2 As 304/2017 - 42 CZECH REPUBLIC DIFFERENT COURTS OF THE M REPUBLIC The Supreme Administrative Court decided in a panel composed of the chairwoman JUDr. Miluš Došková and judges JUDr. Karel Šimka and Mgr. Eva Šonková in the legal matter of the plaintiff: MAFRA, a. s., with registered office in Prague 5, Karla Engliše 519/11, against the defendant: Office for the Protection of Personal Data, with registered office in Prague 7, Plk. Sochora 27, against the decision of the chairman of the defendant dated 26/09/2014, no. UOOU-05185/14-20, in the proceedings on the plaintiff's cassation complaint against the judgment of the Municipal Court in Prague dated 9/8/2017, no. j 5 A 200/2014 – 49, as follows: I. Judgment of the Municipal Court in Prague of 9 August 2017, No. 5 A 200/2014 – 49, and the decision of the chairman of the defendant of 26 September 2014, No. UOOU-05185/14-20, are canceled and the case is returned to the defendant for further proceedings. II. The defendant is obliged to pay the plaintiff a total of CZK 8,000 for the costs of the lawsuit and the cassation complaint within one month from the date of entry into force of this judgment. Reasoning: I. Definition of the case [1] With a cassation complaint filed within the statutory period, the plaintiff as the complainant contests the above-mentioned judgment of the municipal court, which dismissed her lawsuit against the decision of the chairman of the defendant dated 26 September 2014, no. UOOU-05185/ 05185/14-20, by which the plaintiff's motion was rejected and the defendant's decision of 7/30/2014, No. UOOU- 05185/14-13, was confirmed. [2] By this decision, the defendant imposed a fine on the plaintiff in accordance with § 45a paragraph 1, 3 of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain laws (hereinafter referred to as "Act 2 As 304/2017 on the protection of personal data") in the amount of CZK 240,000 for an administrative offence, which she committed by violating the ban on the publication of personal data established by another legal regulation and which she committed through the press and a publicly accessible computer network. The defendant identified as a breach the obligation set out in § 8c of Act No. 141/1961 Coll., on criminal court proceedings (penal code), according to which no one may, without the consent of the person to whom such information relates, publish information about the order or implementation of wiretapping and recording of telecommunications traffic pursuant to Section 88 or information obtained from it, data on telecommunications traffic ascertained on the basis of an order pursuant to Section 88a, or information obtained by monitoring persons and things pursuant to Section 158d paragraphs 2 and 3, if they enable the identification of this person and if they were not used as evidence in court proceedings. [3] In the statement of the defendant's decision, it is stated that the party to the proceedings Mafra, a. s., committed an offense by "in connection with the publication of information on the wiretapping and recording of the telecommunications operation carried out by RNDr. Petr Nečas and Mgr.

J. N. (formerly N.) published the following information in the newspaper MF DNES and via the news portal iDNES.cz". In addition, the statement on five pages contains detailed transcripts of the wiretapping published on 16/05/2014 in the article "The head of ČEZ pushed his man to lead the police, wiretapping revealed", on 20/05/2014 in the article "N. launches the Darwin action", on 21/05/2014 in the article "I already have a camouflage scarf, Madam Director, N.'s secretary reported", on 22/05/2014 in the article "Information from the file: How N. was controlled by Prime Minister Nečas" and in of the article "You just do it that way! N. controlled Nečas", dated 21/05/2014 in the article "A masking scarf and scary walls, Sledovački were made for N. by her colleagues", dated 22/05/2014 in the article "MF DNES: When Nečas was not persuaded by arguments, took out N.'s personal life", and on 22 May 2014 in the article "N. swears, N. reproaches, N. shouts, the policemen wrote". Transcripts of wiretapping contain the time the calls were made, their actors, their content and possibly comments and explanations of the nicknames used. [4] In the justification of the decision, the defendant noted the statement of the High Prosecutor's Office in Olomouc on the connection of articles with criminal proceedings concerning the misuse of Military Intelligence, according to which the relevant part of the investigative file containing wiretapping was made available only to the persons affected by it and their lawyers. In relation to the statement of the participant in the proceedings, the defendant evaluated the issue of proportionality between two protected rights, namely the right to privacy according to Article 10 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") and the right to freedom of expression and information according to Article 17 of the Charter. He also took into account the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"), namely its Article 8 regulating the right to respect for family and private life and Article 10 on freedom of expression. He concluded that the disclosure of the content of the wiretaps and the content of the messages affected all those concerned; specifically, they were Petr Nečas, J.N. (formerly N.), D.B., R.N., J.P., L.P., J.P., A.H., M.K. and O.P. Persons not explicitly named in the articles but identifiable (assistant/secretary J.N.) were also affected. At the same time, the wiretaps were not used as evidence in the proceedings terminated by the criminal order dated 27/06/2014 issued against J.N. The fact that some of the wiretaps were previously quoted in other media does not exclude the illegality of the conduct. When considering the amount of the fine, the defendant, to the detriment of the plaintiff, took into account that there had also been a violation of the right to confidentiality of communication and that the disclosure of information was made irreparably and to an unlimited number of persons. He recognized as a mitigating circumstance that the intervention was related to a widely publicized case that has long been the

subject of societal interest. [5] The chairman of the defendant stated in the dissolution decision that there is no doubt about the content of the wiretaps and from which source they come. He pointed to the jurisprudence of the European Court of Human Rights (hereinafter also "ECtHR") in the case of Klass and others v. Germany - judgment of the plenary session of 6 September 1978, complaint No. 5029/71, and in the case of Bykov v. Russia - judgment of the Grand Chamber dated March 10, 2009, complaint No. 4378/02. From them, he concluded, 2 As 304/2017 - 43 continued that the nature of the wiretapped call, as well as the position of the persons speaking, does not play a role in assessing whether there has been an invasion of private life, because otherwise the police would not need a warrant for wiretapping. The interception should then be used only within the limits of the law. The chairman of the defendant ruled out that the decision of the ECJ in the RADIO TWIST case could be applied to the case, as requested by the plaintiff. Some of the published interceptions were not even related to the criminal prosecution of J.N. (formerly N.), they were only interesting from the point of view of the tabloid newspaper reader. The chairman of the defendant did not even approve the application of the resolution of the Constitutional Court no. stamp Pl. ÚS 10/09, admitting a situation where the public interest prevails over the protection of privacy in the sense of § 8d of the Criminal Code. The fact that not all persons whose rights were affected by the publication of the articles were not explicitly named in the notice of initiation of the proceedings was called inconclusive by the chairman of the defendant, as the clarification was made during the proceedings. He also found the unnamed persons to be identifiable due to their work relationship or part of the obvious surroundings of the eavesdropped. There was also no violation of the principle of ultima ratio according to § 12 paragraph 2 of Act No. 40/2009 Coll., Criminal Code. What is inconclusive is the fact that none of the persons whose rights were affected complained - responsibility is not derived from how the persons concerned perceived the publication. It was not established that the content of the articles contained information previously published, nor that the content of the wiretapping was used as evidence in criminal proceedings. The chairman of the defendant agreed with the assessment of the proportionality of the conflicting rights and with the consideration of the amount of the fine. [6] In the lawsuit, the plaintiff accused the defendant of a lack of factual findings and an incorrect legal assessment of the matter. Although the defendant called it undisputed, the plaintiff never admitted that the published information came from wiretapping and that she would have violated the law by publishing it. The defendant insufficiently dealt with the objection that the information was published under § 8d of the Criminal Code and with reference to the decision of the ECtHR in the case of RADIO TWIST versus Slovakia or with reference to the resolution of the plenary session of the Constitutional Court no. stamp Pl. ÚS 10/09.

The protection of other persons, whose right to the protection of privacy was to be affected, was not mentioned in the notification of the initiation of the administrative procedure or in the introduction to the documents of the decision. The plaintiff did not have the opportunity to comment on it. It is also not clear what the defendant's conclusion about the identifiability of other unnamed persons derives from. None of the affected persons ever complained about the publication. She also pointed to the previous publication of the same information and the incorrect assessment of the use of evidence in court proceedings. She considered her procedure to be in accordance with § 8d of the Criminal Code. Finally, the plaintiff described both administrative decisions as unreviewable and expressed reservations about the aspects according to which the amount of the fine was determined. [7] In the contested judgment, the municipal court considered it proven that the source of the articles were police wiretaps and records of telecommunication traffic, which is also evident from the plaintiff's statements themselves and also from the structure and form of the information provided to the public. He also considered the violation of Section 8c of the Criminal Code to be proven and the reference to the ECJ's decision in the RADIO TWIST case unnecessary, as it was a conversation between politicians regarding matters of public interest. In the same way, the Constitutional Court in its resolution no. stamp Pl. ÚS 10/09 commented on a case that is not similar to the current one. When assessing the requirement for the completeness of the notice of initiation of proceedings, the municipal court based its judgment on the Supreme Administrative Court of 31 March 2010, No. 1 Afs 58/2009 - 541, and found no violation of the law in the given case. Regarding the possible identifiability of explicitly unnamed persons, he pointed to § 4 letter and the Personal Data Protection Act and the fact that these persons were also identifiable from the data contained in the articles. It is completely undecided whether the persons concerned have filed a criminal complaint or whether they have expressed their concern in any way. At the same time, in the given case, the imposition of administrative responsibility was sufficient and there was no need to approach criminal responsibility. The defendant also duly considered whether the information published by the plaintiff had not already been published before, and from the principle of two-instance proceedings, he concluded that it would be sufficient if this assessment included a decision on dissolution. The municipal court also certified 2 As 304/2017 to administrative authorities in the evaluation of the use of wiretapping in court proceedings, despite the fact that it did not consider possible publication in court proceedings to be decisive. The city court also called the evaluation of proportionality between the right to privacy and the right to freedom of expression as proper. The public's interest in being informed about the criminal activities of public figures cannot be confused with the interest in publishing specific and detailed transcripts of wiretapping. Even public figures

have the right to privacy. Material information obtained even from these interceptions could be published in such a way that the protection of privacy is respected and that the right to privacy protection of other persons is not interfered with. It is in the public interest to inform about the influence on the prime minister's political decisions, however, there is no public interest in the specific content of his communication. The object of protection is not only J.N. or Petr Nečas, but also other persons whose calls had nothing to do with J.N.'s criminal activity, and were not even purely political. The Municipal Court respects that public figures must endure a greater degree of criticism (here he referred to the ruling of the Constitutional Court of 15 March 2005, file no. I. ÚS 367/03), but in the given case it was not criticism of the Prime Minister. The fact that the wiretapping concerned one of the highest constitutional officials does not constitute a liberating reason. The municipal court agreed with the considerations regarding the amount of the fine. II. The plaintiff's cassation complaint and the defendant's statement II.1. The plaintiff's cassation complaint [8] The plaintiff's cassation complaint filed against the judgment of the municipal court is based on grounds of cassation according to § 103 paragraph 1 letter a), b), and d) s. s. s. Thus, he objects to illegality consisting in an incorrect assessment of a legal question by the court, a lack of factual findings in the administrative procedure and the unreviewability of the judgment consisting in the lack of understanding or a lack of justification, or any other procedural defect capable of affecting the legality of the judgment. [9] She sees the shortcomings of the findings of fact (part IV of the cassation complaint) in the fact that the defendant was based on the non-existent agreement on the existence of the deed between her and the administrative body, which she noted on p. 12 of the first-instance decision. The chairman of the defendant in the decision on dissolution pointed to the plaintiff's statement admitting the existence of the deed and on p. 9 of his decision drew incorrect conclusions from it. The complainant does not agree with this, as the authenticity of the wiretaps was not confirmed by the High Prosecutor's Office in Olomouc. The municipal court considered her prosecution argument to be purposeful, because in her statement of 12 June 2014 she did not dispute that the source of her articles was wiretapping. However, it was not clear from the notice of initiation of proceedings dated 28 May 2014 which information from the articles the administrative body makes the subject of the proceedings. This was determined only in the notice of familiarization with the documents of the decision on 8 July 2014. The complainant did not really dispute that the source of her articles were wiretapping, but she never stated in her statements which parts of the articles they were. At the same time, the complainant already stated at the beginning of the administrative proceedings that she was protecting the source of the information. Finding out all the facts was the task of the defendant, not the complainant. The complainant does not consider it proven whether and to what extent the

published information originates from wiretapping and may be subject to the prohibition stated in Section 8c of the Criminal Code. Therefore, both the defendant and the municipal court should have relied on the principle of in dubio pro reo and the principle of presumption of innocence and legality. Already in this, the complainant sees a reason for which the city court should have annulled the decision of the chairman of the defendant. [10] The complainant further finds a procedural defect in the violation of the principle of legitimate expectation (part V of the cassation complaint). He quotes from p. 14 of the first-instance decision, where the persons affected by the articles are listed and the content of the conversation between J.N. (formerly N.) and her assistant is specified, and where there is a reference to the fact that her colleagues were monitoring her. However, the facts listed here 2 As 304/2017 - 44 continued were not part of the notification of the initiation of the proceedings or the familiarization with the documents of the decision. According to the complainant, this violates the principle of legitimate expectations and makes the decision surprising. If the defendant stated on pp. 10 - 11 that the range of affected persons was not defined only by the names of Petr Nečas and J.N., it did not mean that only they were affected by the publication of the wiretaps. This is the purposeful assertion of the defendant, especially in relation to the assistant J.N. [11] The complainant finds a defect in the procedure – violation of the principle of impartiality and insufficient ascertainment of the facts (part VI of the cassation complaint) in the defendant's insufficient familiarization with her statement, which was approximately 200 pages long delivered on Friday 25 7. 2014, while the first-instance decision was then issued on Wednesday 30. 7. 2014. Thus, the defendant could not even familiarize himself with the complainant's statement, which he admitted in the decision (p. 14), saying that he did not consider them relevant. However, this was a fundamental statement regarding the issue of previous publication of the same information. The municipal court also considered it insufficient, but with the surprising opinion that "the relevant legislation does not consider this fact as a circumstance excluding illegality". The chairman of the defendant accepted a number of procedural errors and reached the same conclusions based on the same facts with different arguments. [12] The municipal court committed an incorrect legal assessment (part VII of the cassation complaint) by not using the basic principles of criminal proceedings, namely the principle of in dubio mitius or ultima ratio. For this, the complainant cites from the judgment of the Supreme Administrative Court of 27 October 2004, No. 6 A 126/2002 - 27, the rule of applicability of criminal principles in administrative punishment. The municipal court agreed with the defendant's conclusions about the priority of the right to privacy and stated that the recording is always an intrusion into the privacy of the persons concerned. Such an opinion contradicts the decision of the ECtHR in the case of RADIO TWIST v. Slovakia (points 57, 58). The Municipal Court rejected

this decision as irrelevant, which is contrary to the proportionality test it carried out. In the same way, he deviated from the decision of the plenary session of the Constitutional Court no. stamp Pl. ÚS 10/09. If the defendant's opinion accepted by the municipal court about the priority of the right to privacy was correct, the existence of Section 8d of the Criminal Code would have no meaning. The municipal court's view that the defendant properly performed the proportionality test is also not correct. The defendant carried it out in relation to all the information together, and the municipal court subsequently did so in direct contradiction to the judgment of the ECtHR in the case of RADIO TWIST versus Slovakia. The municipal court did not take into account the fact that none of the concerned persons approached the complainant with a request aimed at protecting their right to privacy. The proceedings were not initiated based on the initiative of any of the affected persons, some of whom commented on the matter in the press, without it being clear from their statements that they felt affected by the publication of the wiretaps. The municipal court also improperly dealt with the claim that the information contained in the wiretaps had previously been released. Publication should be understood as any public disclosure in the restrictive sense of the word, not in the broader sense of the word, as understood by the municipal court. From this he deduces the necessity of applying the principle of in dubio mitius and the principle of ultima ratio (in relation to § 12 of the Criminal Code). The Municipal Court also approved the assessment of the conditions for determining the amount of the fine, despite the fact that the defendant considered the interference with the right to confidentiality of information to be an aggravating circumstance, which is a conceptual feature of the provisions of Section 8c of the Criminal Code. Making it available to a wide range of people without taking into account that the data in question had been published earlier was also considered an aggravating circumstance. [13] According to the complainant, the decision is unreviewable (part VIII of the cassation complaint) because the published information was subordinated to § 8d of the Criminal Code, i.e. it was information where the public interest in publishing the information prevails over the right to protect the privacy of individuals. In the justification, the defendant did not provide any argument why the protection of privacy should prevail, nor did he indicate why he considers the published information to be defamatory and/or grossly invasive of privacy. The decision is therefore unreviewable for insufficient reasons. 2 As 304/2017 The complainant's coverage primarily concerned the Prime Minister of the Czech Republic, which justifies a higher level of permissible criticism and is also relevant to the level of balancing of both conflicting fundamental rights (here she points to the ECtHR's decision in the Castells v. Spain case, complaint no. 2 /1991/254/325). The evaluation of the municipal court on p. 13 of the judgment is equally insufficient; the municipal court did not consider the publication as criticism of a public figure, but as the publication of a

recording of wiretapping and telecommunications traffic in violation of § 8c of the Criminal Code. [14] For all these reasons, the applicant proposes the annulment of the contested judgment of the municipal court and the return of the matter to this court for further proceedings. II.2. Statement of the defendant on the cassation complaint [15] In her statement on the cassation complaint, the current president of the defendant agrees with the conclusions expressed in the judgment of the municipal court. In addition, he points out that the complainant basically only repeats the arguments used in previous proceedings, which have already been repeatedly and sufficiently resolved. He adds the following to some of the objections. In order to claim that the origin of the published information was not proven, he points out that the complainant herself directly admitted in the articles in question that the information came from police wiretapping. The subject of the proceedings was not defined by listing the persons whose privacy rights are affected; so it is clear that it applied to all who were affected by the information. The complainant's statement, although the defendant had it available for 3 days, was taken into account by him, which is clear from the justification of the first-instance decision - for example, it deals with the claim of prior publication of information in other sources. It is not true that the dissolution decision was based on different arguments, which is clear by comparing the reasoning of both decisions; the development of the argument is not a contradiction. The proportionality test was properly carried out in both decisions. It also points to the content of the published information, which was partly confidential and had nothing to do with the political or public activities of the persons concerned. In such circumstances, the public interest cannot outweigh the protection of privacy. Each publication of information must have its limits, while each subsequent repetition significantly expands the circle of recipients of the information and its reach; therefore, the frequency of information disclosure cannot be underestimated. For these reasons, the president of the defendant proposes the rejection of the cassation complaint. III. Assessment of the cassation complaint by the Supreme Administrative Court III.1. Conditions for consideration of the cassation complaint [16] The Supreme Administrative Court first assessed the formal requirements of the cassation complaint and stated that the cassation complaint is filed by a person authorized to do so, it is filed on time, it is a decision against which the cassation complaint is admissible, and the complainant acts as a person with legal status by education. The cassation complaint is admissible and negotiable. [17] The Supreme Administrative Court then assessed the merits of the cassation complaint within the limits of its scope and the reasons applied (§ 109 par. 3, 4 s. ř. s.). At the same time, he decided on the matter without ordering proceedings under the conditions resulting from the provisions of § 109, paragraph 2, sentence one of the Civil Code, Section III.2. Assessment of the reasonableness of cassation objections III.2.a) Objection of the

non-reviewability of the judgment 2 As 304/2017 - 45 continued [18] The Supreme Administrative Court first assessed the judgment of the municipal court from the point of view of the contested non-reviewability, as only a reviewable decision is usually eligible to be the subject of evaluation from the point of view of alleged illegality and procedural defects (cf. e.g. judgment of the Supreme Administrative Court of 28 August 2009, no. 2 Azs 47/2009 – 71). The Supreme Administrative Court is even obliged to take into account the non-reviewability of judgments of administrative courts and decisions of administrative bodies as a matter of official duty (§ 109 para. 4 s. ř. s.). When assessing the non-reviewability of the Supreme Administrative Court, it is based on established jurisprudence of the Constitutional Court (e.g. the decision of the Constitutional Court of 20 June 1996, file no. III. ÚS 84/94, published under No. 34 in Volume No. 3 of the Collection of Decisions and ruling of the Constitutional Court, decision of the Constitutional Court of 26/06/1997, File No. III. ÚS 94/97, published under No. 85 in Volume No. 8 of the Collection of Decisions and Decisions of the Constitutional Court) and from established jurisprudence of the Supreme Administrative Court (e.g. judgment of 4 December 2003, No. 2 Ads 58/2003 - 75, published under No. 133/2004 Coll. NSS, judgment of 27 June 2007, No. 3 As 4/2007 - 58, judgment of 18 October 2005, No. 1 Afs 135/2004 - 73, published under No. 787/2006 Coll. NSS, judgment of 8 April 2004, no. j. 4 Azs 27/2004 - 74, and others). [19] Although the applicant raises grounds of cassation pursuant to § 103 paragraph 1 letter d) s. ř. s., i.e. the non-reviewability of the judgment of the municipal court, however, the cassation complaint is structured similarly to a lawsuit, while complaints of defects or non-reviewability are directed at administrative decisions. He only marginally criticizes the municipal court for shortcomings in its reasoning, such as in the assessment of the relationship between the public interest and the right to privacy on p. 13 of the judgment. However, the municipal court clearly stated and justified its opinion here. The complainant is therefore rather aiming at the correctness of this assessment, which, of course, falls under the cassation ground according to § 103 paragraph 1 letter a) s. r. s. The Supreme Administrative Court did not find that the judgment was unreviewable, even beyond the scope of the cassation objections applied; the reasoning supports the statement and adequately deals with the prosecution's objections. III.2.b) Objection of insufficient ascertainment of the facts [20] Ground of appeal according to § 103 paragraph 1 letter b) s. ř. s. the complainant sees a number of deficiencies in the administrative procedure, which, in her opinion, the municipal court did not take into account or evaluated incorrectly. First of all, he considers the defendant's claim of a consensus on the source of the published information to be misleading, and he does not consider it proven that this source was wiretapping. It is clear from the administrative file that, in her statement on the notice of the initiation of administrative proceedings dated 12 June 2014,

the complainant stated that she was using her right to protect the source, but she nevertheless stated that the information she published from wiretapping and records of telecommunication traffic between Petr Nečas and J.N. come from wiretaps from criminal proceedings; her statement of 14 August 2014 also contains a similar statement. On the one hand, the complainant therefore denies that she ever admitted the origin of the information and it was so undisputed, on the other hand she stated this fact herself in the proceedings. It is also possible to confirm the argument of the defendant and the municipal court that the origin of the information is obvious from the published articles themselves, while both took into account that this is not a tabloid press, where the fictitious origin of the information would not be excluded. The information was also published in the structure of the call or messages corresponding to the recording of the call or electronic communication. The municipal court sufficiently evaluated all of this on p. 9 of the judgment, while also dealing with the fact that the statement of the High Prosecutor's Office in Olomouc could not explicitly confirm or refute the authenticity of the information in the interests of the criminal proceedings. [21] In this context, the complainant points to the fact that it was not sufficiently clear from the initiation of the proceedings which information the administrative authority considers to be part of criminal conduct. In the notice of initiation of administrative proceedings dated 28/05/2014, the administrative offense of which the complainant is suspected is described with the dates and titles of the published articles, which contained 2 As 304/2017 information, as follows: on 16/05/2014 in of the article "ČEZ boss pushed his man into police leadership, wiretapping revealed", on 20/05/2014 in the article "N. launches the Darwin action", on 21/05/2014 in the article "I already have a camouflage scarf, Madam Director, N.'s secretary reported", on 22/05/2014 in the article "Information from the file: How N. was controlled by Prime Minister Nečas" and in of the article "You just do it that way! N. drove Nečas". Also via the news portal iDNES.cz: on 21/05/2014 at 6:02 a.m. in the article "A masking scarf and scary walls, Sledovačky did for N. her colleagues", on 22/05/2014 at 8:48 a.m. in the article "MF TODAY: When the arguments did not work on Nečas, she brought out N.'s personal life", and on 5/22/2014 at 10:11 a.m. in the article "N. swears, N. reproaches, N. shouts, the policemen wrote". In the notice of initiation of the proceedings, it is stated that this is information obtained from the wiretapping and recording of telecommunication traffic carried out between RNDr. Petr Nečas and Mgr. J. N. (formerly N.), whereby by this publication the complainant should have violated the obligation set out in § 8c of the Criminal Code. In the introduction to the documents of the decision of 8 July 2014 (delivered to the complainant on the same day), the contents of all these articles are described on approximately four pages, while the complainant was informed of the possibility to comment on these documents before the decision, which will follow on the 25th. 7. 2014. [22] The municipal

court correctly pointed out the fact that the provisions of § 46, paragraph 1 of Act No. 500/2004 Coll., Administrative Code, require that the notification of the initiation of administrative proceedings ex officio contain a definition the subject of the proceedings, while the details of this definition derive from the judgment of the Supreme Administrative Court of 31 March 2010, No. 1 Afs 58/2009 – 541: "the subject of the proceedings must be identified with sufficient certainty in the notice of initiation of the proceedings so that it was clear to the participant in the proceedings how his conduct would be assessed, and to guarantee his right to effectively defend himself in the given proceedings. The administrative body may specify its subject in the course of proceedings initiated ex officio, if this action does not cause any procedural harm to the parties to the proceedings. Specifying the subject of the proceedings must not lead to its fundamental expansion or change compared to its definition in the notice of initiation of administrative proceedings. The administrative body must properly inform the participants of the proceedings about the specification of the subject matter of the proceedings and must give them the opportunity to comment on it". [23] The aim of the definition of the subject of the proceeding initiated ex officio is to familiarize the participants with it in such a way that it is clear to them, and at the same time, so that it is beyond doubt that such a proceeding is no longer being conducted and that there is no obstacle in the sense of § 48 of the Administrative Code. The definition of the subject of the proceedings is therefore not subject to such strict requirements as the definition of the deed in the decision. Given that the complainant was the publisher of the information in question and knew its content, she could not have doubted the definition of the act based on the notification of the initiation of the proceedings. She also responded to them adequately and with knowledge of the matter with a statement. A more detailed definition of the act, which should have interfered with the rights to the protection of personality, was then described in detail in the notice of familiarization with the documents, i.e. before the decision. Here, too, the complainant was given the opportunity to express herself. It should be emphasized that already in the notification of the initiation of administrative proceedings, the administrative authority explicitly stated that the violation of the law occurred by publishing information without the consent of the persons to whom it relates. In connection with specifying the content of the articles, the range of persons whose privacy was to be violated was also given. At the same time, it was noted not only a violation of the protection of directly named persons, but also of identifiable persons. E.g. the complainant herself, in her statement of 12 June 2014, named the persons to whom the wiretapping concerned in connection with the criminal proceedings. If then in your statement of 25 7. 2014 constructed that it is apparently only about the protection of the privacy of Petr Nečas and J.N., it pretends an assumption that either stems from a misunderstanding of the content of both notifications,

or is purposeful. In this context, the Supreme Administrative Court did not find the objected to have violated the principle of legitimate expectation. The doubts expressed in the court proceedings are not proof of the illegality of the procedure of the administrative authorities, and therefore there was no reason to annul the decision of the chairman of the defendant by the municipal court. 2 As 304/2017 - 46 continued [24] The complainant also perceives the fact-finding in the administrative proceedings as insufficient and points to the fact that the defendant could not sufficiently familiarize himself with her claims and the evidence presented, as he made a decision shortly after receiving them; he also sees in this a violation of the principle of impartiality of the administrative body. The complainant was informed of the fact that and when the defendant plans to make a decision on the matter by inviting her to familiarize herself with the underlying materials. The invitation was delivered on 08/07/2014, with the fact that the decision is expected after 25/07/2014. It was not about setting a deadline, just general information. The complainant sent her statement to the defendant on 25 July 2014; in it, she focused in particular on specific data about the previous publication of the same information in other media, and submitted comprehensive appendices to this claim. The defendant issued a decision on 30 July 2014. From the fact that the last mentioned dates were Saturday and Sunday, it cannot be inferred that this was a time period that was not sufficient to get acquainted with these documents and possibly also to verify the facts asserted there. The defendant states the contents of this statement, including the annexes, in his decision and responds to the claim of previous publication on p. 14 of the decision by saying that he does not consider such a fact to be decisive at all, as it does not rule out the illegality of the conduct. He also did not take these facts into account when determining the amount of the fine. The chairman of the defendant agreed with this opinion, specifically elaborating that the previous disclosures did not contain a transcript of the wiretaps, and he emphasized the importance of the disclosure in terms of form and repetition. The municipal court described the argumentation in the defendant's decision as insufficient, but accepted the correction made in the dissolution decision with reference to the judgment of the Supreme Administrative Court of 14/04/2009, No. 8 Afs 15/2007 – 75, on the meaning of the two-instance proceedings, including options for correcting errors committed by lower instances. It is not clear the complainant's complaint that the city court described the defendant's settlement with the fact of previous publication as insufficient, but with the surprising opinion that "the relevant legislation does not consider this fact as a circumstance excluding illegality". The quoted part of the sentence is not the opinion of the municipal court, but part of the reference to the wording of the first-instance decision. The sentence in the last paragraph on p. 11 of the judgment is a bit misleading in this regard, however, a careful reading makes it clear that the municipal court's own opinion is

contained only after the semicolon and continues on the next page. The violation of impartiality alleged by the complainant cannot be found either. The principle of impartiality arising from § 7 of the Administrative Code guarantees the equality of the participants in the proceedings and is intended to prevent the favoring or disadvantaging of any of them, which in the given case does not even come into consideration in the proceedings of the defendant or its chairman. The court of cassation agrees with the assessment of the objection of insufficient settlement of the documents submitted by the applicant to the municipal court and the fulfillment of the ground of appeal according to § 103 paragraph 1 letter b) s. r. s. does not find. III.2.c) Objection of incorrect assessment of legal issues [25] The appellant specifies the cassational objections directed against the correctness of the assessment of the legal issue by the court from the point of view of fulfillment of the factual essence of the delict, from the point of view of the correctness of the assessment of proportionality between the right to information and to the protection of privacy, and from the point of view of the application of basic principles of criminal procedure - principles of in dubio mitius or ultima ratio. [26] First, it is necessary to state the decisive legal regulation. [27] Pursuant to Section 45a Paragraphs 1, 3 of the Act on the Protection of Personal Data, a legal entity or a natural person running a business commits an administrative offense by violating the ban on the publication of personal data established by another legal regulation. A fine of up to CZK 5,000,000 is imposed for an administrative offense committed through the press, film, radio, television, publicly accessible computer network or other similarly effective means. 2 As 304/2017 [28] Pursuant to § 8c of the Criminal Code, no one may, without the consent of the person to whom such information relates, publish information about the order or implementation of interception and recording of telecommunications traffic pursuant to § 88 or information obtained from it, data on telecommunications traffic detected on the basis of an order pursuant to § 88a, or information obtained by monitoring persons and things pursuant to § 158d paragraphs 2 and 3, if they enable the identification of this person and if they were not used as evidence in court proceedings. [29] According to Section 8d of the Criminal Code, information subject to the ban on publication according to Sections 8a to 8c may be published to the extent necessary for the purposes of searching for persons, to achieve the purpose of criminal proceedings, or if this law allows it. Said information may also be published if the public interest justifies it, if it prevails over the right to privacy of the person concerned; at the same time, special care must be taken to protect the interests of persons under the age of 18. [30] The Supreme Administrative Court considers it sufficiently proven that the information published by the complainant is information obtained from interceptions and from records of telecommunications traffic taken in the regime envisaged in § 8c of the Criminal Code, while none of the persons concerned gave their consent to the publication

and did not act for information already used in proceedings before the court. The fact that these persons subsequently did not object to the publication of information in any way cannot be considered as consent. The prohibition set out in Section 8c of the Criminal Code was violated and the information was published through the press and a publicly accessible computer network. This fulfilled the formal features of an administrative offense according to § 45a, paragraph 1 of the Personal Data Protection Act. However, it is not a delictual act if the conditions of § 8d of the Criminal Code are met, in the given case the conditions of public interest for the publication of information, if it prevails over the right to privacy of the person concerned, and that of each of them. Here, the assessment of proportionality between the right to information and the right to protect the privacy of the persons affected by the publication has its place. [31] In the first-instance decision, when assessing proportionality, the defendant was based on the public position of the communicating persons, however, he was of the opinion that a distinction must be made between information about the existence of a person who has influence on the Prime Minister's political decisions and between a specific transcript of their communication including their privacy and places completely lacking informational value (e.g. parts of the text in the article "N. launches Darwin action"). The information also affected persons who were merely the subject of communication or the object of surveillance and who were not involved in the criminal proceedings in any way. The defendant enumerates these persons, including the fact that even the secretary J.N. (formerly N.) should be considered a person concerned, as she was identifiable. The chairman of the defendant objected to the complainant's opinion on the automatic supremacy of the public interest over the right to protect the privacy of public officials. He also cited from the published information those that affected the privacy of persons who are not public figures (the prime minister's wife, monitored persons), or although they are public figures, but the subject of publication were their nicknames, or the subject of which were purely personal, sometimes even intimate conversations between J.N. and Petr Nečas. The very fact that the public is also interested in this was not considered by the chairman of the defendant to be a sufficient reason for the public interest to prevail over the protection of the privacy of the persons concerned. The municipal court then added to these arguments that the interest in publishing information cannot be carried out in a defamatory or grossly invasive manner, which was done by completely transcribing the content of the wiretapping. [32] The conditions for the application of Section 8d of the Criminal Code require an assessment of the relationship between public and private interest, i.e. an assessment of the proportionality of conflicting rights; these are as follows. According to Article 10(1) of the Charter, everyone has the right to have their human dignity, personal honor, good reputation and name protected. According to paragraph 2 of the same provision, everyone has

the right to protection from unauthorized interference in private and family life. 2 As 304/2017 - 47 continued According to paragraph 3 of the same provision, everyone has the right to protection against the unauthorized collection, publication or other misuse of personal data. At the same time, the right to privacy is understood in the sense of Article 8, paragraph 1 of the Convention. Art. 17, paragraph 1 of the Charter guarantees the right to information, paragraph 2 then guarantees everyone the right to express their opinions, including the dissemination of information, while this right can be limited by law according to paragraph 3 of the same provision, among other things, for the purpose of protecting the rights and freedoms of others. Here, too, the Charter follows on from the Convention – its Article 10, paragraph 1. [33] The Constitutional Court commented on the application of these rights and their conflict, for example, in the judgment of 24 January 2012, file no. stamp Pl. ÚS 10/09, by which he assessed, among other things, the proposal to abolish part of § 8c of the Criminal Code; for this reason alone, it cannot be denied its relevance for the matter in question. When assessing the right to information, he relied on Article 10 of the Convention and, in its light, expressed general principles in relation to freedom of expression and the role of the media (part VII of the decision). He emphasized the importance of the fundamental right to freedom of expression, especially in relation to public matters, i.e. to the activities of politicians and officials. He saw journalistic activity as important for the discussion of civil society. He stated that the rights arising from Article 17 of the Charter are not absolute rights, and that when the right to information conflicts with another constitutionally protected interest, the specific circumstances of the case must be weighed, especially in relation to the protection of the personal rights of an individual, the publication of which is not in the public interest. When considering the conflict of these rights, he referred to the judgment of the ECtHR of 25 July 2006 in the case of Dammann v. Switzerland, complaint no. 77551/01. He also emphasized the importance of the right to privacy in relation to data obtained from wiretapping (paragraph 88 of the finding). Similar conclusions about the importance of the right to information and the importance of journalistic activity creating conditions for public discussion can also be read from the decision of the Constitutional Court of 30 March 2010, file no. stamp Pl. ÚS 2/10 (publ. under No. 123/2010 Coll.). The ruling of the Constitutional Court of 15 March 2005, file no. stamp I. ÚS 367/03, which the municipal court declared inadmissible, as it involved unauthorized criticism of a public figure, whereas in the case under consideration it is the publication of interceptions and records of telecommunications traffic in violation of the law. It is true that the finding relates to the relationship between the right to freedom of expression and the right to protect the personality of a popular singer, however certain rules were stated here as well, from which it follows that publicly disseminated opinions should fundamentally not deviate from the limits of the

rules recognized in a democratic society, so as not to avoid constitutional protection. In this ruling, the Constitutional Court reflects the jurisprudence of the ECtHR in such a way that it also accepts hurtful or insulting opinions if they are part of a public or political debate, and admits the restriction of the right to freedom of expression as very exceptional. It also notes the different position of public officials (politicians, public officials and artists) as persons who have to endure a higher level of criticism and who also have easier access to the media to react to information affecting them (p. 6 of the finding). Even here, it cannot be said that this finding would be without significance for the case under consideration. [34] From the ECtHR judgment of 19 December 2006 in the case of RADIO TWIST v. Slovak Republic (complaint no. 62202/00), which the defendant and the municipal court called inconclusive, the legal conclusions in this case also flow from the ECtHR judgment highlighted by the applicant. The case decided there concerned the publication of a wiretapping of a telephone conversation between the then Prime Minister and the Minister of Finance and the Secretary of the Minister of Justice regarding the change of management and the occupation of the Slovenská poisťovna, a.s. paragraph 2 of the Convention leaves little scope for limiting freedom of expression in matters of public interest. Here, too, the possibility of a higher degree of involvement in relation to a public official, e.g. a politician, is noted. The court was based on the clearly political content of the calls, the absence of interference in personal life, and the purpose of publication, which was to acquaint the public with facts that were part of public life. 2 As 304/2017 [35] In the ECtHR decision of 1992 referred to by the applicant in the case of Castells v. Spain (complaint no. 2/1991/254/325), this court stated that freedom of expression is a necessary condition for the formulation of political opinions and admitted , that the expression of a politically active person must enjoy protection even if it is harsh or even offensive criticism of the government, which he granted a lower degree of protection than private citizens, and this is because both politicians and government officials are accountable to the people for their activities. The press, then, is the one who has an important role in providing information of various kinds, thus giving the public the opportunity to form their opinions. [36] In addition, we can also mention the judgment of the ECtHR of 29/03/2016 in the case of Bédat v. Švýcarsk (complaint no. 56925/08), which the municipal court used in another judgment (file no. 5A 138/2014). Here, the ECtHR assessed the case of a journalist being penalized for publishing information about ongoing criminal proceedings, while considering the limits of protection under Article 10 of the Convention, he identified the following factors as decisive: a) the content and manner of the published information – whether the information was published in a serious manner, or whether, on the contrary, tried to cause rather a sensation or to describe a person in a purely negative way, b) how the publication of the information contributed to a

debate of public interest, or whether its aim was only to satisfy the public's curiosity, c) what impact the published information had on the criminal proceedings, whether the principle of the presumption of innocence was violated , or whether the impartiality of the court was affected. Here, the ECtHR assessed in particular the relationship of the published information to the ongoing criminal proceedings, however, its conclusions are partly applicable to the given case where the right to information conflicts with the right to privacy. Specifically, in paragraph 72 of the judgment, the ECtHR recalls the jurisprudence from which it follows that in order to interfere with the right to the protection of good reputation under Article 8, the attack must be serious and must be carried out in a way that violates the right to private life. [37] The chairman of the defendant referred to the ECtHR decision of 6/9/1978 in the case of Klass and others v. Germany (complaint no. 5029/71), and of 10/03/2009 in the case of Bykov v. Russia (complaint no. 4378 /02). The first of these decisions deals with protection against police wiretapping, and in relation to the case now being dealt with, its conclusion can be stated that the right to private life is being interfered with for persons against whom wiretapping was not permitted. In the second decision, the ECtHR deals with obtaining evidence in criminal proceedings in an admissible manner and in this connection deals with the protection of rights arising from Article 8 of the Convention. [38] In the light of all these exemplary decisions of the Constitutional Court and the European Court of Human Rights, it is then necessary to assess the proportionality between the right to information and the right to privacy in a given case. It is not possible to choose only some of the decisions that, in terms of their output, are suitable for managing the monitored goal. All the mentioned decisions are based on the fact that it is always necessary to weigh the specific factual circumstances, the importance of the information for public life, the persons to whom the information relates and the degree of impact on their rights. At the same time, the principle of proportionality ensures that in each specific case only such interference with privacy is allowed that is balanced with the purpose for which the restriction of this right serves. Proportionality must be weighed in relation to each entity that became the subject of published information from wiretapping or from records of telecommunications traffic. [39] In order to evaluate the correctness of the considerations of the defendant, its chairman and the municipal court, it is appropriate to analyze the information that was the subject of published interceptions and records of telecommunications traffic. This needs to be done concretely, although there is no need to repeat the complete transcription of the information, as this has already been done by the administrative authorities and the municipal court; for the purposes of the assessment of the Court of Cassation, the following summary will suffice: 2 As 304/2017 - 48 continued a) article dated 16/05/2014 "The head of ČEZ pushed his man to lead the police, wiretapping revealed". It is only stated that the

person concerned should have been referred to as D. b) article dated 20/05/2014 "N. triggers the Darwin action'. It intercepts calls between N. and P. on 26/10/2012 and 1/11/2012. It is established that N. has a negative attitude towards R.N., which he often calls vulgar nicknames, and the content of the call is recorded, the subject of which is apparently course of monitoring R. N. The conversation between N. and P. on 10/03/2013 was supposed to concern the relationship between P. and "N. ". The call between N. and K. dated 14/03/2013 is information about the result of monitoring these persons referred to as "dog food", while in another message dated 15/03/2013 N. gives instructions for monitoring them, in the message and during the call dated 16/03/2013, the photo of H., its address and the parking place of P.'s vehicle are dealt with. The monitoring of these persons is also addressed in the record dated 21/03/2013, while N. subsequently discusses the same with P. Furthermore, the conversation between N. and Nečas dated 28/03/2013, the subject of which was a communication about the detected common trip watched. The recording of the call between N. and P. from 04/05/2013 is a statement of the results of the reporters' monitoring. The article concludes with findings about N. and P.'s interview with those being watched, stating that they did not have the courage to fire them. c) the article dated 21/05/2014 "I already have a camouflage scarf, Madam Director, N.'s secretary reported" describes N.'s activities towards P. in relation to surveillance in Tuchomerice and a conversation about this surveillance with the assistant she sent there. d) article dated 22/05/2014 "Information from the file: How N. managed Prime Minister Nečas" continuing with the article "You'll just do it that way! N. controlled Nečas", records the conversation and messages sent between Nečas and N., which concern opinions about P., the staffing of the SAO leadership, including N.'s personal criticisms of Nečas and his personal reactions to them. e) the article dated 21/05/2014 "Masking scarf and scary walls, Sledovačky djeli for N. her colleagues" continues the continued monitoring of H. [ad c)] and summarizes the communication between N. and P. and the secretary. f) the article dated 22/05/2014 "MF DNES: When Nečas's arguments did not work, N. took out N.'s personal life" contain a partial quote of personal conversations and messages between Nečas and N. with an evaluation of Nečas's personal subordination. g) article dated 22/05/2014 "N. scolds, N. scolds, N. shouts, the police wrote down" contains a description of seven calls and messages between N. and Nečas, the character of which is mainly a personal solution to their conflicts, from which it is clear, however, that the reason was the opinion about P. and the occupation of the management SAO, the outcome of which is Nečas's preference for their personal relationship over work issues. [40] The defendant's decision in tort identified the full content of all the articles, with the defendant concluding that the publication of the content of the wiretaps affected all persons to whom the articles concerned; specifically, they were Petr Nečas, J.N. (formerly

N.), D.B., R.N., J.P., L.P., J.P., A.H., M.K. and O.P. Persons not explicitly named in the articles, but identifiable, were also affected - assistant J.N. The defendant cited the article as an example of exclusion of public interest "N. triggers the Darwin action'. The chairman of the defendant added that some articles cannot be characterized as purely political, for example the articles "The head of ČEZ pushed his man to lead the police, wiretapping revealed" and "N. triggers the Darwin action'. He considers articles related to the surveillance of J.P. and A.H., which are not even related to J.N.'s criminal activity, to be unrelated to politics. In the articles "How N. managed Prime Minister Nečas", "You just do it that way! N. drove Nečas", and "When Nečas was not defeated by arguments, she took N.'s personal life" are purely personal, confidential and even intimate conversations. In these articles, the chairman of the defendant did not find anything that should 2 As 304/2017 make them a subject of public interest, or where the public interest does not prevail. When assessing the existence of public interest, the chairman of the defendant points to quotations from interviews in which personal and defamatory expressions are heard. The Municipal Court found an invasion of privacy directly in the text of the published articles, found in them a violation of the right to privacy of all the persons named in the decision, while factual information obtained from wiretapping could be published in a way that would not be an interference with their rights. [41] Police wiretapping is a serious intrusion into an individual's privacy and their authorization is subject to strict legal conditions. This also applies to their use, even more so for their use outside the framework of criminal proceedings. To assess the correctness of the reasoning of the defendant, its chairman and the municipal court, an analysis of the content of the articles listed above and 39 a) - g) is necessary. The administrative authority deciding on the offense pursuant to Section 45a Paragraphs 1, 3 of the Act on the Protection of Personal Data when identifying a breached regulation pursuant to Section 8c of the Criminal Code must, as already stated above, examine whether the reasons listed in Section 8d of the Criminal Code are not given, i.e. whether there is no public interest in disclosing the information; at the same time, the latter must outweigh the interest in protecting the privacy of the persons concerned. The administrative authority must carry out this proportionality test specifically in relation to all affected persons and to all published information. Therefore, it is not enough to state the names of all persons who were affected by the information in any way, and to provide a summary of all information with an exemplary list of their parts, for which the public interest does not prevail in the opinion of the administrative body. In view of the jurisprudence of the European Court of Human Rights and the Constitutional Court cited above, it must also be established what position in society the persons concerned had or have, and whether the preponderance of the public interest does not derive from this position. Public interest certainly cannot be considered to be

merely interesting to the public, but it must be perceived in a narrower sense - that information is needed for public life, that it can be used for forming political opinions and for perceiving and assessing the activities of state bodies, politicians or public life affecting society officials. Petr Nečas was the prime minister of the Czech Republic, J.N. held the position of senior director of the cabinet section of the prime minister, some of the other actors in the wiretapping held high positions in the intelligence services. After all, the wiretapping was apparently ordered precisely in connection with the suspicion of abuse of intelligence services by J.N. These political functions and important official positions can lead to a preponderance of interest in the disclosure of information. However, neither the defendant nor its chairman evaluated this in more detail, for which they do not have sufficient support even in the decisions of the ECtHR, on which they were based, regardless of the other jurisprudence mentioned above. On the other hand, the publication of information also affected persons whose position did not justify the preponderance of public interest. The information was also published relatively extensively, and even in relation to persons who have to endure a higher degree of public interest, it is necessary to consider whether those whose interest in privacy protection prevails were not also published. [42] Specifically, the Supreme Administrative Court is of the opinion that it is questionable to refer to the "chief of CEZ", who was designated by the diminutive of his first name in Article ad 39 a). Also questionable is the involvement of actors in the wiretapping in Article ad 39 b), who were J.N. and "informants" in management functions, while the subject of the wiretapping and recording of telecommunications traffic was its tasking of intelligence services by private monitoring; on the other hand, in this article, the preponderance of the interest in protecting the privacy of those persons to whom the surveillance applied (R.N., J.P., A.H.) and to whom the content of the information was sometimes even disparaging, is evident. In Article ad 39 c) the preponderance of the public interest can only be found in relation to J.N.'s communication with P., as it concerns the surveillance of persons by the intelligence service; on the other hand, in the next part containing J.N.'s communication with her assistant, no public interest can be found at all. The questionable relationship between the public interest and the right to privacy is also in Article ad 39 d). Although this is a conversation of a mostly private nature between Petr Nečas and J.N., on the other hand, it must be appreciated that it shows the extent of J.N.'s influence on Petr Nečas in matters of his political decisions (holding the position of "head of the SAO"). The case of Article 2 As 304/2017 - 49 continuation of ad 39 e) corresponds to article ad 39 c). Article ad 39 f) also documents the influence of J.N. on Petr Nečas, but here one can agree with the defendant that the communication is of private content, and therefore one can attest to the preponderance of the interest in protecting their privacy. Article ad 39 g) could be considered in the same way, but here the

influence of J.N. on the political decisions of Petr Nečas is more clearly evident. In general, it can be summarized that it is impossible to deny the preponderance of the public interest in the publication of information where this information acquaints the public with the fact that the Prime Minister was relevantly influenced in his power decision-making by a person to whom such actions formally did not belong, and that this person communicated with intelligence officers services in matters of his private interest relating to the Prime Minister. The full disclosure of intercepts and records of telecommunications traffic was thus problematic and the scope of the information should have been limited, but failing that, it was up to the defendant and its chairman to sort through this information and responsibly address the extent to which disclosure of this information was permissible in terms of § 8d of the Criminal Code. The municipal court should have done the same. Thus, the complainant can be substantially confirmed in the claim of incorrect legal assessment of the case in the sense of § 103 paragraph 1 letter a) s. ř. s. [43] As part of the challenge to the correctness of the legal assessment of the case, the applicant further objects that the municipal court should have been based on the basic principles of criminal proceedings, primarily the principle of in dubio mitius. The Municipal Court dealt with this objection on p. 12 of the judgment and correctly pointed to the interpretation of the principle contained in the judgment of the Supreme Administrative Court of 22 July 2014, No. 9 Afs 63/2013 – 84, and emphasized that the application of this principle presupposes the existence of several equally defensible interpretations of a certain provision of a legal regulation. The complainant was of the opinion that the ambiguous interpretation should have related to the term "publication" referred to in Section 8c of the Criminal Code. She then saw the problem in the fact that the term can be perceived either as any release of information to the public, or only its first release to the public, while she was not the first. The Supreme Administrative Court, in agreement with the municipal court, did not find a reason to examine the possibilities of interpretation of this provision, if the information as it was published by the complainant (i.e. the transcript of the wiretaps) was not the subject of previous publications (see below). In addition to this fact, the Supreme Administrative Court adds that the term "publication" is usually associated with any disclosure of information to the public, while the text of the law does not allow for a different interpretation. The repetition of publication, perhaps partial, in a given case can only have an effect when considering the amount of the fine. [44] With the above-mentioned principle, the complainant also connects the principle of ultima ratio resulting from Section 12, paragraph 2 of the Criminal Code, and criticizes the municipal court for not using it. According to this provision, "(t)he criminal responsibility of the perpetrator and the criminal consequences associated with it can only be applied in socially harmful cases in which the application of responsibility under another legal regulation is

not sufficient". The municipal court commented on it only by declaring the administrative sanction to be sufficient. The principle expresses the principle of subsidiarity of criminal repression, whereby the most serious acts are the object of criminal repression. The use of this principle is certainly not excluded even in administrative punishment, even though here, by the fact that it is an administrative punishment, it is a lower level of repression that affects actions that are less socially harmful. The applicant does not define what milder means she has in mind, and it is not clear to the court what milder punitive procedure would be considered here. From her argumentation that the proceedings were not initiated at the initiative of the persons concerned and they did not even object to the publication of the information, it can be inferred that she believes that her actions lacked social harm. The administrative offense according to § 45a, paragraph 1 of the Act on the Protection of Personal Data is not tied to the proposal of the person concerned or to a higher degree of his involvement; the reactions of the persons concerned could also be important for consideration of the amount of the fine (of course there is a difference if the person affected by the publication of information from criminal proceedings becomes almost a celebrity as a result of this publication, or if, on the contrary, he suffers health damage, or is damaged in his personal life or in employment). If the complainant cites the judgment of the Supreme Administrative Court of 27 October 2004, No. 6 A 126/2002 – 27, in connection with this objection, the Court of Cassation 2 As 304/2017 does not consider it decisive, because in addition to the acceptance of criminal law principles in administrative proceedings, it refers to the criminality of the act when the legislation is changed. [45] However, the complainant connects both principles with the fact that in her case it was not a matter of publishing unknown information, as she documented in the administrative proceedings that it was information previously published by other entities. The administrative file includes two folders containing an overview and citations of reports mainly from 2013, some of which relate to the "N. case", its activities and cooperation with the secret services, they comment on the fact of police interrogations of J.N., the conduct of police searches, they note the interrogations of other publicly known persons, the reaction of public officials or persons affected by the case to the criminal prosecution of J.N. or related to the discussion of the possibility of Peter Nečas' extradition for criminal prosecution and the consequences of the whole affair for him. Among them are reports whose source could be wiretapping, as they comment on the use of nicknames (e.g. Lidové noviny 27/04/2014, daily Aha 14/11/2013), comment on the surveillance of N. (ČT 1 of 23/06/2013 "Nagygate"), etc. However, this is by no means a complete transcript of the wiretaps corresponding to the information published by the complainant. [46] The applicant also challenges the determination of the amount of the fine. The Personal Data Protection Act stipulates in Section 46, paragraph 2,

that when deciding on the amount of the fine, "in particular, the seriousness, manner, duration and consequences of the illegal act and the circumstances under which the illegal act was committed" are taken into account. The defendant explicitly defined what he found to be mitigating circumstances (wide media coverage of the case) and aggravating (interference with the confidentiality of communications pursuant to Article 13 of the Charter, disclosure to an unlimited number of persons, and the associated irreparable consequence). The chairman of the defendant acknowledged that making information available to an unlimited number of people is a conceptual feature of the tort. The municipal court accepted the consideration of determining the amount of the fine as legal, when it did not find breach of confidentiality of communication to be a conceptual sign of the offense; on the contrary, he testified to the consequence of the wide distribution of information compared to other methods of publication and excluded the possibility of the influence of previous publication as a mitigating circumstance because it was not proven. The defendant's reasoning in the correction made by the defendant's chairman corresponded to the legal aspects, and the municipal court dealt with the objection in question properly. Due to the different opinion of the Supreme Administrative Court on the scope of delictual conduct, however, after its new definition, consideration of the amount of the fine will also have to be re-considered. IV. Conclusion and reimbursement of costs [47] For the above-mentioned reasons (and para. 44, 45), the Supreme Administrative Court came to the conclusion that the cassation complaint is well-founded, and therefore annulled the contested judgment of the municipal court (§ 110 para. 1 first sentence s. r. s.). Using § 110 paragraph 2 letter a) s. s. s. at the same time annulled the challenged decision of the chairman of the defendant and returned the matter to the defendant for further proceedings (§ 78 par. 3 and 4 s. s. s.). [48] If the Supreme Administrative Court annuls the decision of the administrative body in addition to the contested judgment and returns the case to it for further proceedings, this administrative body is bound by the legal opinion expressed by the Supreme Administrative Court in the annulment decision [§ 110 para. 2 letter a) s. ř. s. in connection with § 78 paragraph 5 s. ř. s.]. [49] The Supreme Administrative Court is the last court to decide on the matter, and therefore must determine compensation for the costs of the entire court proceedings. Pursuant to Section 60(1) of the Code of Civil Procedure in conjunction with Section 120 of the Code of Criminal Procedure, a successful party to court proceedings has the right to reimbursement of reasonably incurred costs against a party that was not successful in the case. 2 As 304/2017 - 50 continued [50] The costs in the proceedings of the successful applicant amounted to the amount of CZK 8,000 for paid court fees [1 x CZK 3,000 for the claim under item No. 18 point 2 letter a) the list of court fees, which is an appendix to Act No. 549/1991 Coll. on court fees, as amended, and 1 x 5,000 CZK for a cassation complaint pursuant to item

No. 19 of the same Act]. [51] Therefore, the Supreme Administrative Court imposed on the procedurally unsuccessful defendant the obligation to pay the successful complainant the sum of CZK 8,000 as compensation for the costs of the proceedings, within one month of the legal effect of this judgment. Lesson learned: No appeals are admissible against this judgment. In Brno on May 3, 2018 JUDr. Miluše Došková, President of the Senate