OFFICE FOR PERSONAL DATA PROTECTION

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* UOOUX00DM985 *

Ref. UOOU-01096 / 19-19

DECISION

Chairwoman of the Office for Personal Data Protection as the appellate body competent pursuant to § 10 and § 152 para. 2 of Act No. 500/2004 Coll., Administrative Procedure Code, decided pursuant to § 152 para. b) Administrative Procedure Code as follows:

Appeal filed by the accused, XXXXXX, against the decision no. UOOU-01096 / 19-10 ze on 13 May 2019, is rejected and the contested decision is upheld.

Justification

By decision no. UOOU-01096 / 19-10 of 13 May 2019 was indicted by the company XXXXXX (hereinafter referred to as the “accused”), found guilty of committing offenses pursuant to Section 11 para. a) points 1, 2 and 3 of Act No. 480/2004 Coll., on certain information society services and on change certain laws, as it disseminated the commercial communications specified in the statement without valid legal title, without proper designation as commercial communications and further without proper indication the identity of the sender on whose behalf the communication takes place. For the above described delict At the hearing, the accused was fined CZK 10,000.

The proceedings themselves were initiated by order no. UOOU-01096 / 19-3 of March 11, 2019. Background for its issuance was a protocol on control ref. UOOU-06436 / 16-165 of April 27, 2018 et seq file material acquired by the Office inspector Ing. Josef Vacula during the inspection of file no. zn. UOOU-06436/16 for the accused pursuant to Act No. 255/2012 Coll., On control (control rules), including settlement of objections by the President of the Office Ref. UOOU-06436 / 16-172 of 21 September 2018.

On March 18, 2019, the accused filed a statement of opposition, in accordance with Section 150 (3) of the Act

No. 500/2004 Coll., Administrative Procedure Code, to cancel the order and the administrative body continued the proceedings which

resulted in an annulment of the contested decision.

The contested decision was served on the accused on 13 May 2019 and on 28 May 2019

decomposition filed through the data box. The legal deadlines were thus complied with and the dissolution

was filed on time.

The accused stated in the appeal that she considered the decision to be clearly illegal

and factually incorrect, finds obvious errors in the procedure of the first instance body, and therefore

annul the contested decision. However, the accused did not provide any further justification and only

added that it would do so in detail within 10 days.

Due to the fact that it was not clear from the filed appeal what the contradiction is seen

with the law or the incorrectness of the decision or procedure which preceded it,

the accused was asked to rectify the filing defects within 10 days. Given the circumstances

as well as the fact that the time limit set by the administrative authority corresponds to the time limit within which

the accused herself announced that she would complete the submission, the time limit could be considered reasonable. Although

the deficiencies of the appeal were not remedied within the set time limit and the appellate administrative body is so

obliged to review the decision in its entirety only from the point of view of legality and regularity

review only if the public interest so requires, the Appellate Body taking into account it

the obligations imposed in § 50 para. 3 and § 89 para. 2 of the Administrative Procedure Code also took into account the additional

justification of 28 May 2019, as it cannot be ruled out a priori that the alleged facts

could not affect the legality of the decision.

In the text of the statement of reasons, the accused referred to administrative proceedings (hereafter referred to as "sanctions")

sp. UOOU-00313/19, which, similarly to the decision under review, responded to

conclusions of the inspection sp. No. 06436/16, and should thus be in the legitimate expectation that all in control the identified deficiencies are the subject of the above-mentioned "sanction" procedure, this procedure should provide full cooperation.

At the same time, the objection of limitation of liability and prosecution of the offense was raised, however the accused did not develop her argument in this regard in any other way.

Finally, the accused pleaded guilty to sending a commercial communication dated 11 May 2016 from e-mail address XXXXXX to e-mail address XXXXXX (ie operative part II. 1 of the decision), but not with regard to other cases of illegal trade dissemination communication. In these cases, he refers to the principle in dubio pro reo, as he considers that it was not the administrative authority of the first instance sufficiently demonstrated who each commercial communication sent.

The appellate body examined the contested decision in its entirety, including the process which preceded by its issuance, and concluded that no conflict of law could be found.

The imposed fine and its amount is duly justified, does not deviate from the limits of legality and is fully in accordance with the constantly presented opinions of the Office.

First, the appellate body dealt with the characteristics of the proceedings of file no. stamp UOOU-00313/19, which was supposed to be according to the accused, conducted with the same subject matter. As must be forwarded, administrative proceedings sp. UOOU-00313/19, similarly to the contested decision, followed up on the inspection performed by the Office inspector Ing. Josef Vacula sp. UOOU-06436/16 and was published of the shortcomings identified by him. In the case of administrative proceedings file no. mark UOOU-00313/19, however, was subject to non-compliance remedies imposed by the Office's inspector by order of on 10 October 2018, ref. UOOU-09378 / 18-3 (copy also kept under ref. UOOU-00313 / 19-2), for which a fine of CZK 100,000 was imposed on the accused. The subject of proceedings file no. stamp UOOU-00313 / 19-2/4

2 was thus a completely different act, which cannot be confused with the conduct under consideration. When

proceedings for the imposition of measures to remedy file no. UOOU-09378/18 can then be pointed to be different

purpose from the current proceedings. Imposing corrective action is not possible with the application of liability

to confuse or combine in any way the offense, as the aim of each of the proceedings is entirely

different thing. While sanctions punish the perpetrator for the offense and thus perform a particularly preventive one

and repressive function, in terms of remedial action

is the restoration and correction of the existing

illegal status. The imposed remedial measures, especially with regard to their meaning

and reparative character cannot be given a criminal dimension within the meaning of the European Convention on Protection

human rights and fundamental freedoms, which would constitute a ne bis in idem

criteria set by the European Court of Human Rights (cf. ECtHR Engel

v Netherlands of 8 June 1976, complaint no. 5100/71 and others).

If

In the case of the alleged limitation period, the appellate body first states that the law

No. 250/2016 Coll., on liability for misdemeanors and proceedings against them, came into force in accordance with his

§ 114 as of 1 July 2017. From the wording of § 11 par. a) of Act No. 480/2004 Coll. is then

it is clear that the offenses listed in the individual points of the provision constitute collective

administrative offenses. The objective side of the substance of the tort thus requires a number of attacks,

because only by that is it is illegal

the conduct acquires its tortious character. Assumption

The "repetition" of the spread of unsolicited commercial communication was thus fulfilled only by sending the second

commercial communication, ie in this case on August 2, 2017. Because of this attack

was also the last case of sending a commercial message without the consent of the addressee

and at the same time the fact that the mass tort is committed at the moment of the execution of the last

attack against an interest protected by law, it can be concluded that the offense was committed on

August 2, 2017 - ie with the effect of Act No. 250/2016 Coll. To assess the limitation period is so

essential that Act No. 480/2004 Coll. allows a fine to be imposed for the tort / delict in question

up to CZK 10,000,000, as the limitation period in such a case is according to the provisions of § 30 letter b)
and § 31 par. 1 and 2 letter b) of Act No. 250/2016 Coll. 3 years from the date of the next offense
offense. If the appellate body at this point disregards the fact that it has so determined
the limitation period was subsequently
interrupted by the issuance of the order and further challenged
decision, as well as the length of the period itself without interruption, clearly support the conclusion,
that the objection of limitation cannot be upheld in this case. The same then applies in the case of
offenses according to § 11 par. 1 let. (a) points 2 and 3, ie the dissemination of commercial communications without due
diligence;
marking and secrecy of the sender's identity. The last attack was also carried out on August 2
2017, the above applies in these cases and can only be concluded that the statute of limitations
no offenses occurred.
Finally, the Appellate Body examined the allegations that the principle in dubio pro reo had to be applied because
in some cases, it should not have been clarified who sent the commercial message. Not even at this point
however, no relevance can be found for a different assessment of the case, as all objected
the facts were sufficiently established in the administrative proceedings.
Since the case of the business communication of May 11, 2016 from the e-mail address
XXXXXX to the e-mail address XXXXXX is not the subject of a dispute, the appellate body will not be there
to elaborate. Regarding the business message sent on August 2, 2017 from the telephone number
XXXXXX to phone number XXXXXX, this promoted the accused service offered to her
operated web portal, the actual sending of this communication itself accused
expressly acknowledged (see the document Statement of the Obligated Entity Ref. UOOU-06436 / 16-121),

in this context, she referred to the good faith in the legitimacy of sending a business
communication. However, the impossibility of applying liberation from liability in this case the administrative body
duly substantiated. Even in the next accused case of dispatch, ie.

business message from phone number XXXXXX to phone number XXXXXX dated June 27

2016, it cannot be agreed that it was not proven who sent the business message. It was pending

it is clearly established that the actual dispatch took place from the company's telephone number

XXXXXX, which under the contract provided the accused with a communication channel for sending SMS.

It is clear from the file that the commercial communication in question was sent

on the basis of the accused's order, when this company XXXXXX designated as the addressee of the business

message, as well as its content itself, and forwarded them for sending through the application

program interface. Responsibility for the lawfulness of the dissemination of commercial communications sent in

the benefit of the accused and, on the basis of its instructions, cannot be contractually transferred to a third party,

as the obligation to disseminate commercial communications is only a lawful burden on it

as the sender of such a communication.

In view of all the above, the Appellate Body rejected the defendant's arguments. At the same time not

did not find any reason for the illegality or incorrectness of the decision and did not find either

no errors in the procedure of the administrative body of the first instance.

Lessons learned:

Pursuant to the provisions of Section 91 (1) of the Act, this decision shall be challenged

No. 500/2004 Coll., Administrative Procedure Code, cannot be revoked.

Prague, October 24, 2019

official stamp imprint

JUDr. Ivana Janů

chairwoman

(electronically signed)