

The inspection was initiated on the basis of 7 complaints related to the dissemination of unsolicited commercial communications, while one of these complaints concerned a suspected violation of obligations related to the processing of personal data and their further use for direct marketing. The reason for this inspection was not only these initiatives, but also complaints that the Office has been regularly receiving since 2015, and that is why it decided to carry out an inspection of both the legal titles enabling the sending of commercial communications by electronic means, as well as an inspection of the processing of personal data, electronic addresses, which for the purpose of mailings commercial communications are processed by the inspected person. The subject of the inspection was, in addition to the inspection of compliance with the obligations arising from Act No. 480/2004 Coll., on certain information society services, in relation to the sending of commercial communications using electronic means, also compliance with the obligations of the controller or processor of personal data set Act No. 101/2000 Coll., on the protection of personal data, effective at the time of the inspection, in connection with the processing of personal data with regard to the acquisition of e-mail addresses and possibly other data of customers or registered users, which are the subject of given business mailings message, or email campaigns. The control was already started on September 7, 2017, and in view of the extensiveness of the required information, which resulted from the large number of affected data subjects, this control affected until the effective date of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons in connection with the processing of personal data and the free movement of such data and the repeal of Directive 95/46/EC (general regulation on the protection of personal data), and therefore the Office focused not only on assessing the situation at the time of the start of the inspection, but also on assessing the factual situation in the aftermath to effective new legislation in the field of personal data protection. The controlled person was in the position of a personal data administrator, as he processed personal data for himself, at least for the purpose of promoting his own business activity, while he also chose the means of personal data processing, which is the CRM system database. The Office came to the same conclusion when assessing the new legislation resulting from Regulation (EU) 2016/679. At the time of the start of the inspection, the inspected person was collecting the personal data of the data subjects on the basis of the legal title of consent in the sense of the provisions of § 5 paragraph 2 of the preamble of Act No. 101 /2000 Coll., while this consent could not be considered a conscious and informed consent in the sense of the provisions of § 4 letter n) of Act No. 101/2000 Coll., because the controlled person incorrectly fulfilled his obligation to provide information as required

by the provisions of § 11, paragraphs 1 and 2 of Act No. 101/2000 Coll., as according to document "Personal data and personal data protection", personal data was transferred to unspecified companies that could not be additionally identified from the point of view of data subjects. Thus, when giving consent to the processing of personal data, the data subjects did not know in advance and did not even have a real opportunity to find out which entities other than the personal data controller had access to their personal data, with the exception of three companies that were explicitly mentioned in the information. The inspected person thus systematically violated Act No. 101/2000 Coll., at least during the ongoing inspection until May 25, 2018. From the point of view of the new legislation, the Office found that the inspected person amended its information obligation in accordance with Art. 12-14 of Regulation (EU) 2016/679, therefore, from May 25, 2018, it was possible to look at personal data obtained by the controlled person on the basis of the legal title of consent as lawfully obtained. In the area of sending commercial messages, the Office stated that all the messages in question, which were sent via e-mail or SMS messages, correspond to the definition of a commercial message, as they contained offers of goods and services provided by the controlled person and also encouraged to visit the website of the controlled person. All messages were sent for the purpose of directly supporting the offered goods, services and the image of the business entity. The office also found out as part of this inspection that part of the business messages were sent by other entities. In these cases, the controlled person was in the position of disseminator of commercial communications, since the messages in question were sent on the basis of a mailing order entered by the controlled person. For the majority of commercial communications, the Office found that the sender of these communications was the controlled person. The controlled person was asked to document the legal titles for sending the commercial communications in question, specifically for the entire implemented campaign in question, as well as for other individual commercial communications. The Office notes that from the point of view of Act No. 480/2004 Coll. only 2 legal titles are possible, namely consent to the sending of commercial messages or a customer relationship, which is, however, conditional on the offer of only own and similar products or services and the fact that the sending of commercial messages has not been previously rejected by the addressee. The inspected person commented on the e-mail addresses and telephone numbers that were the subject of individual mailings. She also stated the methods of obtaining contact information, which are a call to the head office, filling out a form on the group's website, a contact obtained in connection with sales. All these methods were verified by the Office both directly during the local investigation and in the form of test registrations. In relation to the campaign in question, the audited person stated that the mailing was carried out to 459,779 e-mail addresses and indicated

only the source from which these e-mail addresses came. In view of the large number of these e-mail addresses, the Office requested documentation (proof) of specific legal titles only for a sample of 1% of e-mail addresses that it selected itself. However, the audited person provided only a partial version of the database related to the e-mail campaign in question, where most of the contacts were anonymized. This version counted only 996 e-mail addresses, the other e-mail addresses were already anonymized, as stated by the audited person. Only 256 e-mail addresses contained an invoice number, from which it can be concluded that they were customers of the inspected person, while this finding was randomly verified by the Office as part of a local investigation. In other cases, the legal title (i.e. consent) to sending business communications was not documented. The Office thus found that the controlled person sent or had sent (as a distributor) a commercial message in violation of § 7 paragraph 2 of Act No. 480/2004 Coll., i.e. without the prior consent of the addressee. As part of the mass mailing of the campaign in question, the Office stated that only in the case of 256 contacts it is possible to say that the commercial messages were sent by a controlled person in accordance with § 7, paragraph 3 of Act No. 480/2004 Coll., as there was evidence of a customer relationship with controlled person. The Office further assessed compliance with the conditions specified in § 7, paragraph 4 of Act No. 480/2004 Coll. In relation to part of commercial communications, he concluded that the inspected person did not meet the condition set out in § 7 paragraph 4 letter a) of Act No. 480/2004 Coll., as the messages in question were not clearly and distinctly marked as business communications. The labeling of these messages was quite misleading and it was not even possible to determine from their title (subject) that it was a commercial offer or that it was not labeled at all.

The inspected person objected to the inspection findings. All objections were rejected by the chairwoman of the Office, and the inspection was thus completed on September 4, 2019, with the objections settled.

Recommendation:

The spreader, or the sender of commercial messages must always be able to prove the legal title that authorizes him to send the commercial message. It must be proven that the addressee agreed to the sending of the commercial message, and that the consent met all requirements or that it is an electronic contact obtained in connection with the own sale of products or services. Mere telephone calls, the execution of which is recorded in the system, are not evidence of the granting or non-granting of consent to the sending of commercial messages. In order to prove a customer relationship, it is necessary, for example, to document an invoice or order, from which it will be clear what contact details the addressee (buyer) provided.

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