9 As 380/2017 - 46 CZECH REPUBLIC DIFFERENT COURTS OF THE M R E P U B L I C Y The Supreme Administrative Court decided in a panel composed of the chairman of the panel Mgr. Radovan Havelce and judges JUDr. Tomáš Rychlý and JUDr. Jaroslav Vlašín in the plaintiff's legal case: Stavební bytové družstvo Praha, with registered office at Střelničná 1861/8a, Prague 8, represented by JUDr. Jana Felixová, lawyer with registered office in Prague 5, U Nikolajky 833/5, against the defendant: Office for the Protection of Personal Data, with registered office in Prague 7, Plk. Sochora 727/27, in proceedings on the cassation appeal of the plaintiff against the judgment of the Municipal Court in Prague dated 12 October 2017, No. 11 A 83/2017 – 32, point: I. Scope of the appeal. II. None of the participants will be reimbursed for the costs of the cassation appeal. Arguments [1] The defendant, as an administrative authority of the first instance, by its decision of 29 November 2016, No. UOOU – 10704/16-8, imposed a fine of CZK 250,000 on the plaintiff for committing four administrative delicts according to § 45 paragraph 1 letter c), d), f) and h) of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain laws, as amended for the matter under discussion (hereinafter referred to as the "Act on the Protection of Personal Data"). The plaintiff filed an appeal against this decision, which the chairman of the defendant rejected by her decision of 16 February 2017, no. UOOU-10704/16-15 (hereinafter referred to as the "decision on appeal"). [2] It follows from the administrative and court file that the plaintiff is engaged in the management of own real estate, or apartments in these real estates, and also manages real estate owned by third parties (mainly on the basis of contracts with associations of unit owners or housing cooperatives). According to the defendant's decision, the plaintiff committed four acts in connection with the processing of personal data of "owners, tenants, sub-tenants, husbands and wives of tenants and other members of the household of residential and non-residential units (hereinafter also referred to as ``affected persons'') who are owned or 9 As 380/2017 to the administration of the party to the proceedings (i.e. the plaintiff), i.e. approximately 17,000 residential units out of a total of 22,000 residential and non-residential units in 260 apartment buildings". [3] The plaintiff filed a lawsuit against the decision on dissolution to the Municipal Court in Prague (hereinafter referred to as the "municipal court"), which dismissed it as unfounded in the contested judgment. [4] The municipal court first considered the objections regarding the defects of the administrative procedure. He admitted that the administrative authorities committed a procedural error if they decided on the matter without ordering an oral hearing and provided evidence with documentary material, including the control protocol, which the plaintiff argued was not properly submitted as evidence. However, the municipal court emphasized that all the materials were part of the administrative file throughout the proceedings, the plaintiff was familiar with the documents (including the

control protocol), and therefore this procedural error did not affect the legality of the defendant's decision, or the decision on dissolution. [5] The municipal court also called the plaintiff's other objections regarding defects in the administrative procedure unfounded. The plaintiff considered that he did not have enough time to familiarize himself with the documents for the decision. The court pointed out that the plaintiff was invited to make the acquaintance on 24/10/2016; the defendant did not set a deadline for this, only announced that the decision would be issued after 9/11/2016. The decision was finally issued on 29/11/2016. The plaintiff exercised his right to familiarize himself with the documents on 31/10/2016 and did not no comments on them. Regarding the objection of a violation of the prohibition against self-incrimination, when the plaintiff should have been forced under the threat of a fine to cooperate with the defendant, the city court quoted from the case law of the Supreme Administrative Court on this issue and stated that the defendant's actions did not contradict the prohibition against self-incrimination. [6] The plaintiff further objected to the defects in the statements of the defendant's decision, stating that the deed on which the proceedings are being conducted is not defined with sufficient certainty. In this context, he particularly complained that the defendant did not specify specific data subjects to whom the acts relate. The city court also did not find this objection justified. According to him, the defendant's decision meets the judicial requirements for the description of the act. According to the municipal court, it is not necessary to specify each individual data subject. Even for the purposes of the defendant's consideration of the seriousness of the plaintiff's unlawful conduct, it is not necessary for the number of entities to be counted "to one". According to the municipal court, the ordinal determination that there were thousands of subjects was sufficient. He further stated that from the statement II. it is clear from the defendant's decision that the conduct in question is alleged in relation to "all owners, tenants, sub-tenants, husbands and wives of tenants and other household members of all residential and non-residential units that are managed or owned by the defendant". The objection regarding the failure to state the time when the processing of personal data was already unreasonable is also unfounded. It is evident from the statement that the defendant considered the processing of personal data of persons from the time when these persons moved out of the unit, sold the unit or died to be disproportionate to the stated purpose. According to the court, such a delimitation was sufficient. [7] The plaintiff further objected to insufficient definition of the purpose of personal data processing. The Municipal Court stated that it was not necessary to define all legal titles or purposes of processing personal data. It was important to define those personal data in relation to which the controller or processor of personal data violated their obligations. That's what the defendant did. [8] The plaintiff further objected that the defendant did not deal with the issue of termination of

responsibility for committed administrative offenses. The municipal court confirmed that the reasons for the defendant's decision as a first-level administrative body and the decision on dissolution do not contain considerations on this topic. However, this did not make the decision illegal, according to the municipal court. If the plaintiff did not object to this in the administrative proceedings, the defendant, or his chairperson, were not obliged to express themselves on this issue. 9 As 380/2017 - 47 continued [9] As for the very question of the termination of responsibility for the given administrative offences, the municipal court did not hear the plaintiff's arguments. The latter claimed that (i) responsibility for an administrative offense does not fall on personal data collected before the Personal Data Protection Act came into effect, (ii) it is subject to exemption grounds pursuant to Section 46, Paragraph 1 of the Act on Personal Data Protection and (iii) an administrative offense according to § 45 paragraph 1 letter c) of the Act on the Protection of Personal Data, regarding the collection of personal data to the extent that it does not correspond to the stated purpose, does not have a lasting nature, and therefore the time limits for the termination of liability begin to run from the moment the plaintiff collected the personal data. For argument sub (i), the municipal court cited the relevant provisions of the Act on the Protection of Personal Data and explained that Section 47, Paragraph 3 of this Act (as amended on June 1, 2000) contains – as the rubric suggests – measures for a transitional period. It only follows that the administrator or processor had until 31 December 2002 to bring their activities into compliance with the law. However, the transitional period ended on the said date, and after its end, the administrator or the processor is responsible for tortious conduct, in principle also in relation to the period preceding 12/31/2002. Regarding argument sub (ii), the municipal court stated that the plaintiff did not state any specific steps that would testify to the fulfillment of the reason for liberation, and he did not demonstrate such steps either. For argument sub (iii), the municipal court pointed to an analogy with criminal law and characterized a continuing crime as an act by which the offender causes an illegal state and then maintains it, or only maintains the illegal state, without the law requiring him to also cause it. Actions consisting in the unauthorized collection of personal data fulfill such a characteristic, as it does not end with the collection of personal data itself. In the end, he also did not confirm the claim of the plaintiff about the futile expiration of the relevant periods (one-year subjective and three-year objective) regarding the administrative offense according to § 45 paragraph 1 letter f) of the Personal Data Protection Act. [10] In conclusion, the municipal court also rejected the plaintiff's general objection that the defendant's considerations regarding the imposition of the sanction could not be examined. According to the court, its conclusions were supported by sufficient factual findings, they do not contradict the administrative file, and the defendant's chairperson

subsequently dealt with the plaintiff's objections, which he presented in the dissolution proceedings. The defendant's conclusions also do not contradict the principles of logical thinking. In the end, the municipal court did not even find reasons to moderate the fine imposed above. [11] The plaintiff (hereinafter referred to as the "complainant") challenged the judgment of the municipal court with a cassation complaint, the grounds of which he submits under § 103 paragraph 1 letter a), b) and d) of the Administrative Code of Court (hereinafter referred to as "s. ř. s. "). [12] He considers the challenged judgment unreviewable, because the municipal court did not deal with all his objections. Specifically, he did not deal with the fact that the defendant's decision is largely based on the witness statement of the representative of the complainant, who was not properly instructed before submitting it as part of the state control that, in view of his position, he is not obliged to testify in the case or to provide other active cooperation, if he would thereby cause himself or the complainant the danger of criminal (administrative) prosecution. Furthermore, according to the complainant, the municipal court did not deal with the issue that the defendant apparently included in the decision statement the processing of personal data of persons who are no longer alive, i.e. persons who are not protected according to the legislation on the protection of personal data, and did not even take into account that in the event of the end after the lease, the lessee's responsibilities or debts to the lessor remain, while the exercise of the lessor's rights requires the processing of personal data even after the end of the lease. The basis for the processing of such data is § 5 paragraph 2 letter e) of the Personal Data Protection Act. Neither the defendant nor the municipal court took this aspect into consideration. [13] The applicant further argues with the municipal court regarding the assessment of procedural defects in evidence in administrative proceedings. The complainant believes that these defects led to an illegal decision. As an accused, he could not effectively defend himself, because he does not know what conduct he is charged with 9 As 380/2017 and what evidence the administrative body used. This is an irremediable violation of the complainant's right to a fair trial. Deviating from the conclusions of the municipal court, the complainant also insists that he was not given sufficient time to familiarize himself with the documents for issuing the decision. He also insists that the defendant violated the principle of prohibition against self-incrimination. [14] He also disagrees with the municipal court in his opinion that the determination of the affected data subjects and the time period, as stated in the statement part of the defendant's decision, was sufficient to define the act. The blanket definition of the sentence part with the words "everyone" deprives the accused (i.e. the complainant) of the possibility of an effective defense and constitutes a violation of the right to a fair trial. This is because the accused does not know which specific case he can argue that the fact in question did not happen, for example by proving a different legal basis for the

processing of personal data. Such a basis could legitimize both the time and scope of personal data processing. According to the complainant, the same also applies to the possibility of defense and the claim of termination of liability. Moreover, in other cases, the defendant specifies the data subjects in the statement part of his decisions. If the data subjects are not identified, the complainant has a limited opportunity to defend himself and it is not even possible to assess the termination of his responsibility. [15] The complainant also does not identify with the "indirectly stated conclusion" of the municipal court that if the defendant alleges a violation of the legislation, he does not have to state what exactly he sees as such a violation and confront this conclusion by describing decisive facts that he perceives as a situation corresponding to the legislation. If the defendant wants to punish the complainant, he can impose the punishment only if he describes the facts of the case, interprets the legal regulation and then states, if in his opinion the established factual situation does not correspond to the legal regulation, what he sees as a violation of the law, at least in the basic outlines. If the defendant "does not himself know what the correct state of affairs is, he cannot demand such knowledge from third parties." [16] The complainant further criticizes the municipal court and the defendant for their opinion on the "admissibility of the retroactivity of the legal norm", as derived from § 47 of the Personal Data Protection Act in its original version. The complainant does not agree with the opinion that the processing of personal data, which the processor started implementing long before the Personal Data Protection Act came into force, can be punished. This processing does not have all the parameters according to the mentioned law, because in many aspects it is not possible to actually remove the deficiencies. Such an application is an inadmissible retroactivity of the legal norm and contradicts the constitutional order. [17] The complainant does not agree with the contested judgment even in the fact that the administrative delict linked to the obligation to provide information pursuant to Section 11 of the Act on the Protection of Personal Data is of a continuing nature. According to the complainant, the obligation to provide information to the data subject is a one-time obligation that is exhausted at the moment of collection of personal data from the data subject. The same also applies to the obligation according to § 5 paragraph 1 letter d) of the Personal Data Protection Act. Related to the above is the complainant's objection of incorrect assessment of the issue of termination of liability for administrative offenses linked to the complainant's obligation to inform the data subject pursuant to § 11 of the Act on the Protection of Personal Data, or pursuant to § 12 and § 21 of this Act, respectively the obligation to collect personal data corresponding to the monitored purpose and to the extent necessary for the fulfillment of the purpose according to § 5 paragraph 1 letter d) of the cited law. The aforementioned obligations are of a one-time nature, and the defendant should have taken into account the statute of

limitations for the committed torts. The one-off nature of the obligation can be seen when compared to the regulation enshrined in Section 5, paragraph 2 of the Personal Data Protection Act, which stipulates the obligation to have a title for the processing of personal data. Such an obligation, on the other hand, has an ongoing nature. 9 As 380/2017 - 48 continued [18] In conclusion, the complainant expresses disagreement with the conclusions of the municipal court on the proper justification of the sanction imposed. If the defendant's decision and the proceedings before the defendant suffer from the defects described, the decision to set aside and the defendant's decision cannot be properly argued in relation to the amount of the sanction imposed. A blunt repetition of vague statements in the absence of logical reasoning by the defendant about the purpose and consequences of the imposed sanction cannot be sufficient. [19] In the course of the proceedings before the Supreme Administrative Court, the applicant sent another submission, marked as "plaintiff's statement - termination of criminality". In it he points out that on 25 5. 2018, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free movement of such data and on the repeal of Directive 95/46/EC (General Regulation on the Protection personal data) - in English "general data protection regulation" (GDPR) - (hereinafter referred to as the "GDPR regulation"). Although the Personal Data Protection Act was not formally repealed, the effectiveness of the GDPR resulted in a de facto derogation of the substantive personal data protection standards contained in Sections 3 to 27 of this Act. These standards have been replaced by the standards contained in the GDPR regulation. At the same time, however, the law to implement the GDPR (hereinafter referred to as the "adaptation law") has not yet been adopted. From this, the complainant concludes that the criminality of his actions ceased on 25/05/2018. This opinion is based on the fact that the GDPR regulation cannot formulate the universal facts of criminal acts and it is not possible to punish directly on the basis of this regulation. It points to the principle of criminal law expressed in Article 40, paragraph 6 of the Charter of Fundamental Rights and Freedoms, according to which the criminality of the offense is assessed and the punishment is imposed according to the legislation that came into force only after the offense was committed, if it is more favorable to the offender . [20] In his statement, the defendant agreed with the judgment of the municipal court. He pointed out that the complainant repeats the argument he used in the administrative proceedings and in the lawsuit. At the same time, however, he does not contradict the situation found by the inspection, as he did not defend himself procedurally either against the protocol of the inspection or against the order imposing corrective measures on him. [21] Regarding the objection regarding evidence in the administrative proceedings, the defendant pointed to the falsity of the

claimant's claim that the municipal court concluded that there had been a violation of the right to a fair trial. The court only admitted a procedural error on the part of the defendant, which, however, did not affect the legality of the decision. The right to a fair trial must be understood comprehensively and it cannot be argued that this right has been violated on the basis of every procedural error. The control report should then be considered as documentary evidence that was part of the administrative file. The complainant was also informed of the right to comment on the basis for issuing the decision and exercised this right. He was therefore properly acquainted with all the documents and the claim of interference with his rights is purely purposeful. [22] Regarding the objection regarding the insufficient period for getting acquainted with the documents for the decision, the defendant stated that due to the nature and amount of documents, he considers a period of more than one month to be reasonable. All documents were also part of the administrative file and the complainant could consult it at any time during the proceedings. [23] The defendant also rejected the objection that the complainant was forced to actively cooperate under the threat of a disciplinary fine. He pointed out that Act No. 255/2012 Coll., on inspection (inspection regulations), requires the cooperation of the inspected (i.e. the complainant). It is not about forcing self-incrimination, but about ensuring the proper course of control. [24] Regarding the objection of insufficient definition of the act, in particular the failure to specify the specific number of affected data subjects, the defendant stated that the failure to fulfill an obligation towards one subject is sufficient to fulfill the substance of the administrative offense 9 As 380/2017. The number of affected entities makes sense from the point of view of determining the amount of the fine and "has been reliably established in order". The complainant was the administrator of the personal data of thousands of natural persons, therefore it is not possible for the defendant to explicitly calculate the number of subjects in the statement of the decision and indicate what personal data the complainant processed illegally in a specific case. Such an enumeration would represent a disproportionate time burden, it would be confusing and "it would reach the parameters of unreviewability". With such a quantity, the number of data subjects would change every day and it is impossible to write down a list of all affected subjects in such a way that it permanently corresponds to the factual situation. The applicant's request would thus lead to absurd consequences. Regarding the objection of not specifying the time when the processing of personal data was already disproportionate, the defendant points out that the statement of his decision states that the processing was disproportionate from the time when the data subjects moved away, sold the units or died. He disputes the claim of the complainant that the personal data of the deceased are not protected; according to the defendant, there were different positions of experts on this issue, and even the GDPR regulation does not exclude that the member states of the

European Union adopt their own regulation to protect the personal data of deceased persons (recital no. 27). [25] The defendant also rejects the cassation objection that he did not calculate all the legal provisions that affect the activity of the complainant and that liability for the tort has lapsed with the passage of time. The complainant maintained an unlawful state – processing personal data in violation of the law – and therefore it was a continuing tort. Liability for tort cannot be extinguished if the defective processing continues. [26] In the conclusion of his statement, the defendant rejected the arguments of the complainant that his decision is unreviewable from the point of view of the justification of the amount of the sanction. This was set in the lower half of the statutory rate, was justified by the seriousness of the offender's actions, and the defendant pointed to both aggravating and mitigating circumstances. For the stated reasons, the defendant suggested that the Supreme Administrative Court reject the cassation complaint. [27] The defendant subsequently responded to the additional submission of the complainant, in which the latter pointed out the entry into force of the GDPR regulation and the absence of an adaptation law. The defendant drew attention to the fact that the GDPR only entered into force during the cassation complaint proceedings. According to the decision of the extended senate of the Supreme Administrative Court dated 11/16/2016, No. 5 As 104/2013 – 46, more favorable legal arrangements for offenders will be used only in proceedings before an administrative body, or before a regional (here municipal) court. On the contrary, this modification cannot be used until the cassation complaint procedure as an extraordinary remedy against the decision of the regional (city) court, therefore the argumentation of the complainant is irrelevant. In addition, the defendant does not even agree with the actual content of the objection - with the claim that the crime has ceased to be criminal. It points to the direct applicability of the GDPR and considers it a "comprehensive basis for the imposition of sanctions". Its direct effect cannot be conditioned by the adoption of an adaptation law. Furthermore, the act of the complainant fulfills the characteristics of an unmarked administrative offense according to Article 83 of the GDPR regulation, for which a fine of up to EUR 20,000,000 can be imposed. The later legislation (GDPR regulation) is therefore not more favorable for the perpetrators and the application of the Personal Data Protection Act must be continued. [28] The Supreme Administrative Court reviewed the contested judgment within the scope of the cassation complaint filed (§ 109 para. 3, sentence before the semicolon s. ř. s.) and for the reasons stated therein (§ 109 para. 4, sentence before the semicolon s. ř. with.). At the same time, it decided on the matter without a hearing under the conditions arising from Section 109, paragraph 2, sentence one of the Criminal Procedure Code [29] The Supreme Administrative Court first dealt with the objection that the contested judgment could not be reviewed. From the court file, he verified that the

complainant filed a relatively extensive lawsuit 9 As 380/2017 - 49 continued (17 pages of text in total). In it, he objected to defects in the decision, including the statements of the defendant's decision, incorrect legal classification of the matter, the loss of responsibility for an administrative offense and procedural defects. However, the lawsuit does not contain an objection that the defendant's decision is largely based on the witness statement of the representative of the complainant, who before submitting it during the inspection was not properly instructed about the possibility of not testifying with regard to the danger of criminal (administrative) prosecution caused to himself or the complainant himself. Therefore, the complainant unjustifiably criticizes the municipal court that it "didn't deal with the mentioned argument at all". It is the responsibility of the complainant as a plaintiff to allege all relevant facts in the lawsuit and pre-empt the claims [§ 71 par. 1 lit. d) s. r. s.]. The complainant states in the cassation complaint that his objection "did not only concern the presentation of existing documents, but the cooperation required by the defendant in general, including, for example, witness statements" with the fact that the defendant did not instruct the persons concerned. However, if he intended the claim in this way, it was his procedural responsibility to state this explicitly in the claim. But he didn't do that. It is not the duty of the municipal court to infer the unspoken context of the prosecution argument. [30] The above also applies to the claim of the complainant, according to which the municipal court did not deal with the fact that the defendant did not take into account that in the event of the termination of the lease, the tenant's responsibilities or debts to the landlord persist, while in order to exercise the landlord's rights, personal data processing is required even after the end of the lease. If the complainant considered this circumstance to be significant, he should have clearly stated it in the complaint. [31] The complainant further states that the municipal court did not deal with the issue that the defendant apparently included in the decision statement the processing of personal data of persons who are no longer alive, i.e. persons who are not protected according to the legislation on the protection of personal data. However, in order to make the content of this claim clear, it is necessary to recall its context. In the lawsuit, the complainant primarily complained that the defendant did not state the number of persons who should have been affected by the unauthorized processing of personal data in the statement of the decision; according to the complainant, this cannot be inferred even from the preamble of the statement part of the decision, since (among other things) the complainant should have committed unauthorized collection of personal data also in relation to data collected before the date of entry into force of the Personal Data Protection Act. The defendant did not reflect that in many cases it could be data about persons who are no longer alive (pages 6 and 7 of the lawsuit). In the justification of its judgment, the municipal court dealt extensively with the issue of identification of data subjects

concerned (pages 10 and 11 of the contested judgment) and the collection of personal data before the law came into force (page 12 of the contested judgment). It is true that he did not explicitly address the brief mention of the personal data of the deceased persons, but this omission is understandable given that the applicant made this mention - as the context indicated above shows - only briefly, in a secondary sentence, and without presenting any considerations about the significance of this partially asserted fact for assessing the legality of administrative decisions. On the contrary, it is clear from the lawsuit that the focus of the plaintiff's arguments was not the argument about the collection of data about deceased persons, but precisely the complaint about the lack of identification of the data subjects concerned and the penalty regarding personal data collected before the Personal Data Protection Act came into effect. This core of the plaintiff's argument was dealt with in detail by the city court. It follows from established jurisprudence that the court is not obliged to deal with every partial objection if it opposes the claim of a party to the proceedings with a legal opinion against which the objections as a whole cannot stand (cf. e.g. judgment of the Supreme Administrative Court of 23 December 2015, no. 2 As 44/2013 – 125; all cited decisions of this court available at www.nssoud.cz). Such a procedure was found to be constitutionally compliant by the Constitutional Court in its judgment of 12 February 2009, no. stamp III. ÚS 989/08, available at http://nalus.usoud.cz: "It is not a violation of the right to a fair trial if general courts do not build their own conclusions on the detailed opposition (and refutation) of individually raised objections, if they oppose them with their own comprehensive 9 As 380/2017 argumentation system, which logically and legally reasonably interprets such that supporting the correctness of their conclusions is sufficient in itself. " [32] The Supreme Administrative Court concludes that the challenged judgment of the municipal court is reviewable because it adequately recapitulated the points of action and dealt with them in an orderly and comprehensible manner, i.e. including the presentation of the relevant legal argumentation. [33] It follows from § 109 paragraph 4 s. of the Administrative Code and from the consistent jurisprudence of the Supreme Administrative Court (see, for example, the judgment of 26 January 2015, no. 8 As 109/2014 – 70) that the proceedings cassation appeals are governed by the principle of disposition. The content and quality of the cassation complaint thus largely determines not only the scope of the review activity, but also the content of the court's judgment. It is therefore the responsibility of the complainant to sufficiently specify in the cassation complaint the factual and legal reasons for which he challenges the decision of the regional (here municipal) court. [34] As for the legal argumentation of the complainant in the cassation complaint, a large part of it repeats the plaintiff's argumentation verbatim and without further development and is thus primarily directed against administrative decisions, not against the legal conclusions of the municipal court. Specifically, it

concerns a section of the cassation complaint entitled "Part 3. Regarding the defects of the decision" and also a passage entitled "Part 4. Regarding other defects in the proceedings" (pages 6 to 21 of the cassation complaint). Here, the cassation complaint – apart from a brief and relatively general polemic with the opinion of the municipal court on the alleged defects of the statements of the defendant's decision on pages 10 and 11 – does not contain anything relevant in relation to the conclusions of the municipal court. [35] At this point, it should be recalled that the core of the judicial review of the decisions of administrative bodies is concentrated in the proceedings before the municipal (regional) court. Related to this are relatively strict rules on the concentration of proceedings and the possibility of defining claims only within the time limit for filing a claim (see § 72, paragraph 1, s. ř. s.). Proceedings on a cassation complaint as an extraordinary remedy against a final decision of a municipal (regional) court are proceedings during which the Supreme Administrative Court reviews the legality of the assessment of the matter and the procedure of the municipal (regional) court. The reasons that can be successfully applied in a cassation complaint must therefore be attached to the decision of the municipal (regional) court (see the resolution of the Supreme Administrative Court of 3 June 2003, no. 6 Ads 3/2003 – 73). Therefore, the Court of Cassation did not deal more closely with the objections of the complainant, which were only taken from the lawsuit, but they were not accompanied by arguments in relation to their assessment by the municipal court, not even at a general level (for a comparison, see the expression of disagreement with the conclusions of the municipal court in the cassation section complaints marked as "Part 1. Grounds for filing a cassation complaint"), as was the case with the objections dealt with below (see paragraph [39] et seq.). For the reason stated, this argumentation of the complainant cannot be considered as cassational objections in the sense of § 103 paragraph 1 of the Code of Criminal Procedure. In principle, the complainant received a sufficient answer in the contested judgment of the municipal court to the arguments raised by him against the decision on dissolution, or against the first-instance administrative decision , and it is not the purpose of the cassation review to repeat all the conclusions from the contested judgment again. [36] Furthermore, the applicant repeatedly attributes to the municipal court statements or arguments that the court did not use [as the defendant correctly pointed out in his statement regarding point (a) below – see paragraph [21] above]. It concerns, for example, the claim of the complainant that: (a) the municipal court "itself stated in the decision that the right to a fair trial had been violated" (in connection with the fact that the defendant violated the rules on evidence); (b) the municipal court "indirectly stated" the conclusion that "if the defendant alleges a violation of the legal regulation, he does not have to state what he specifically sees as such a violation and confront this conclusion by describing decisive facts that he

perceives as a situation corresponding to the legal regulation"; (c) the municipal court derives from § 47 of the Personal Data Protection Act in its original version an opinion about "permissibility of the retroactivity of a legal norm". 9 As 380/2017 - 50 continued [37] In the case referred to under point (a), the municipal court only noted the existence of a "procedural error in evidence", but concluded that "[the] plaintiff's knowledge of the proceedings is also evidenced by the fact that in the matter filed a timely resolution. Therefore, it cannot be overlooked that the plaintiff's rights were not violated" (p. 8 of the contested judgment; emphasis added). The conclusion that the defendant did not have to describe in his decision the decisive facts and legal regulations that were violated by the conduct [see point (b) in the previous paragraph] cannot be found in the reasoning of the contested judgment at all, and the municipal court also did not comment on the admissibility of retroactivity. It follows from the above that the objections of the complainant sub (a) to (c) are not true, and therefore not justified. [38] The complainant further presented an objection that has no precedent in the lawsuit and is therefore inadmissible in the sense of § 104, paragraph 4 of the Civil Code. Such is the objection, according to which it follows from the contested judgment that it is not decisive for the case whether the complainant processed the personal data of former tenants or owners for other purposes as well, and that even after the end of the lease, derivative liability relationships or the tenant's debts to the landlord often persist. In order to exercise the lessor's rights, the lessee's personal data must be processed even after the end of the lease, and the basis for the processing of such data is § 5 paragraph 2 letter e) of the Personal Data Protection Act. It follows from the dispositional principle that all reasons for the illegality of the contested decision or all defects in the procedure that preceded its issuance must already be applied in the action. The municipal court must be given the opportunity to properly and completely deal with all objections. Only then, if the complainant could not apply the reasons in the proceedings before the municipal court, can he base his cassation complaint on them. However, this was not the case in the considered case of the parties to the above objection. [39] From the point of view of admissible and negotiable objections (although in view of their generality and in some places the verbatim repetition of the lawsuit, it is a cassation complaint that is on the border of negotiable) the complainant argues with the municipal court regarding the assessment of procedural defects in the evidence in the administrative proceedings. He claims that, as an accused, he could not effectively defend himself, because he does not know what conduct he is accused of and on what basis the administrative body was based. According to him, the means of evidence were not properly used in the proceedings, specifically, the procedural regulation on evidence was not taken care of, which represents a serious flaw in the proceedings. Furthermore, he insists on his claim that he did not have enough time to

familiarize himself with the documents for the decision and that the defendant violated the prohibition against self-incrimination when he forced him to cooperate under the threat of a disciplinary fine. However, the complainant practically does not add a specific explanation to the generally expressed disagreement with the contested judgment and the repetition of the claims; the Supreme Administrative Court found these objections unfounded for the reasons stated below. [40] The Supreme Administrative Court must, first of all, correct the opinion of the municipal court that, in the absence of an oral hearing, the method of evidence with file material (including the control protocol, i.e. documentary evidence) chosen by the defendant represents a certain procedural error (even if, according to the municipal court, it had no effect on the legality of the contested administrative decision). The municipal court concluded that the complainant was not in violation of § 51, paragraph 2 of Act No. 500/2004 Coll., administrative regulations (hereinafter referred to as "administrative regulations"), notified of the taking of evidence outside of oral hearings, and administrative authorities further in violation of § 18, paragraph 1 of the Administrative Code, they did not draw up a protocol on the execution of the evidence outside the oral hearing. However, in this context, the Supreme Administrative Court stated in its judgment of 13/03/2013, No. 1 As 157/2012 – 40, that "[t]he purpose of § 51, paragraph 2 of the Administrative Code is to enable the parties to the proceedings to they could be present during the taking of evidence, if an oral hearing was not ordered to take it. Thanks to being present during the presentation of evidence, the participants can become better acquainted with its content (comprehensively perceive the testimony of the witness, the examined object, etc. with all senses) and, following this, comment on the evidence in more detail. However, if a document is presented as evidence, moreover, a document presented by the complainant, it is not a procedural defect, if the complainant was not informed about the presentation of evidence outside of the oral hearing. (…) It would be completely pointless, 9 As 380/2017 for the defendant to have to inform the complainant that on the specified day and hour he intends to read the documents presented to her and thus use them as evidence. All the more so because the administrative authority is not obliged to communicate to the parties to the proceedings a preliminary judgment about the evidence resulting from the evidence provided. The administrative body shall implement its considerations on the evaluation of evidence until the justification of the administrative decision (Section 68, paragraph 3 of the Administrative Code). The party to the proceedings can familiarize himself with the content of the documentary evidence when inspecting the file, e.g. in connection with familiarizing himself with the documents before issuing the decision. These conclusions can also be applied to the current case, although this is an inspection report, i.e. a document that was not submitted by the complainant himself in the

administrative proceedings. In the light of the cited jurisprudence, the other circumstances of the case, which the municipal court appropriately pointed out, are key, i.e. that the complainant "was acquainted not only with the inspection report objected to by him, but also with all the other documents on which the administrative authorities based their decisions on the case in question". Thus, the defendant did not make a mistake and did not violate § 51 paragraph 2 of the Administrative Code, however, the incorrect legal opinion of the municipal court in this regard, taking into account the fact that the complainant was not deprived of his rights and his legal objection was not justified, does not affect the assessment of the legality of the contested judgment. [41] The Supreme Administrative Court also referred to § 53, paragraph 6, first sentence of the Administrative Code, according to which an entry is made in the file about the execution of evidence by document, in connection with § 18, paragraph 1 of the Administrative Code (and coincidentally in relation to the same defendant ) already ruled in the judgment of 28 December 2016, No. 3 As 121/2014 – 35. At that time, the complainant also objected to the failure to provide documentary evidence in accordance with the law. The Court of Cassation stated with reference to other jurisprudence that "[a] common feature of all cases under review was the finding that the administrative authorities carried out evidence by document outside of the oral proceedings by simply inserting the document into the file, which it was part of throughout the administrative proceedings, without an official record or protocol would be drawn up on the execution of the proof by deed. The Supreme Administrative Court looked at this issue through the lens of a possible interference with the procedural rights of a party to the proceedings, when the center of its attention was the question of whether the party had the opportunity to become familiar with the given evidence and comment on it, and not the question of whether the established procedure was purely formally followed by the administrative code in the provisions cited above. At the same time, he came to the conclusion that if (1) the administrative authority places a document in the file according to § 17 of the Administrative Code and (2) the party to the proceedings has the opportunity to familiarize himself with this document when inspecting the file according to the procedure according to § 36, paragraph 3 of the Administrative Code, evidence can be be carried out also by the fact that the document was only inserted into the file". In the present case, it is clear and undisputed between the parties that the complainant had the opportunity to familiarize himself with the given evidence (inspection protocol), so he did not suffer any damage in the sense of the cited jurisprudence. [42] Furthermore, the municipal court correctly assessed that, given the specific circumstances, the complainant had sufficient time to familiarize himself with the documents for the decision and was also not forced to incriminate himself (see pages 8-9 of the contested judgment). Apart from general disagreement with

his views, the complainant did not comment on the arguments of the municipal court in more detail. Beyond that, the Court of Cassation adds that in its previous jurisprudence it has already dealt with determining the grounds for the application of the principle of nemo tenetur (se ipsum accusare), i.e. the prohibition of coercion to self-incrimination, stating that "even the threat of a sanction cannot lead to the conclusion of a violation of the principle of the prohibition of self-incrimination for failure to comply with the obligation to disclose the required information" (see judgment of the Supreme Administrative Court of 22 February 2017, no. 3 As 35/2016 – 41). [43] The complainant further objects to the incorrect assessment of the issue of alleged defects in the statement of the defendant's decision. In this context, he emphasizes above all the common and general designation of the affected data subjects, which the complainant's delict concerned, which, according to the complainant, makes his defense more difficult and contradicts the defendant's decisions in other cases. [44] From the content of the defendant's decision, it is evident that the defendant did not determine exactly the affected data subjects to which the complainant's offenses related. Tens of thousands of subjects were concerned [paragraph 9 As 380/2017 - 51 continuation of the sentence of the defendant's decision gives an approximate figure of 17,000 housing units, but several people (data subjects) may live in each of them]. [45] Defining the act in the administrative decision is not an end in itself; it must be specific enough that the sanctioned conduct cannot be confused with another. According to the resolution of the extended senate of the Supreme Administrative Court dated 15/01/2008, No. 2 As 34/2006 – 73 (published under No. 1542/2008 Collection of the NSS), it is valid that "[in] decisions of a criminal nature by which there are also decisions on other administrative offences, it is necessary to establish for sure what specific conduct the subject is affected for - this can only be guaranteed by concretizing the data containing a description of the act by specifying the place, time and manner of commission, or by specifying other facts that are necessary for so that it cannot be confused with another. Such a level of detail is certainly necessary for the entire sanctioning procedure, in particular to exclude the obstacle of lis pendens, double punishment for the same deed, to exclude the obstacle of a res judicata, to determine the scope of evidence and to ensure a proper right to defence. ” [46] The legal question of the case under discussion concerns the extent to which the defendant should have gone into detail when drafting the statement of the decision in order to preserve the above-mentioned principles of jurisprudence. The complainant requests specification of the concerned data subjects, while the defendant refuses this mainly for practical reasons, more precisely because of practical impracticability due to the large number of these subjects. [47] At the same time, the applicant does not claim that his deed could be confused with another; in the lawsuit, however, he deduced from the alleged lack of

specificity of the statement that "without this basic information and parameters (...) the seriousness of the alleged conduct cannot be assessed in any relevant way". In the cassation complaint, on the other hand, he stated that the specification of the defendant's decision has an effect on the complainant's defense, for example by proving a different legal basis for the processing of personal data or modifying his claims regarding the statute of limitations for criminal liability. [48] The Supreme Administrative Court considers it significant that the complainant did not question the credibility of the orderly number of housing units (from which the orderly number of affected personal data subjects also depends), which was stated in the statement part of the defendant's decision, and did not submit information competing with it that would contradict the defendant's estimates seriously questioned. Nor does he object that the insufficient definition of the data subjects caused him to not understand what conduct the defendant is accusing him of. He remains with his objections on a common and purely formalistic level. [49] The Supreme Administrative Court, on the other hand, considers the defendant's statement (see paragraph [24] above), which pointed out the exceptionally high number of data subjects and its dynamic, constantly changing nature, to be correct. It is clear that it would be a disproportionate burden on the defendant if, for the purpose of defining the act, he had to calculate the number of data subjects in question exactly in units. This would of course be appropriate in situations where the tort concerns a single or several individual data subjects, or where a more precise number can be ascertained without undue effort (e.g. where personal data are processed automatically and therefore precisely quantified). In general, however, it can be expected that precisely in the sphere of supervision of compliance with regulations in the field of personal data protection, which are usually processed en masse, there will often be situations where the affected personal data, data subjects and other circumstances will only be defined in general terms with the indication of a reasonable estimate their number (and of course also their type). The Supreme Administrative Court attests to the reasoning of the contested judgment, which states, among other things, that "in relation to the consideration of the seriousness of the plaintiff's unlawful conduct, the court does not consider it necessary that the number of subjects of personal data affected by the plaintiff's actions should be calculated exactly 'to one', that there were thousands of entities - considering the number of units managed or owned by the plaintiff, which are 9 As 380/2017 enumerated in the statement of the decision - is, in the opinion of the court, completely sufficient for consideration of the seriousness and scope of the illegal conduct". On the contrary, it is significant that in his decision the defendant defined the act materially and temporally, stated its legal qualification and, to the maximum extent possible, while maintaining the economy of the proceedings, stated the range of data subjects to whom the tort concerns and

the approximate number of these affected subjects. [50] Earlier, the Supreme Administrative Court ruled in the same direction in the already cited judgment No. 3 As 121/2014 – 35. At that time, it considered a similar case, namely liability for an administrative offense pursuant to § 45 paragraph 1 letter h) of the Personal Data Protection Act. The fact was that the plaintiff did not ensure and verify the proper shredding of documents with personal data; some of these documents were found in a landfill. The plaintiff at the time objected to the inaccurate indication of the number of documents found in the administrative decision. The Supreme Administrative Court did not accept this objection and stated that "[t]he amount of documents from this set that were not demonstrably disposed of (documents physically found in a landfill) is therefore not an immanent condition for the fulfillment of its factual nature in the case of this delict and represents only a criterion of the intensity of the violation of the statutory responsibilities". A similarly conceived cassation objection of the complainant is not justified even in the current case. [51] The complainant further believes that the municipal court in its reasoning approved the retroactivity and penalty of the processing of personal data, which the complainant, as a processor, began to implement before the entry into force of the Personal Data Protection Act. Firstly (as stated in more detail in paragraph [37] above) the city court definitely did not admit the retroactive effect of the law in the contested judgment; this statement is not true. [52] The Supreme Administrative Court considers it appropriate to quote the relevant passage of the reasoning of the contested judgment here: "From the provisions of § 47 [of the Personal Data Protection Act - note court] – the explicitly named measure for the transitional period means only that if the processor or personal data administrator did not fulfill the obligation to bring the processing of personal data, which began before the Act on Personal Data Protection came into effect, into compliance with this Act, and therefore committed violation of the obligations stipulated by this Act, he was not sanctioned for such conduct until 31 December 2002 (the Act on the Protection of Personal Data entered into force on 1 June 2000, with the exception of some provisions which are not decisive for the case at hand - court's note). However, on December 31, 2002, a transitional period, the purpose of which was to create sufficient time for the administrator, or processors of personal data to bring their activities into compliance with the new legislation has ended. If a violation of the obligations set out in the Personal Data Protection Act is detected after this date, i.e. after the end of the transition period, the controller or the processor is responsible for such actions, even in relation to the period before 12/31/2002 - if there was no termination liability due to the expiry of the set period, and therefore he may be sanctioned for such conduct. " [53] The Supreme Administrative Court agrees with the aforementioned reasoning. Apparently, the complainant mistakenly infers from it that the municipal court approved the retroactive effect of the law; however, it would

only make sense to talk about it if the defendant was punishing the actions of the complainant in the period before the Personal Data Protection Act came into effect. In the present case, however, the defendant punishes the complainant for illegal conduct only from the effective date of the said law (from June 1, 2000, see statements I. and II. of the defendant's decision). It is therefore not about the effect of the law into the past (true retroactivity), which is prohibited in criminal law (and similarly in administrative punishment) according to Article 40, paragraph 6 of the Charter of Fundamental Rights and Freedoms. On the contrary - Section 47 of the Act on the Protection of Personal Data provided administrators and processors with an additional period during which, even after the Act on the Protection of Personal Data came into force, non-compliance of the processing of personal data with this Act was still tolerated. Therefore, if the complainant was penalized for processing (respectively storing) personal data in violation of the law even after the deadline pursuant to § 47, paragraph 2 of the Act on the Protection of Personal Data 9 As 380/2017 - 52 continued, it is a penalty in accordance with legal regulations. The opposite situation would have arisen if the complainant had been affected for unlawful conduct during the transitional period (that is, between 1.6.2000 and 31.12.2002), but this did not happen in the case under consideration. What is decisive is that even after the Act on the Protection of Personal Data came into effect, the complainant processed (stored) personal data in violation of this Act and did not bring his activities into compliance with the Act even within the transitional period. Therefore, the fact that the processing of personal data began before the Personal Data Protection Act came into force cannot absolve the Complainant from responsibility. [54] Furthermore, the Supreme Administrative Court comments on the objections of the complainant summarized in paragraphs [17] and [18] above. Assessment of the regional court regarding the nature of the offense according to § 45 paragraph 1 letter c) of the Personal Data Protection Act is stated on pages 13-14 of the contested judgment, to which the Supreme Administrative Court refers in detail. The Court of Cassation agrees with the regional court's conclusions that it is an ongoing administrative offense. After all, this opinion is also supported in the professional literature, as the commentary on the provision in question also states that "[t]he first group of actions by which this administrative offense can be committed is the collection of personal data to an extent that does not correspond to the specified purpose. This is therefore a violation of the obligation according to § 5 paragraph 1 letter d) OchOsÚ. (…) In all these cases, these will be ongoing administrative offences" (see KUČEROVÁ, A. et al. Personal Data Protection Act. Commentary. 1st ed. Prague: C.H. Beck, 2012). The regional court also clearly explained on page 13 of the judgment that the applicant's responsibility for an administrative offense pursuant to § 45 paragraph 1 letter f) of the Personal Data Protection Act did not expire, as the

defendant initiated administrative proceedings on this offense in time. In this regard as well, the Supreme Administrative Court did not find any errors in the regional court's assessment. [55] Furthermore, the objection regarding the insufficient justification of the imposed sanction is (similarly to the claim) very general and non-specific. The Supreme Administrative Court therefore approves the opinion expressed in the contested judgment, according to which "[t]he specific criteria that the defendant must take into account when imposing a fine for administrative offenses under the Act on the Protection of Personal Data are defined in the provisions of Section 46, Paragraph 2 of the Act on the Protection of Personal Data data (as amended until 30/06/2017 – note of the court), according to which the defendant was obliged to take into account, in particular, the seriousness, manner, duration and consequences of the illegal act and the circumstances under which the illegal act was committed. The court considers the definition of circumstances that the defendant subordinated to the aforementioned criteria to be quite specific, when the defendant defined that, when determining the amount of the fine, he took into account the fact that the plaintiff had committed multiple administrative offenses, the fact that the plaintiff had been collecting personal data for a long time and the number of affected personal data subjects ranged in the order of thousands. The defendant also took into account, as a circumstance reducing the seriousness of the plaintiff's actions, the plaintiff's active actions aimed at correcting the illegal situation. " [56] In conclusion, the Supreme Administrative Court also dealt with the question of whether it is not necessary to apply the new legal regulation of the GDPR to the complainant's responsibility as a regulation which - according to his claim - is more favorable for him and from which he derives impunity for himself. In this matter, the Supreme Administrative Court agrees with the defendant, who correctly refers to paragraph 52 of the resolution of the extended senate No. 5 As 104/2013 – 46, according to which the new, more favorable regulations for the offender can be used only in administrative proceedings, or in proceedings before the regional court by the court. The enlarged panel stated at the time that "[r]ecision of the regional court on the claim is the final result of judicial review, including the exercise of full jurisdiction. Therefore, within the framework of the cassation complaint procedure, legal regulation that would become effective after the decision of the regional court became final can no longer be taken into account. In cassation appeal proceedings, regardless of cassation objections, the Supreme Administrative Court will review ex offo whether the law was correctly applied in previous proceedings". The applicant did not present any competing argument to this. Therefore, the new regulation of the GDPR – even if it were perhaps more favorable for the complainant as the perpetrator of the offense – is not applicable in the proceedings before the Supreme Administrative Court. Therefore, the court did not even consider its own question whether this

adjustment would actually be more favorable for the offender or not. 9 As 380/2017 [57] Considering that the Supreme Administrative Court found the cassation complaint unfounded, it rejected it according to § 110, paragraph 1 in fine s. řís s. [58] The Supreme Administrative Court decided on the costs of the cassation complaint proceedings between the participants administrative court according to § 60 paragraph 1, first sentence of the Civil Code, in conjunction with § 120 of the Civil Code. The complainant was not successful in the case, therefore he is not entitled to reimbursement of costs. This right would be granted to a procedurally successful defendant who, however, did not incur costs in the cassation complaint proceedings beyond the scope of his official activities. Therefore, the Supreme Administrative Court did not award compensation for the costs of the proceedings to any of the participants. Lesson learned: No appeals are admissible against this judgment. In Brno on January 31, 2019, Mr. Radovan Havelec, chairman of the senate