OFFICE FOR PERSONAL DATA PROTECTION

Lt. Col. Sochora 27, 170 00 Prague 7

phone: 234 665 111, fax: 234 665 444

posta@uoou.cz, www.uoou.cz

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Ref. UOOU-03562/22-14

DECISION

The Chairman of the Office for the Protection of Personal Data as an appellate authority competent under Section 152, paragraph 2

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

Decomposition of the accused,

,

, against the decision of the Office for Personal Data Protection no. UOOU-03562/22-6 from

on January 13, 2023, is rejected and the contested decision is confirmed.

Justification

Definition of the matter

[1] Proceedings for suspected offenses under § 11 paragraph 1 letter a) point 1 to 4

Act No. 480/2004 Coll., on some information society services and on changes to some

laws, in connection with the sending of commercial messages, was initiated by the notification of the Office for

protection of personal data (hereinafter referred to as the "Office"), which was accused,

(hereinafter referred to as "the accused"),

delivered on November 9, 2022. The basis for the initiation of proceedings was the control protocol

no. UOOU-04863/21-34 of September 7, 2022 (hereinafter referred to as the "inspection protocol"). Against protocol

the accused did not object to the inspection.

[2] On the basis of the following procedure, the administrative body of the first instance issued a decision

no. UOOU-03562/22-6 of January 13, 2023 (hereinafter "the contested decision"), by which the accused found guilty of committing an offense under § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., because the accused violated the obligation set out in § 7 paragraph 2 of Act No. 480/2004 Coll., since repeatedly sent commercial messages (24 commercial messages to five recipients) without the addressees gave their prior consent (statement I of the contested decision), further recognized the accused are guilty of committing an offense under § 11 paragraph 1 letter a) point 2 of Act No. 480/2004 Coll., because

the accused violated the obligation stipulated in § 7 paragraph 4 letter a) of Act No. 480/2004 Coll., since repeatedly sent business messages in the form of SMS (11 business messages to three recipients), without these messages being clearly and clearly marked as business messages (statement of II. of the contested decision), further found the accused guilty of committing an offense under § 11 paragraph 1 letter and) point 3 of Act No. 480/2004 Coll., because the accused violated the obligation stipulated in § 7 paragraph 4 letter b) of Act No. 480/2004 Coll., as it repeatedly sent commercial communications (23 commercial communication to five addressees) without clearly and clearly stating the identity of the sender on whose behalf communication takes place (statement III of the contested decision), and further found the accused guilty from the commission of an offense according to § 11 paragraph 1 letter a) point 4 of Act No. 480/2004 Coll., because the accused violated the obligation stipulated in § 7 paragraph 4 letter c) of Act No. 480/2004 Coll., since repeatedly sent commercial messages (24 commercial messages to five recipients) without this the commercial message contained a valid address to which the addressee could send directly and effectively information that he does not wish to continue receiving commercial communications from the sender (statement IV of the contested decision), for which he imposed a fine of CZK 60,000 on her (statement V. contested decision.

[3] Against the said decision, which was delivered on January 16, 2023, the accused submitted through her legal representative on January 30, 2023 a timely blank declaration, which she justified at the request of the administrative body of the first instance on February 15, 2023.

Decomposition content

[4] The accused filed a blank appeal against the contested decision as a whole, appeal
however, she justified only in relation to statement II. and statement V. of the contested decision.
[5] In the breakdown, the accused to the statement II. stated that the administrative authority of the first instance committed
a completely incomprehensible, strict and excessive interpretation of the law in relation to compliance
obligations in the dissemination of business communications referred to in § 7 paragraph 4 letter a) Act No. 480/2004 Coll.,
i.e. in connection with the obligation to mark the sent messages clearly and clearly as commercial messages,
while referring to the commentary literature.1 According to the accused, the administrative body of the first instance
constructs that the nature of the commercial communication must be clear to the addressee without having to
read the entire message with the commercial message, while it is necessary that one is explicitly used
from the terms "OS, newsletter, news, business communication" or similar, already in the subject
e-mail messages or at the beginning of SMS. According to the accused, such a requirement by law
it does not follow. The accused further stated that the said comment unequivocally admits that the term
He only found "OS" at the end of the sent message. The accused emphasizes that she is not obliged to use above
the quoted terms that the administrative body of the first instance requires of her.
[6] Regarding the verdict on the administrative penalty, the accused stated that the imposed penalty was disproportionately
severe,
while the administrative authority of the first instance insufficiently justified the amount of the imposed fine. Accused
stated that the administrative authority of the first instance was based on "account records" that it found on the portal
justice.cz, however, did not further consider the property situation of the accused, for example, did not take it into account
the pandemic situation or the rising rate of inflation. The accused further stated that it was entirely appropriate to take them
considering not only the considerable scope for reducing the fine, but also the possibility of imposing only an administrative
penalty
warning.
1 Maisner, Martin. § 7 [Dissemination of commercial communications]. In: MAISNER, Martin. Act on certain information
services
companies. 1st edition. Prague: C. H. Beck, 2016, p. 161, marg. No. 56.

[7] The accused therefore proposed to annul or change the decision so that the accused would be newly accused found guilty only of committing the offenses described in statements I., III. and IV. attacked decision, whereby the imposed fine will be reduced, or the imposed sanction will take the form warning.

Applicable law

[8] Provision § 2 letter f) Act No. 480/2004 Coll. reads: "For the purposes of this Act, the following shall mean: ... f) commercial communication means all forms of communication, including advertising and invitations to visit websites intended to directly or indirectly support goods or services or image the enterprise of a person who is an entrepreneur or performs a regulated activity."

[9] Provisions of § 7 paragraph 4 letter a) of Act No. 480/2004 Coll. reads: "Sending electronic mail for the purpose of disseminating a commercial message is prohibited unless...a) this is clearly and clearly marked as a business message."

[10] Provisions of § 11 paragraph 1 letter a) point 2 of Act No. 480/2004 Coll. reads: "The legal entity shall commits an offense by...a) mass or repeated dissemination by electronic means business message…2. not marked clearly and distinctly as a commercial message.'

[11] Provisions of § 11 paragraph 2 of Act No. 480/2004 Coll. reads: "A fine may be imposed for an offense up to: ...b) CZK 10,000,000, if it is an offense according to paragraph 1 letter and)."

[12] Pursuant to § 2 paragraph 1 of Act No. 250/2016 Coll., on liability for misdemeanors and their proceedings, liability for the offense is assessed according to the law in force at the time the offense was committed; according to the later law, it is assessed only if it is more favorable for the offender.

With effect from March 23, 2023, an amendment to Act No. 480/2004 Coll. [Act No. 58/2023 Coll., amending Act No. 480/2004 Coll., on certain services of the information society and on the amendment of certain Acts (Act on Certain Information Society Services), as amended regulations] to amend § 11 of this Act. The existing paragraph 1 is newly designated as paragraph 2, paragraph 2 letter b) newly as paragraph 5 letter C). In the case of the provisions of Act No. 480/2004 Coll., pursuant to

of which the actions of the accused were assessed, only their "renumbering" took place, the wording itself remained unchanged. The appellate authority therefore assessed the offense according to the wording of the effective law at the time the offense was committed.

Assessment by a second level authority

[13] The appellate body reviewed the contested decision on the basis of the submitted breakdown, including the trial that preceded its release and first dealt with the arguments of the accused.

[14] Appellate body for statement II. of the contested decision states that the breach of duty clearly and to clearly mark the messages sent as commercial communications was the administrative authority of the former degree noted only in the case of commercial messages sent via SMS, not through email messages. In the sense of clear and distinct marking of the message as of a commercial communication is, according to the appeals body, that the addressee of the commercial communication at first the view was able to differentiate the business message from other messages delivered to it, and so that it could decide whether to spend their time and expense and accept (read) the message or not. From the content of the SMS sent by the accused, it was clear that it was a commercial message, but only after it was message recipients opened and read. So the addressees of the messages did not have the opportunity to decide whether they will accept (open) the business message.

[15] In the commentary literature referred to by the accused in her analysis, there is regarding the obligation to mark sent messages as commercial communications, it is stated that “[t]he purpose of this rule is the protection of the addressee consisting in the fact that the latter is able to recognize as soon as possible that it is a commercial message, or the device to which the commercial message is sent is already able to recognize it will come This obligation again follows from Directive 2000/31, where the wording "clearly recognizable". As for the placement of this sign, it can definitely be recommended that it be this as soon as possible. Ideally, already in the sender's designation or in the subject of the message. Marking in itself of the content of the message already brings noticeably higher costs associated with the fact that the addressee has to complete the business

accept the message. In such a case, the label at the beginning of the commercial message is ideal.

Of course, even here it is necessary to take into account the overall context and appearance of the business message. For example

in a situation where the form of commercial communication will be a classic product offer in the form of product images and indication of the price, it would be possible to allow marking at the end of the message, because the addressee must discern the nature of the message earlier. However, this will, on the contrary, increase the cost of transmitting the message again.

On the contrary, in the case where the commercial communication will look like a normal commercial or private one correspondence, the marking at the end of the text can be considered insufficient".2 From the quoted comments according to the appellate authority, the same conclusion as the administrative authority of the first follows degree, i.e. that the fact that the sent message is a commercial message should be clear recognizable, and as soon as possible so that the addressee does not have to accept the entire commercial message.

In the case under consideration, the accused sent commercial messages from different telephone numbers and the messages began with the address "Good day, ..." which, according to the appeals body, they could not message recipients without reading the entire message recognize that it is not personal correspondence, but about business communication. If it were sufficient for the addressee to infer from the content of the message that it is a commercial communication, then the provisions of § 7 paragraph 4 letter a) of Act No. 480/2004 Coll., that is prohibition to send commercial messages without clearly and clearly marking them as commercial messages, lost its meaning. Also, the linguistic interpretation of the word "marked" can be taken to mean that it should go about easily recognizable information.

[16] Regarding the very designation of the report as a commercial communication, the appellate authority states that the administrative authority of the first instance gave only an exemplary list of possible ways (e.g. OS, newsletter, news, business communication). The administrative authority of the first instance further stated that the designation of the commercial message can either be in the beginning of the message or this information can be visible also from the sender's number, which can take the form of various short codes or unique names (alphanumeric codes). According to the appellate authority, it cannot be concluded from the contested decision,

that the administrative authority of the first instance would insist on specific marking of commercial communications.

[17] The Appellate Body further adds that the Office informs about the labeling of commercial communications on its website (Frequently asked questions to Act No. 480/2004 Coll., question No. 16 and 20).3 The accused was (among other things) obliged to clearly mark commercial communications by the Office previously notified by letter no. UOOU-03696/21-3 dated November 11, 2021. Based on of the aforementioned notice, the accused informed the Office that "the recommendation for further sending of commercial we will fully respect the message and it will be modified". You are accused according to the appellate authority she was well aware that the Office considers non-marking (distinct and clear) commercial communications as a commercial communication for violation of Act No. 480/2004 Coll.

2 Maisner, Martin. § 7 [Dissemination of commercial communications]. In: MAISNER, Martin. Act on certain information services companies. 1st edition. Prague: C. H. Beck, 2016, p. 161, marg. No. 55–56.

3 https://www.uoou.cz/casto-kladene-otazky-k-zakonu-c-480-2004-sb/ds-5494/archiv=0&p1=1493.

[18] Regarding the fine imposed above, the appellate authority states that the administrative authority of the first instance properly justified the amount of the imposed fine, while evaluating that the accused had committed a crime of illegal behavior against five addressees of commercial communications. As an aggravating circumstance the seriousness of the offense was evaluated by the administrative authority of the first instance for the period during which it was commercial messages disseminated (from June 2021 to February 2022), and also the manner in which the offenses were committed, i.e. gross invasion of privacy, consisting in repeatedly sending commercial messages to four recipients (so-called address repetition). The administrative authority of the first instance considered it as an aggravating circumstance to the fact that the accused committed four offenses by her actions and as mitigating circumstances took into account the fact that the accused excluded the given addressees from her mailings of commercial messages, and that it modified the texts of commercial communications to comply with the requirements of Section 7(4) of the Act

No. 480/2004 Coll.

[19] In this context, the appellate authority particularly recalls that the imposed fine could
in accordance with § 11 paragraph 2 letter b) Act No. 480/2004 Coll. up to 10,000,000 CZK. So she was
measured at the very bottom of the possible rate, which the appeals body considers with regard to
above as reasonable and not deviating in any way from the standard applied by the Office.
Regarding the accused's argument that § § 11 paragraph 2 letter b) Act No. 480/2004 Coll. does not establish the lower
limit of the fine, the appellate body states that the lower limit of the possible fine is not in the mentioned
the provisions of the law are explicitly stipulated, but it follows from the logic of the matter that the Office can impose a fine
in the range from CZK 0 to CZK 10,000,000. In the case of a fine of CZK 60,000, it can be said that
was stored at the lower limit.
[20] The appellate body states that the administrative body of the first instance set the amount of the fine at
based on the above-described circumstances of the accused illegal act (nature and seriousness
offense and other circumstances). Subsequently, the administrative body of the first instance dealt with whether
the imposed fine will not have a liquidation character. As stated by the Supreme Administrative Court in the resolution
of the extended senate, no. 1 As 9/2008-133 of April 20, 2010 "[w]here the law with conditions
the offender as a special consideration for determining the amount of the fine, should have information
about the property situation of the offender to act as a "safety brake", i.e. the aforementioned correction, which
it comes into play rather exceptionally, and only when there is a threat of such a high fine that it could
to have an inadmissible liquidation character for the perpetrator of an administrative offense from a constitutional point of
view".
In the case of ascertaining the assets of the parties to the proceedings, the administrative body has limited powers
options. The administrative body of the first instance was therefore based on the accused's financial statements for the year
2021
published on the portal www.justice.cz, from which it follows that the net turnover for the given accounting period
did
. In the resolution cited above, the Supreme Administrative Court further stated that "[t]he

therefore, it depends mainly on the party to the proceedings, whether they show their interest in having the fine imposed
it did not have liquidation consequences for him, by providing the administrative body with basic data about himself
personal and property circumstances and will also substantiate these in a credible manner". Accused her
she did not provide any proof of the property conditions even in the breakdown. According to the appellate authority, the
accused
in the dissolution, he does not object to the liquidating nature of the fine, he only seeks to reduce the fine, however
not because of its liquidation nature. The appellate authority notes that the accused
she did not prove that the imposed fine would have a liquidating nature for her.

[21] Regarding the amount of the imposed sanction, the appellate body further states that the Municipal Court in Prague in a
number of its cases
of judgments (e.g. in case no. 11 A 178/2019 of June 17, 2021) stated that it is "necessary
take into account the fact that administrative sanctions must fulfill not only a preventive but also a punitive function,
which means that the imposed sanction must be felt by the perpetrator of the offense to be non-negligible
harm - in this case as a negative intervention in one's property sphere".

[22] The Supreme Administrative Court in its judgment no. 6 As 68/2017-53 of June 7, 2017
(point 25) stated that "the jurisprudence of administrative courts usually assigns administrative sanctions
preventive and punitive function". It follows from the cited judgment that the repressive function
represents a "punishment" in the original sense of the word, i.e. a purely negative consequence of an illegal act
conduct, which in this case consists in interfering with the perpetrator's property sphere. Preventive
the function includes, on the one hand, deterring the offender from further violations of legal norms in the future
(individual preventive function), but also a warning to other persons that the accused is unlawful
actions are not tolerated by the state (general preventive function). To the said appeal
the authority adds that the Office has previously repeatedly warned the accused about compliance with obligations under
dissemination of business communications (file no. UOOU-02181/20, UOOU-00971/21, UOOU-03696/21,
UOOU-03696/21), while the accused promised to make amends. Subsequently, the Office received further complaints

on violation of Act No. 480/2004 Coll. accused, which resulted in the extradition of the accused

decision. The appellate body is convinced that an individual would not meet the penalty of reprimand

preventive function. The imposition of a fine in the specified amount is, according to the appellate authority, entirely on

place.

[23] The accused justified the submitted breakdown only in relation to statements II. and V. attacked

decision. The appellate body subsequently also reviewed the remaining statements of the contested decision,

from the point of view of their legality, concluding that the contested decision was issued

in accordance with legal regulations.

[24] Therefore, the appellate body rejected the argument of the accused and after an overall review

did not find any errors in the procedure of the first-level administrative body of the Office

illegality of the decision.

[25] Therefore, for all the above reasons, the Appellate Body decided as stated in

statement of this decision.

Lesson learned:

this decision according to the provisions of § 152, paragraph 5 of the Act

Against

No. 500/2004 Coll., Administrative Code, dissolution cannot be filed.

Prague, May 17, 2023

M.Sc. Jiří Kaucký

chairman

(electronically signed)