reduce it within the limits of the law allowed, if such can be made ID no. 9A 66/2019 Conformity with the original is confirmed by V.B. 17 decision to be made on the basis of the factual situation from which the administrative authority proceeded, and which the court possibly supplemented with its own evidence in non-essential directions, and if it proposed such procedure of the plaintiff in the action. In the given case, the plaintiff was imposed a fine of CZK 380,000 by the administrative body of the first degree in the wording of the contested decision, in which the court did not find the administrative discretion unreasonable in view of all the assessed circumstances and the criteria that came into consideration according to § 37 of Act No. 250/2016 Coll. The stated conclusion thus does not fulfill the condition for the application of moderation, because if the amount of the fine is not disproportionate, it cannot meet the assumption of moderation of the fine according to the cited legal provision, which consists in the attribute "manifestly disproportionate

amount" of the fine. VIII. Conclusion 64. On the basis of the above-mentioned reasons, the court came to the conclusion that the contested decision was issued in accordance with the law, and therefore rejected the filed lawsuit as unfounded in accordance with Section 78, paragraph 7 of the Code of Criminal Procedure. 65. The court decided on reimbursement of the costs of the proceedings in accordance with § 60, paragraph 1, s. s. s. spent against the participant who was not successful in the matter. The plaintiff was not successful in the matter, therefore she is not entitled to compensation for the costs of the proceedings. The defendant administrative body did not incur costs of the proceedings beyond the scope of its normal administrative activities. Lesson: A cassation complaint can be filed against this judgment within two weeks from the day of its delivery. The cassation complaint is submitted in two copies to the Supreme Administrative Court, with its seat at Moravské náměstí 6, Brno. The Supreme Administrative Court decides on cassation appeals. A cassation complaint can only be filed for the reasons listed in Section 103, paragraph 1 of the Civil Code. and in addition to the general requirements of the filing, it must contain an indication of the decision against which it is directed, to what extent and for what reasons the complainant is contesting it, and information on when the decision was delivered to him. In cassation appeal proceedings, the complainant must be represented by a lawyer; this does not apply if the complainant, his employee or a member acting for him or representing him has a university degree in law which is required by special laws for the practice of law. The court fee for a cassation appeal is collected by the Supreme Administrative Court. The variable symbol for paying the court fee to the account of the Supreme Administrative Court can be obtained on its website www.nssoud.cz. Prague, October 13, 2021 JUDr. Naděžda Řeháková, Acting President of the Senate