1 As 136/2019 - 38 CZECH REPUBLIC JUDGMENT ON BEHALF OF THE REPUBLIC The Supreme Administrative Court decided in a panel composed of the chairman JUDr. Josefa Baxa, judge JUDr. Lenky Kaniová and judge JUDr. Ivo Pospíšila in the legal case of the plaintiff: www.scio.cz, s. r. o., with registered office at Pobřežní 658/34, Prague 8, represented by JUDr. Jan Täubel, LL.M., lawyer with registered office at Sokolovská 68/105, Prague 8, against the defendant: Office for the Protection of Personal Data, with registered office in Plk. Sochora 727/27, Prague 7, on the action against the decision of the Chairman of the Office for the Protection of Personal Data of 20 March 2015, no. dated 25 March 2019, No. 5 A 87/2015-37, as follows: I. The appeal is dismissed. II. The plaintiff is not entitled to compensation for the costs of the cassation appeal. III. The defendant is not awarded compensation for the costs of the cassation appeal. Reasoning: I. Definition of the matter [1] The Office for Personal Data Protection, by decision of 14/01/2015, no. the obligation set out in § 7 paragraph 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), i.e. to disseminate business communications by electronic means only under the conditions set by this law. The plaintiff thereby committed an administrative offense pursuant to § 11 paragraph 1 letter a) of the same Act, because they disseminated commercial messages en masse without the consent of the addressees. The administrative body of the first instance specifically found that the plaintiff used electronic means to disseminate unsolicited commercial communications in the sense of § 2 letter f) of the Act on Certain Services of the Information Society, because it sent from the electronic address scio@scio.cz to the electronic addresses (listed in the decision of the first-level administrative body) a commercial communication regarding the offer to take the National Comparative Examination and the possibility of using its result for admission to the Economic - the administrative faculty of Masaryk 1 As 136/2019 University (ESF MU) without entrance exams, namely to 2717 applicants for a bachelor's degree on 20/03/2014 and to 247 applicants for a subsequent master's degree on 25/03/2014. For this administrative offense administrative the first-instance authority imposed a fine of CZK 450,000 on the plaintiff pursuant to § 11 paragraph 1 of the Act on Certain Information Society Services. At the same time, he ordered her to pay the costs of the proceedings in the amount of CZK 1,000. [2] The plaintiff filed an appeal against the decision of the administrative body of the first instance, which the chairman of the Office for the Protection of Personal Data rejected in the header marked with the decision and confirmed the first instance decision. II. Assessment of the case by the municipal court [3] The plaintiff challenged the decision on dissolution with a lawsuit, which was rejected by the Municipal Court in Prague in the judgment indicated in the header. [4] The municipal court found that the statement of the decision of the administrative

body of the first instance contains a sufficiently specific definition of the factual circumstances of the offense for which the plaintiff was sanctioned, so that this offense cannot be confused with another. The statement of the decision also contains the provisions of the law according to which the decision was made, and it is quite clear from the decision in which specific actions of the plaintiff an administrative offense is seen. [5] The assessed communication of the plaintiff, which offered applicants for university studies the opportunity to register for the National Comparative Examination on the plaintiff's website, also with a reference to the test placed on the plaintiff's website, was considered by the city court to be a commercial communication, since the plaintiff as the businesswoman promoted her services. The plaintiff obtained electronic contacts from the relevant faculty and these were the contacts indicated by each applicant for study at the university in the submitted application for study. It is therefore beyond doubt that these were not electronic contacts belonging to unknown users, where there would be doubt as to whether they are really existing contacts or not. If the plaintiff sent commercial messages to the obtained electronic contacts belonging to specific study applicants without the consent of their users, she thus fulfilled the essence of an illegal act and committed an administrative offense. In this situation, according to the municipal court, it would be superfluous to prove whether individual commercial messages were also delivered. [6] Regarding the objection of the disproportionality of the sanction, the municipal court stated that the assessment of the administrative authority of the first instance was rational, in accordance with the principles of logic, and the administrative authority did not deviate from the limits of administrative discretion. The imposed sanction in the amount of CZK 450,000 is a sanction approaching the lower limit of the statutory range and is completely proportionate to the circumstances of the case and the seriousness of the administrative offence. The municipal court therefore did not comply with the plaintiff's proposal to moderate the sanction imposed, as the fine was not imposed in a clearly disproportionate amount in the given case. III. Content of the cassation complaint [7] Against the judgment of the municipal court, the plaintiff (complainant) filed a cassation complaint on the grounds of § 103 paragraph 1 letter a), b) and d) of Act No. 150/2002 Coll., Administrative Code of Court (hereinafter referred to as "the Code of Administrative Procedure") and seeks its cancellation, including the decision of the chairman of the defendant. The complainant further supplemented the argumentation in the cassation complaint with a reply in which she responded to the defendant's statement. [8] First of all, the complainant objects that the statement of the decision of the administrative body of the first instance is illegal, because it does not sufficiently define the legal norm on the basis of which the fine was imposed. The administrative body omitted that § 11 paragraph 1 letter a) also contains points 1 to 5 and no longer referred to a specific point of the given

provision. Even from the reference to § 7 paragraph 1 of the Act on certain services, continuation 1 As 136/2019 - 39 information society, it is not clear what exactly the complainant should have committed. The municipal court did not consider this fact, thereby burdening its judgment with a defect consisting in its illegality. [9] The applicant considers the interpretation of the term "business communication" by the administrative authorities and the municipal court to be formalistic, disproportionately extensive and against the meaning and purpose of the law. The applicant is a legal entity that, as a subcontractor, provides universities with a service consisting in the implementation of entrance exams. These are so-called national comparative exams. The university can use the National Comparative Examinations as an alternative to its own admission procedure, or it can so-called "outsource" the entire admission procedure to the applicant, when the only criterion for admission to the university in question is the fulfillment of the National Comparative Examinations with a certain result. For this purpose, the universities conclude a work contract and a personal data processing contract with the complainant, on the basis of which the complainant processes the personal data of applicants for studies at the given university. The same was the case in the case under consideration, when ESF MU acted in the position of customer and administrator of personal data, while the complainant acted as a contractor and processor of personal data. The complainant refers to § 6 paragraph 1 and § 49 paragraph 5 of Act No. 111/1998 Coll., on universities and on the amendment and addition of other laws (the Act on universities), and emphasizes that universities can, respectively must inform applicants about how it is possible to meet the conditions of the admission procedure. [10] About commercial communication in the sense of § 2 letter f) of the Act on Certain Information Society Services can only be used if, by sending the message, the sender intended to promote the goods or services of a person who is an entrepreneur. In the case under consideration, however, the informative e-mail was not sent by the complainant with the intention of endorsing the goods or services of the complainant or another person. The purpose of the e-mail was only to inform applicants about the conditions for admission to study according to Section 49, Paragraph 5 of the Act on Universities. The e-mail sent by the complainant therefore does not constitute a commercial communication. In the event that, despite all the above-mentioned facts, the Supreme Administrative Court finds that the e-mail sent by the complainant constituted a commercial communication, it objects that she was authorized to send commercial communications to applicants. The complainant acted as a personal data processor for the administrator – Masaryk University. Thus, she performed all activities connected with the admission procedure on behalf of (on behalf of) Masaryk University. [11] In conclusion, the complainant objects that the fine was imposed in an obviously disproportionate amount due to the

circumstances of the case. The fine was imposed in the amount of almost half a million crowns for a rare and unintentional act which, even according to the administrative body, had a minimal impact. The administrative body received only one complaint, and that was for another alleged violation of the law, which was also not proven. It is therefore obvious that practically all recipients of the e-mail understood it as completely standard and legitimate information about the way the university entrance exam is conducted, because it was. The fine is also clearly disproportionate compared to the fines imposed by the administrative authority in similar cases. In the opinion of the complainant, the municipal court should have exercised the right of moderation and waived the imposition of the fine, or at least reduced it adequately. If he derived the adequacy of the fine from the fact that it was imposed at the lower limit of the legal rate, such justification is not appropriate according to the complainant. It is not possible, especially in situations where the maximum legal amount of some fines reach astronomical heights, to assess the adequacy of the fine based on the range of rates defined in the law, but on the basis of the circumstances of the specific act and its seriousness, i.e. according to the degree of interference in the legal sphere of the affected persons, degree of culpability, economic benefit and other criteria determining the seriousness of the committed administrative offence. IV. Statement of the defendant [12] The defendant stated in his statement to the cassation complaint and in his rejoinder, i.e. his response to the complainant's reply, that he agrees with the conclusions of the municipal court. Regarding the objection of indeterminacy of sentence 1 As 136/2019 for insufficient specification of the provisions of the law, he pointed out that the system presented by the complainant § 11 paragraph 1 letter a) of the Act on Certain Services of the Information Society was only inserted into the Act by amendment No. 183/2017 Coll., with effect from 1 July 2017. [13] In the defendant's opinion, the concept of commercial communication must be evaluated objectively, whether there has been fulfillment of the defining features defined in § 2 letter f) of the Act on Certain Information Society Services. The same then applies to the purpose of the communication to directly or indirectly support the entrepreneur, i.e. the intention of the communication must also be evaluated from objective points of view. In other words, it can basically be interpreted as the ability of the communication to support business activity. As part of the evaluation of the message, its content must also be evaluated. In the present case, it did not concern the provision of general information about the conditions of admission to study by ESF MU, but was limited to information about the commercial service offered by the complainant. In this connection, the defendant refers to the judgment of the Supreme Administrative Court of 22 July 2010, No. 5 As 48/2009-76, which concerned the internal psychological relationship of communication and its consequences in connection with advertising. [14]

In an attempt to subordinate the actions of the complainant to the fulfillment of a legal obligation under § 49 of the Act on Universities, the defendant primarily refers to the meaning and purpose of this provision, however, the impossibility of such subsumption also follows from the language itself. The purpose of Section 49 of the Act on Universities is to ensure the objectivity of the admission procedure and the equality of study applicants through unchanging conditions for admission to study and the possibility for the general public to get to know them well in advance. The selective sending of e-mails notifying study applicants during the admissions process that has already begun about the possibility of participating in commercial tests that may be taken into account as part of the admissions process is clearly not publication within the meaning of the legal provision in question. [15] When considering the amount of the fine, the defendant respected the legal threshold for imposing a fine. He duly justified the imposed sanction, while evaluating the circumstances increasing the seriousness of the criminal act, as well as the mitigating circumstances. Argumenting the amount of fines imposed on other entities is inappropriate, as each case must be evaluated in its individuality, which is related to the differentiation of the sanction reflecting the circumstances of the case and the harmfulness of the actions for society. At the same time, in the case of the complainant, the very high amount of disseminated spam represented a significant circumstance increasing the seriousness of the crime, while the defendant particularly emphasizes in this context that in similar situations it was possible to consider an order of magnitude higher sanction. V. Assessment of the case by the Supreme Administrative Court [16] The cassation complaint is timely, filed by an authorized person and admissible. The court assessed the merits of the cassation complaint within the limits of its scope and the reasons applied, while examining whether the challenged decision does not suffer from defects, which it is obliged to take into account as a matter of official duty (§ 109 par. 3 and 4 s. ř. s.). [17] The cassation complaint is unfounded. a) The legislation in question [18] The definition of the term commercial communication is contained in § 2 letter f) the Act on Certain Information Society Services, according to which, for the purposes of this Act, commercial communication means all forms of communication, 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. [19] The legal regulation regarding the conditions for the dissemination of commercial communications is contained in § 7 of the Act on Certain Information Society Services. Pursuant to Section 7, Paragraph 1 of this Act, commercial continuation 1 As 136/2019 - 40 communications may be disseminated by electronic means only under the conditions stipulated by this Act. According to § 7, paragraph 2, [p]etails of electronic contact can be used for the purpose of disseminating commercial communications by

electronic means only in relation to users who have given their prior consent. Pursuant to Section 7, Paragraph 3 of the Act on Certain Services of the Information Society [not]withstanding Paragraph 2, if a natural or legal person obtains from his customer the details of his electronic contact for electronic mail in connection with the sale of a product or service in accordance with the requirements for the protection of personal data regulated by a special by law, this natural or legal person may use these electronic contact details for the purposes of disseminating commercial communications regarding its own similar products or services, provided that the customer has a clear and distinct option to refuse in a simple way, free of charge or at the expense of this natural or legal person consent to such use of his electronic contact even when sending each individual message, if he did not initially reject this use. According to § 7, paragraph 4 of the same law, it is prohibited to send electronic mail for the purpose of disseminating a commercial message, if a) it is not clearly and clearly marked as a commercial message, b) hides or conceals the identity of the sender, on whose behalf the communication takes place, or c) is sent without a valid address to which the addressee could directly and effectively send information that he does not wish to continue receiving business information from the sender. [20] According to § 11 paragraph 1 letter a) of the Act on Certain Services of the Information Society, as amended at the time of the commission of the administrative offence, i.e. as amended until 30 June 2017, a fine shall be imposed on a legal person who en masse or repeatedly disseminates commercial communications by electronic means without the consent of the addressee up to CZK 10,000,000. [21] Pursuant to Section 12(2) of the Act on Certain Information Society Services, as amended until 30/06/2017, [when determining the amount of a fine for a legal entity, the seriousness of the administrative offence, in particular the manner in which it was committed and its consequences, shall be taken into account and to the circumstances under which it was committed. b) Regarding the statement of the administrative decision [22] The requirements of the statement part of the administrative decision according to § 68, paragraph 2 of Act No. 500/2004 Coll., Administrative Code, are, among other things, the legal provisions according to which the decision was made. The complainant objects that the statement of the decision of the administrative body of the first instance is illegal, as it does not sufficiently define the legal norm on the basis of which the fine was imposed. [23] The administrative body of the first instance referred to § 2 letter f), § 7 paragraph 1 and § 11 paragraph 1 letter a) of the Act on Certain Information Society Services. From the wording of the decision, the conclusion of the administrative body is thus obvious, according to which the complainant violated the obligation to disseminate commercial communications by electronic means only under the conditions set by the Act on Certain Information Society Services, as she disseminated commercial

communications en masse without the consent of the addressees. Therefore, the municipal court came to the correct conclusion that the administrative decision is completely reviewable and is not illegal due to the lack of requisites of the statement. [24] Regarding the objection of the complainant that the administrative body of the first instance did not specify which point § 11 paragraph 1 letter a) of the Act on Certain Services of the Information Society, the Supreme Administrative Court points out that the applicant incorrectly applies a later legal regulation to the matter under discussion. As the defendant rightly pointed out in his statement, the system referred to by the complainant § 11 paragraph 1 letter a) was only inserted into the law by amendment No. 183/2017 Coll., which came into effect on 1 July 2017. The plaintiff's incriminated communications were sent on 20 and 25 March 2014. The administrative body of the first instance issued its decision on 14 January 2015, the chairman of the defendant decided on dissolution on 20 March 2015. The criminality of administrative offenses and the imposition of punishment must be assessed according to the law in force at the time of the commission of the administrative offence. An exception to this rule is the use of later, more favorable legislation for perpetrators of administrative offences. However, at the time of the decision of the administrative authorities, the legal regulation referred to by the complainant did not even exist yet. In addition, amendment No. 183/2017 Coll. there was only a change in the structure of § 11 paragraph 1 1 As 136/2019 of the Act on Certain Information Society Services and a change in terminology, i.e. renaming administrative offenses to misdemeanors. However, from the point of view of defining the facts of the offense (now contained in Section 11, paragraph 1, letter a) point 1 of the Act on Certain Information Society Services) and the possible amount of the penalty (currently amended in Section 11, paragraph 2, letter b) of the same Act), the subject the amendment did not bring anything new. The complainant's objection is therefore unfounded. c) On the concept of "commercial communication" and its dissemination [25] The contentious issue in the present case is mainly the interpretation of the concept of commercial communication and the fact whether an informative e-mail regarding the offer to take the National Comparative Examination and the possibility of using its result for admission to ESF MU without entrance exams, which the complainant sent from her e-mail address to 2,717 applicants for a bachelor's degree on 20/03/2014 and 247 applicants for a subsequent master's degree on 25/03/2014, is a commercial communication within the meaning of § 2 letter f) of the Act on Certain Information Society Services. [26] It follows from the content of the administrative file that the questionable e-mail with the subject "Possibility of admission to ESF MU without admissions" contained the following text in addition to the address: "According to the database of applicants provided to us by the Faculty of Economics and Administration of Masaryk University, You also

report to the faculty to study. As an option for admission without entrance exams, the faculty also set the result in the National comparative exams. Details can be found on the faculty website, you must register for the exam yourself on the Scio website. The deadline for the next exam date is at the end of next week. You can try the OSP Scio test right now at www.scio.cz/nsz/esf-ukazka.asp. " [27] The definition of the term commercial communication is contained in § 2 letter cited above. f) of the Act on Certain Services of the Information Society, according to which commercial communication means all forms of communication, including advertising and invitations to visit websites, intended to directly or indirectly support the goods or services or the image of the company of a person who is an entrepreneur or performs a regulated activity. The legal regulation regarding the conditions for the dissemination of commercial communications is contained in § 7 of the Act on Certain Information Society Services. [28] In the present case, there is no dispute that the incriminated e-mail was a "communication" in terms of its form, i.e. it was a matter of certain information transmitted between entities. Likewise, there is no doubt that the complainant is an entrepreneur within the meaning of § 2 letter f) of the Act on Certain Information Society Services. As she herself states in the cassation complaint, the complainant is a legal entity that, as a subcontractor, provides universities with a service consisting in the implementation of entrance exams, specifically the so-called National Comparative Exams. From the point of view of the application of the definition of commercial communication in the present case, the only question in principle is whether the e-mail in question of the complainant was a communication defined in the sense of § 2 letter f) of the Act on Certain Information Society Services to directly or indirectly support the goods or services of the complainant or whether its purpose was different. [29] The court first emphasizes that, in general, sending unsolicited commercial messages is undesirable, as the sender transfers a decisive part of the costs of the marketing campaign to someone else. The costs of distribution are mainly borne by internet service providers and by extension also their beneficiaries (time or financial). In addition, sending them can disrupt the proper functioning of interactive networks, mail servers can be overwhelmed, etc. Nevertheless, sending unsolicited business messages is widely used in the field of marketing, because the costs of the sender of such messages are minimal and the message sent by him can reach a large number of people. addressees. [30] It follows from the explanatory report to the Act on Certain Information Society Services that Directive No. 2000/31/EC and Directive No. 2002/58/EC were transposed into the legal order of the Czech Republic by this Act. Directive No. 2000/31/EC defined the basic rules regarding the sending of continued 1 As 136/2019 - 41 unsolicited commercial communications, Directive No. 2002/58/EC then enshrined the protection of personal data of natural persons as well as

authorized persons in connection with electronic communications interests of legal entities. In the same way, the basic ideological starting point 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. At the same time, it is obvious that the legislator is trying to ensure that the user does not have to pay any costs for commercial communications sent to him by electronic mail, which he did not request and which as a result annoy him. The basic purpose of the adoption (not only § 7) of the Act on Certain Information Society Services was therefore to protect the addressee from sending unsolicited commercial messages (including the proper identification of these messages and their originator), to prevent costs related to unsolicited commercial messages, and at the same time to transfer obligations to their spreaders (all this while maintaining the possibility of electronic contracting). [31] These reasons must create interpretative starting points for the interpretation of Section 2, Section 7 and Section 11 of the Act on Certain Services of the Information Society, as an interpretation that would deny their meaning and purpose cannot be accepted. [32] The complainant objects that in the case under consideration the informative e-mail was not sent by the complainant with the intention of endorsing the goods or services of the complainant or another person. The purpose of the e-mail was only to inform applicants about the conditions for admission to study according to Section 49, Paragraph 5 of the Act on Universities. [33] The Supreme Administrative Court disagrees with the claim of the complainant. As already mentioned above, one of the conditions (in this case the only questionable one) that the communication must meet in order to fulfill the definition of commercial communication according to § 2 letter f) of the Act on Certain Information Society Services is the fact that this communication must be intended to directly or indirectly support goods or services or the image of a person's business. This is only the destination, i.e. the sender's intention. It is not so decisive whether the expected result was finally achieved and the goods or services or the image of the company were directly or indirectly supported. The decisive factor is only what the sender intended (cf. Maisner, M.: Law on some information society services. Commentary. 1st edition. Prague: C.H. Beck, 2016). However, the Supreme Administrative Court agrees with the defendant's opinion that this is an objective criterion. [34] As the above-referenced commentary literature states: "In practice, it is therefore not decisive what the sender's real intentions were, but what can be proven and substantiated to the relevant decision-making body." Therefore, the deciding authority will probably be based on the so-called duck test ("If I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I say that bird is a duck." J.W. Riley). It will then be very difficult for the sender to prove that his intentions were originally completely different. Again, the terms direct or indirect support

themselves have no definition. Again, it is therefore necessary, even with regard to the overall focus and purpose of the regulation, to proceed from the assumption that these terms, like many others, will be interpreted extensively. It will therefore not be a mere increase in the sale of goods or the use of services. Support can be, for example, the mere fact that a specific product or service becomes known, that a specific product is talked about or that it is the subject of reviews. ". [35] As stated by the Supreme Administrative Court in the judgment of 22/07/2010, No. 5 As 48/2009-76, regarding the internal psychological relationship of the message and its consequences in connection with advertising, "in the case of an assessment of whether the actions of the complainant meet the characteristics of the dissemination of advertising, his internal motivations or sympathy for the company in question, which the complainant pointed out, are not decisive. In other words, for the assessment of the actions of the person spreading a certain message, it is decisive whether the disseminated message fulfills the characteristics of advertising according to Section 1, paragraph 1 of the Act on the Regulation of Advertising, not the internal motives of the person spreading the advertising message. A similar opinion can be applied in the case of commercial communications, which must also be assessed from an objective point of view. 1 As 136/2019 [36] The Supreme Administrative Court thus agrees with the conclusion of the municipal court that the applicant's communication under review, which offered applicants for university studies the opportunity to register for the National Comparative Examination on the applicant's website, also with a reference to the test placed on the same pages, is a commercial communication in the sense of the above definition, as the complainant promoted her services as an entrepreneur. In a written statement dated 24/06/2014, addressed to the administrative body of the first instance, the complainant explicitly stated that it is a commercial company, the main activity of which is testing and processing its results, especially the National Comparative Examinations. Therefore, if the complainant, through a communication sent electronically to the addresses of applicants for studies at the university, informed these applicants about the possibility of taking the National Comparative Examination organized by her, then undoubtedly the aim of such communication was, among other things, the economic benefit of the complainant. [37] In addition, the Supreme Administrative Court points out that the claim of the complainant about the communication from the MU ESF mandate is not based on the truth and contradicts the statements of the faculty (see answer to question no. 1 in the statement of the vice dean for studies dated 11/09/2014 or letter of the secretary of the faculty dated 12 August 2014), which rejected the mailing and on this basis initiated a complaint procedure against the complainant for breach of contract. However, the claim of the complainant about the communication made on behalf of ESF MU contradicts the statements of the complainant herself, or of her employees (see

e.g. the e-mail of the complainant's employee addressed to Mrs. Iva Tomášková dated 04/07/2014, in which Mrs. Tomášková, who filed a complaint with the Office for Personal Data Protection, the complainant's employee, informs that it was a mistake and misconduct on the part of the complainant). The complainant's argumentation about the implementation of the university's obligation to provide information arising from § 49 paragraph 5 of the Act on Universities (as amended until 31 August 2016) is therefore not relevant, as ESF MU apparently did not implement this obligation to inform about entrance exams through the services of the complainant. d) The adequacy of the imposed fine [38] Last but not least, the complainant objects that the imposed fine is disproportionate and the municipal court should have proceeded in accordance with Section 78(2) of the Criminal Code and waived or reduced the penalty. [39] The conditions for the application of the so-called moderation right of the court are regulated by § 78 paragraph 2 of the Code of Criminal Procedure as follows: 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 grounds for annulment of the decision pursuant to paragraph 1, but the penalty was imposed in an obviously disproportionate amount, waive it or reduce it within the limits permitted by law, if such a decision can be made on the basis of the factual situation from which the administrative body proceeded, and which the court, if necessary, by its own evidence in he added, not in essential directions, and if the plaintiff proposed such a course of action in the lawsuit (underscoring added). [40] It follows from the cited provision that the court can proceed to moderation only if it comes to the conclusion that the imposed sanction (in this case a fine of CZK 450,000) is clearly disproportionate. Regarding the procedure according to § 78, paragraph 2, s. ř. s. The Supreme Administrative Court has already stated in the past that "[t]he meaning and purpose of moderation is not the search for the "ideal" amount of the sanction by the court instead of the administrative body, but its correction in cases where the sanction, moving not only within the legal range and corresponding to all the principles for imposing it and taking into account the criteria needed for its individualization, clearly did not correspond to a generalizable idea of the adequacy and justice of the sanction." (NSS judgment of 19 April 2012, no. 2012 Coll. NSS). [41] The Supreme Administrative Court agrees with the conclusion of the municipal court that the administrative body did not deviate from the limits of administrative discretion in the present case. At the same time, the municipal court did not infer the adequacy of the fine only from the fact that it was imposed within the legal limit, as the complainant objects. Although the imposed penalty of CZK 450,000 is close to the lower limit of the statutory range, the maximum amount of which according to § 11 paragraph 1 letter a) of the Act on certain continuations 1 As 136/2019 - 42 of information society services amounts to CZK 10,000,000, we

can still agree with the complainant that this is still a significant amount. However, in this context, the municipal court expressly stated that the sanction imposed is proportionate to the circumstances of the case and the seriousness of the administrative offence, which the municipal court also took into account in its assessment. He also drew attention to the fact that the administrative body of the first instance assessed both aggravating circumstances and mitigating circumstances, which it specifically described in its decision. As a fact that increases the seriousness of the complainant's actions, the administrative body of the first instance evaluated a large number of addressees of business communications. As a mitigating circumstance, he found in particular the fact that although the e-mail message was sent to a large number of study applicants, it can be inferred from the number of complaints (i.e. one) that the defendant office received that most of these people did not consider it harassing. As a mitigating circumstance, the administrative body of the first instance also considered the content of the report, which was related to the interests of the study applicants. [42] In the cassation complaint and rejoinder, the complainant points to the administrative practice of the Office for Personal Data Protection and cases from which, according to the complainant, it follows that the fine imposed on the complainant should have been lower, or the punishment should have been waived entirely. The Supreme Administrative Court points out that the mere difference in the amount of fines imposed in other comparable cases does not make the fine imposed on the applicant in the present case "obviously" (that is, significantly, strongly) disproportionate within the meaning of § 78 paragraph 2 of the Criminal Procedure Code. The Municipal Court therefore did not have to proceed with moderation due to the reference to the office's administrative practice, only because a comparison of some of the cases referred to by the complainant may indicate that the fine imposed on the complainant in an "ideal" case could have been somewhat lower. As the Supreme Administrative Court stated above, the meaning and purpose of the court's right of moderation is not the search for the "ideal" amount of the sanction by the court instead of the administrative body, but only the elimination of obvious excesses in the imposition of sanctions by the administrative body. However, this is clearly not the case in the present case. VI. Conclusion and costs of the proceedings [43] The Supreme Administrative Court therefore concluded that the cassation complaint was not well-founded, and therefore rejected it according to Section 110, paragraph 1, second sentence of the Civil Procedure Code. [44] The Supreme Administrative Court decided on the reimbursement of the costs of the cassation appeal proceedings in accordance with Section 60, paragraph 1, sentence one of the Civil Code using Section 120 of the Civil Code. The complainant was not successful in the cassation complaint proceedings, therefore she has no to reimburse the costs of the proceedings. The court did not grant reimbursement of costs to the defendant, who would

otherwise be entitled to compensation for the costs of the cassation complaint, because he did not incur any costs in the cassation complaint proceedings beyond the scope of normal official activities. Lesson learned: No appeals are admissible against this judgment. In Brno on June 16, 2020, JUDr.Josef Baxa, chairman of the senate