OFFICE FOR PERSONAL DATA PROTECTION

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* UOOUX00EN3O9 *

DECISION

Ref. UOOU-00681 / 20-18

The President of the Office for Personal Data Protection as the appellate body competent under the provisions § 10 and § 152 paragraph 2 of Act No. 500/2004 Coll., Administrative Procedure Code and according to § 10 paragraph 1 letter a) of the Act

No. 480/2004 Coll., on certain information society services and on the amendment of certain acts,

decided according to the provisions of § 152 par. 6 let. b) of Act No. 500/2004 Coll., Administrative Procedure Code, as follows:

Appeal of the accused, company XXXXX, against the decision of the Office for Personal Data Protection Ref. UOOU-00681 / 20-12 of 6 October 2020, is rejected and the contested decision is upheld.

Justification

Definition of things

[1] Administrative proceedings in the matter of suspicion of committing an offense pursuant to § 11 para. a) point 1 of Act No. 480/2004 Coll. was launched by a notification to the Office for Personal Data Protection ('the Office'), which was indicted, to XXXXX ('the defendant'), delivered on 29 July 2020. The initiation of the proceedings was based on complainants concerning the dissemination of unsolicited commercial communications by the accused company delivered to the Office on 4 February 2020, 17 March 2020 and 15 June 2020. Contents individual submissions were e-mail messages containing a request for purchase evaluation.

[2] On 21 August 2020, the administrative authority of the first instance received the defendant's statement the subject matter of the proceedings (dated 13 August 2020), through

legal representative XXXXXX, lawyer, Advokátní kancelář Šrubař & Partners, at

on the basis of a power of attorney.

[3] In this statement, the defendant's lawyer stated that all persons

specified in the notice of initiation, the clients are accused, while in the case of the accused

repeatedly, and two of these persons have set up a customer account with the accused,

be made without a purchase. These facts were substantiated through a statement

from the database charged, where the customer ID is given, a list of purchases made, whether

the purchase was made without registration or with registration and shipping settings

commercial communications (e-mail or SMS) and consent for third parties. Furthermore, a lawyer

stated that every time a customer makes a purchase, transactional e-mails are sent to him

with the status of the order, while the last of these transactional e-mails is always the e-mail,

which was delivered to the customers named in the notice of initiation. Legal representative

therefore, it does not consider these e-mails to be commercial communications within the meaning of § 2 letter f) of the Act

No. 480/2004 Coll., as all conditions specified in this provision must be

cumulatively, the lawyer stating that the communication in question is missing

the purpose of which should be to promote, directly or indirectly, goods or services or an image

company. The purpose of the communications sent, he said, is, in a broader sense, protection

consumers, in particular the creation of a user-based product quality database

evaluation of individual customers - users of the goods it is intended to prevent

consumer dissatisfaction with the product purchased and, where appropriate, cost savings

associated with the return of goods or their claim. For this reason, these are then

e-mails are also sent to customers who have not given their consent to the sending of business messages.

Furthermore, the defendant's lawyer stated that every customer has the option when shopping at

online store refuse to send a business message, respectively. this consent

not to grant. And for every delivered business message, the customer has the opportunity

unsubscribe from a business message with a single click in the footer of an email. Defendant's lawyer
it also demonstrates communication with clients XXXXX and XXXXXX.

[4] Subsequently, on 6 October 2020, the case was issued by the first instance administrative authority
decision no. UOOU-00681 / 20-12, by which the accused was found guilty of the offense
offense according to § 11 par. 1 let. a) point 1 of Act No. 480/2004 Coll. by repeatedly
disseminated commercial communications in the sense of § 2 letter f) of Act No. 480/2004 Coll., by sending to
e-mail addresses stated in the statement of the decision in question without the consent of the addressee,
thereby violating the provisions of Section 7, Paragraph 2 of Act No. 480/2004 Coll. For the above conduct
a fine of CZK 10,000 was imposed on the accused. This decision was legal
delivered to the accused on 7 October 2020.

[5] On 22 October 2020, the accused filed an administrative decision against the above decision
the court of first instance ('the contested decision').

Decomposition content

[6] In the appeal lodged, the defendants challenge the decision in its entirety, since with it
he completely disagrees because he considers it incorrect.

[7] Accused in the first place (similar to the written statement of 13 August
2020) contradicts the conclusion of the administrative body of the first instance that the e-mail in question
messages, which he calls "transactional messages", have fulfilled the defining characteristics of business
communication in the sense of § 2 letter f) of Act No. 480/2004 Coll. In the opinion of the accused, it is not met
a condition of purpose consisting in the direct or indirect promotion of goods or services or image
the person's business, as these transaction messages do not target either direct or indirect
promotion of evaluated products. The accused further states that she is targeting these reports

to protect and inform consumers and the quality of the products offered. This yours
the opinion subsequently expands more widely in the filed decomposition.

[8] The accused is of the opinion that the administrative body of the first instance uses in its decision-making

tense formalism and interferes in the system according to the accused person "objective"

obtaining information, ie evaluating specific products by customers, in a way that

has the potential to destroy it.

[9] The defendant also contends that the contested decision is unreviewable, since, according to

In its view, the administrative authority of the first instance did not adequately deal with it before

arguments about the purpose of "transactional" messages. Accused literally

It states that it did not identify in the statement of reasons for the contested decision any part in which

the administrative authority of the first instance with its views set out in the observations of

On August 13, 2020, he argued or dealt with them. In this context

the accused mentions that, in the extreme case, the absence of a settlement of the objections leads to

to violate the right to a fair trial. He refers to the Constitutional Court's judgment in

on June 2, 2009, file no. mark II. ÚS 435/09, No. 129/2009 Coll.

[10] At the end of her appeal, the accused proposes that the President of the Office act as an appeal body

taking into account the provisions of Section 152, Paragraph 5 of Act No. 500/2004 Coll., the Administrative Procedure Code, decided

according to the provisions of § 90 par. 1 let. a) of Act No. 500/2004 Coll., the Administrative Procedure Code and the contested

annulled the decision and stopped the proceedings, or that, pursuant to the provisions of § 90 para. b)

Act No. 500/2004 Coll., Administrative Procedure Code, the contested decision for unreviewability

annulled and remitted the case to the administrative authority of first instance for a new decision.

Assessment by a second instance body

[11] The Appellate Body examined the contested decision in its entirety, including the

which preceded its publication and reached the following conclusions.

[12] The defendant's argument that the administrative authority at first instance did not deal with it

the arguments set out in its observations of 13 August 2020,

namely that the e-mails sent to it did not meet the defining characteristics of the commercial communication in

within the meaning of § 2 letter f) of Act No. 480/2004 Coll., which makes the contested decision
unexplained, the appellate body first states that the communications sent are necessary
evaluate according to their actual content, not according to the term used by the accused.
In the opinion of the accused, the e-mails in question were not commercial communications, but
transaction reports, as set out in its statement of 13 August 2020, is administrative
the first instance authority settled in the statement of reasons for the contested decision, namely
page 3, where the difference between a commercial communication and a transactional one is concisely explained
message (e-mail), by explaining the content of the term business message. This interpretation was
in full compliance with the provisions of Section 2, Paragraph f) of Act No. 480/2004 Coll. even with established practice
Office, of which the public is informed, inter alia, through the website
Office. On the website www.uoou.cz, in the main menu, the Counseling section is called
Frequently asked questions according to the processing of personal data within which it is located
separate section "On unsolicited commercial communications and Act No. 480/2004 Coll.",
dedicated to commercial communications (https://www.uoou.cz/casto-kladene-otazky-k-

zakonu-c-480-2004-sb / ds-5494 / archiv% 3D1 & p1% 3D1493). Here is the answer
Question 1 explicitly states that they are in favor of indirect business support
reports containing user reviews and evaluation questionnaires are also considered. Within
This section also states what can be understood by the term so-called technical report. These
reports announce, for example, the new wording of the terms and conditions, the shutdown provided
services, change of opening hours, etc., which can sometimes be a given obligation
directly by law (eg change of business conditions at banks). If only
about this type of message, such a message is not considered a commercial message if it is sent
own customer, even if he refused to receive commercial communications. When,
that such a message is sent to a person who is not a customer and has not given consent
to send commercial communications, this message must be considered a commercial communication

used to indirectly promote goods, services and the image of the company.

[13] Among the technical transaction e-mails related to the order, then, can be considered

e-mails containing order confirmations or information needed to collect them,

e-mails with assigned or renewed login data or customer communication

support.

[14] The first-instance administrative body also relied on the assessment of the transmission of the reports in question

from its previous proceedings, eg in the case of www.scio.cz under ref. UOOU-11510 / 14-7, where

the correctness of the Office's decision was confirmed by a judgment of the Supreme Administrative Court of the Czech

Republic

No. 1 As 136/2019 - 38 of 16 June 2020, which on the contentious issue of whether

in the present case it is a commercial communication within the meaning of § 2 letter f) of the Act

No. 480/2004 Coll., leading to direct or indirect support of goods or services or whether its designation

was different, in paragraph 34 of this judgment, with reference to the Commentary on the Act on Certain

information society services by M. Maisner, (1st edition. Prague: C. H. Beck,

2016) stated the following: “In practice, therefore, it is not decisive what the real intentions were

the consignor, but what the competent decision-making body can prove and prove. "

In paragraph 31 of the same judgment, the Supreme Administrative Court of the Czech Republic stated that: “It is

the legislator's obvious effort to ensure that the user does not have to incur any costs

business communications delivered to him by e-mail, which he did not request

and which harass him as a result. "

[15] Thus, as the administrative body of first instance correctly stated in its decision, if

the report will contain information about a specific product, offered goods or services

and its aim will be to promote it, either directly by reference to its features, price or

benefits or indirectly, eg in the form of (pseudo) objective evaluation or recommendation,

it will be a commercial communication.

[16] Likewise, any message that is sent will have to be considered a commercial communication

to strengthen the image of a particular entity, ie to strengthen the awareness of its name and brand,
to improve its media image, etc., even if it does not contain a reference to certain goods or
offered service.

[17] If the accused wants, based on the evaluation of individual customers - users of goods -
create user product quality databases, as stated in his statement, it is
no doubt about the form of support for goods or services.

[18] The Appellate Body further considers it important to emphasize that, as was the case here
administrative proceedings also found the accused does not give his customers even the opportunity
reject the e-mails in question relating to the evaluation of the products. So
every time a customer buys from the accused, he is overwhelmed by the questionnaires sent. This
that fact is set out on page 5 of the contested decision. When performing a test
purchase, the administrative authority of the first instance found that the field concerning
the possibility to refuse to accept the satisfaction questionnaires. Within the forms
a link to the Privacy Policy has been provided, containing the following
statement: “We also find out your satisfaction with our services through
e-mail questionnaires within the Customer Verified program, which includes XXXXXX
involved. We send them to you every time you buy from us, unless you refuse to send them
However, such a solution is, in terms of § 7 paragraph 3 of Act No. 480/2004 Coll.,
insufficient, as it is not a clear and distinct option in a simple way
refuse to send such commercial communications. It was also a trial case
registration found that the box "I want to receive information about news and promotions
tenders "is pre-checked before the registration itself is completed and another box, e.g.
to send satisfaction questionnaires from XXXXX or third parties, eg from XXXXX, is not
is not mentioned anywhere in this registration. This is another gross violation of the rules for
granting free and transparent consent.

[19] Of course, the Office does not want to prevent defendants from protecting consumers
in the form of sent questionnaires, as the accused erroneously states in her dissolution, is at the same time
however, it must be stated that it is not in accordance with Act No. 480/2004 Coll
consumers were overwhelmed by such requests without being given them in advance
the option to refuse this sending and, conversely, received e-mails requesting evaluation
products even after these emails have already been received from the accused and forwarded to them
expressly declined to their e-mail address by e-mail sent to
customer service accused. For this reason too, it is therefore necessary to ask these questionnaires
considered to be commercial messages, provided that they always relate to the goods or services purchased.
Creating a user quality database based on questionnaires - product evaluation - then
represents one form of promotion of its goods or services, despite the fact that
these are activities fulfilling several purposes at the same time, but including the support of this itself
goods.
[20] As is clear from the file, the defendant sent the two users mentioned
in the operative part of the contested decision, namely users of XXXXXX and
XXXXXX, commercial communications after their previous refusal to send commercial communications.
The third user to whom the commercial communication was sent to the accused, ie the
XXXXXX e-mail address, stated in his complaint that he agreed to the sending of business
he did not give the message. Thus, in two cases, the accused did not respect the clearly expressed will
these users (recipients of commercial communications) do not receive commercial communications and in the third
in this case, has not provided consent to the sending of commercial communications by that user,
which, on the contrary, denies its grant. After all, the accused herself proved in her statement that
that all addressed customers have the option of sending business messages in its system
rejected.

[21] The Appellate Body therefore considers that the accused did not have a legal title

to send business messages to users of the e-mail addresses specified in the statement

of the contested decision and thus violated the provisions of Section 7, Paragraph 2 of Act No. 480/2004 Coll.

and thus committed an offense under § 11 para. a) point 1 of Act No. 480/2004 Coll.

[22] He did not find in the contested decision or in the proceedings which preceded the adoption of the decision

appeal body conflict with the law. Decision of the administrative body of the first instance

was issued in accordance with the law and duly substantiated. Regarding the above

of the fine, the appellate body then finds that it was imposed at the very lower limit

the statutory rate and the amount of the statutory rate were duly substantiated by the

what circumstances he took into account when imposing it and that he did not find any reasons for its use

mitigating or aggravating circumstances. The administrative body of the first instance also pointed to

the fact that in connection with the sending of commercial communications has already been with the accused

proceedings (ref. UOOU-10753 / 18-6 - an order imposing a fine in the amount of

CZK 10,000). Although the accused did not object to the liquidation amount imposed in her dissolution

fines, the administrative authority of the first instance nevertheless, following the conclusions of the decision

Of the Supreme Administrative Court of the Czech Republic No. 1 As 9 / 2008-133, assessed the accounting records

accused in 2019, available on the portal www.justice.cz, and came to the conclusion

that the sanction imposed is not liquidating for the accused.

[23] The Appellate Body therefore concludes that, after an overall examination, it did not find any ground for annulment

dismissal of the contested decision or to amend the sanction imposed. Appellate body

nor did it find any errors in the procedure preceding the adoption of this decision.

The legal conclusions of the first instance administrative body were duly substantiated and in line

with the relevant legislation, including the amount of the fine imposed.

Instruction: Pursuant to the provisions of Section 91, Paragraph 1 of Act No. 500/2004 Coll.,

Administrative Procedure Code cannot be revoked.

Prague, March 23, 2021

official stamp imprint

Mgr. Jiří Kaucký

chairman

(electronically signed)