

OFFICE FOR PERSONAL DATA PROTECTION

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UOOUX00FHCDQ

Ref. UOOU-04856/21-13

DECISION

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

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

Dissolution of the accused, XXXXX, with registered office XXXXX, against the decision of the Office for Personal Protection data no. UOOU-04856/21-7 of April 13, 2022, is rejected and the contested decision confirms.

Justification

AND.

Definition of the matter

/1/ The basis for proceedings in the matter of suspicion of committing a misdemeanor pursuant to § 11 paragraph 1 letter and) points 1 and 3 of Act No. 480/2004 Coll., on certain services of the information society and on the amendment certain laws (hereinafter referred to as "Act No. 480/2004 Coll."), in connection with the dissemination of unsolicited commercial communications by the accused, XXXXX, with registered office at XXXXX (hereinafter referred to as "the accused"), was on file

material collected as part of the inspection sp. stamp UOOU-00685/20, made by the Office for protection of personal data (hereinafter referred to as the "Office") from October 30, 2020 to January 18, 2022, inclusive resolution of objections by the Chairman of the Office with reference no. UOOU-00685/20-51 dated January 17, 2022.

/2/ The inspection in question was part of the Office's inspection plan for 2020 in the area

of direct marketing and sending commercial messages and the reason for its implementation were and specific complaints from holders of e-mail addresses XXXXX and XXXXX. In connection with these the entire e-mail campaign carried out was also checked with complaints as part of the control procedure accused on February 24, 2020 with the content of the message: "We are giving away 10,000 packs of XXXXX". Holder e-mail address XXXXX he stated in his complaint and documented that his e-mail address was sent the subject communication dated February 24, 2020. He also stated that he uses the email address with the domain XXXXX, is not a customer of the sender, has never given the sender consent to send commercial messages and is not a registered user of the sender. Also e-mail holder

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address XXXXX stated and documented in his complaint that the communication in question dated February 24, 2020 was sent to his email address, and that he uses an email address with the domain XXXXX.

The complainant with the address XXXXX stated in his submission that in view of the fact that in the message sent the person of the sender is not indicated, he cannot indicate whether he previously refused to receive business communications

or not. From the control findings, however, it was clearly evident that the sender of the item in question the message is charged.

/3/ The check then revealed that the business communication in question had been sent out through the "XXXXX" service operated by the accused. Commercial messages sent via the "XXXXX" service could be sent to users who, on the XXXXX portal, XXXXX or XXXXX set up an e-mail box. The "XXXXX" service they subscribe to (grant consent) users of e-mail boxes, then consists in the offer of products and services of third parties hillside. According to the contention of the accused, if the user did not give such consent to the accused, she could not no commercial messages will be sent to him. Information that the sending of commercial messages is meaning sending commercial messages (offers) of the partner of the accused (i.e. offers from third parties), it was listed only within the created account, not when expressing consent to sending commercial messages the message given when the e-mail box was established. Consent to send messages to "XXXXX"

(i.e. commercial communications for the benefit of third parties) had to be activated (granted) only within the framework settings directly in the e-mail box. It was also possible to specify within the e-mail box profile by filling in the gender and age, then it was possible to make a selection of the information that will be in "XXXXX" sent.

/4/ As the accused stated during the inspection, the advertising campaigns within the "XXXXX" service are implemented on the basis of orders from individual interested parties. To the campaign implemented on the day On February 24, 2020 ("We are giving away 10,000 packs of XXXXX"), the accused stated that the business in question sent out the message in two mailings to a total of approximately 750,000 e-mail addresses. Within of the local investigation on June 14, 2021, the accused specified that this campaign for the company XXXXX targeted approximately 500,000 e-mail addresses. She documented this fact with an order.

/5/ As part of the control procedure, the accused was invited to provide evidence of legal titles, on the basis of to which recipients a commercial message was sent as part of the campaign in question, and how addressees XXXXX and XXXXX, as well as the remaining approx. 750,000 addressees, who were this business message sent. In addition, the accused stated that, in addition to addressees XXXXX and XXXXX, u in which the accused did not register her consent to sending commercial messages for the benefit of third parties parties, this commercial message was also sent to approximately 250,000 other e-mail addresses, at which it also did not have consent to send commercial communications from third parties. This the fact was verified as part of a local investigation held at the residence of the accused on June 14 2021. In this local investigation, the said order entered into with the company was substantiated XXXXX, in which the requirement to target the campaign was stated, namely to men and women 45+ in the number of 500 000 email addresses. At the same time, a list of 753,993 sent e-mail addresses (i.e. individual recipients), of which 266,607 had the flag "no", i.e. that the accused does not have consent to send commercial messages for the benefit of third parties hillside.

/6/ In addition, the accused stated that already on the day of the mailing, this error consisting in the sending of the object in question

commercial message also to 250,000 users of e-mail addresses that were not sent

business communications service "XXXXX" allowed, it detected, based on internal

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control mechanism through control (test) e-mail addresses

with a sign of agreement and disagreement. The accused subsequently submitted a statement on July 14, 2021

from your system from which the detection of this error is evident. She stated that the error was caused

due to the addition of system message functionality, while this new functionality has canceled

pre-set conditions "XXXXX", and thus the commercial message was erroneously sent to e-mail as well

addresses without consent to the sending of commercial communications "XXXXX". In order to avoid repetition

of this misconduct, the accused modified the management of the database by introducing a separate

a sub-database in which only e-mail addresses with a consent flag are included

with mailing, and continues to be for the purpose of sending business messages within the "XXXXX" service

only this newly created sub-database is used. As part of a local investigation on June 14

In 2021, this new adjustment was verified. Furthermore, the accused added that the relevant sub-database for

mailings are renewed (updated) every day after 22:00, and the mailings themselves

business messages are implemented in the night hours after 24:00.

/7/ Furthermore, after assessing the business communication in question sent on February 24, 2020

through the service "XXXXX" which promoted third party products and services, found that

this business communication in the text only contained a link to the website, Facebook

website, telephone contact or e-mail address of a third party (i.e. the entity for whose benefit

and on whose behalf the commercial communication is sent). They were not mentioned in this communication

specific identification (e.g. the name of this third party, ID number, etc.) that would be the addressee

already obvious from the message itself, without the need to find out this information through

I click on the given links.

/8/ On the basis of the state of affairs established in this way, the administrative body of the first instance of the Office issued

an order

no. UOOU-04856/21-4 dated February 28, 2022, by which the accused was found guilty of committing offenses according to § 11 paragraph 1 letter a) points 1 and 3 of Act No. 480/2004 Coll., for which she was imposed a fine of 250,000 CZK. However, the accused filed a timely objection against this order, which in accordance with § 150, paragraph 3 of Act No. 500/2004 Coll., Administrative Code, cancels the order.

/9/ The administrative body of the first instance of the Office therefore continued the proceedings, the result of which was issuance of decision no. UOOU-04856/21-7 dated April 13, 2022 (hereinafter "Decision").

The decision found the accused guilty of committing an offense under § 11, paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., which she committed by repeatedly spreading commercial communication by electronic means in the sense of § 2 letter f) Act No. 480/2004 Coll., when she sent as part of an email campaign dated February 24, 2020, carried out from the email address XXXXX, via the "XXXXX" service, a message with the subject of the message: "We are giving away 10,000 package XXXXX", to e-mail addresses XXXXX and XXXXX and further to approximately 250,000 other recipients, where the addressees did not give their consent to the sending of commercial messages, thereby breaching the obligation established in § 7 paragraph 2 of Act No. 480/2004 Coll., i.e. use the details of the electronic contact for the purpose of disseminating commercial communications by electronic means only in relation to users who have given their prior consent. Furthermore, the accused was recognized by the decision are guilty of committing an offense according to § 11 paragraph 1 letter a) point 3 of Act No. 480/2004 Coll., because in to the above business communication sent on February 24, 2020 through the service "XXXXX" with the subject of the message: "We are giving away 10,000 packs of XXXXX" the person in for whose benefit the communication takes place, thus breaching the obligation set out in § 7 paragraph 4 letter b) of Act No. 480/2004 Coll., i.e. disseminate commercial communications only if these messages indicate the identity of the sender on whose behalf the communication is being made. For committing

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for the aforementioned offenses, the accused was fined 250,000 CZK. However, against the decision the accused filed a proper and timely report.

II.

Decomposition content

/10/ In the dissolution of the accused regarding the offense according to § 11 paragraph 1 letter a) point 1 of the Act No. 480/2004 Coll. stated that she was aware of the unauthorized mailing of the commercial in question communication, however pointed out the fact that it was an unwanted and isolated misconduct, which was at once disclosed to the accused, and immediate measures were taken to protect him repetition and there was no fundamental interference with the privacy of the addressees. The number of these recipients then was determined by the Office only approximately, based on the estimate of the accused herself, which was wrong the mailing was of no use. The accused should therefore be punished for her openness and cooperation with the Office, with a disproportionately high fine.

/11/ Regarding the offense according to § 11 paragraph 1 letter a) point 3 of Act No. 480/2004 Coll. accused stated that the law does not stipulate anywhere that a person whose the benefit of which the communication takes place, but the sender on whose behalf the communication takes place carries out, with which she is currently accused, who was also a partner for the addressees of business communications. Act No. 480/2004 Coll. then it does not contain provisions corresponding to Article 6 letter b) guidelines 2000/31/EC. The Office therefore impermissibly expanded the factual nature of the offense pursuant to Section 11, paragraph 1 letter a) point 3 of Act No. 480/2004 Coll. Even so, the accused edited the headers of XXXXX messages so that they also contained information about the campaign sponsor.

/12/ Therefore, the accused proposed to change the decision, which she considers incorrect, so that it was not proven commission of an offense according to § 11 paragraph 1 letter a) point 3 of Act No. 480/2004 Coll., and reduce the fine imposed.

III.

Applicable law

/13/ Provision § 2 letter f) Act No. 480/2004 Coll. reads: "For the purposes of this Act, the following shall mean:
... f) commercial communication means all forms of communication, including advertising and invitations to visit websites intended to directly or indirectly support goods or services or image

the enterprise of a person who is an entrepreneur or performs a regulated activity."

/14/ Provisions of § 7 paragraph 2 of Act No. 480/2004 Coll. reads: "Electronic contact details can be used for the purpose of disseminating business messages by electronic means only in relation to users who have given their prior consent."

/15/ Provisions of § 7 paragraph 4 letter b) Act No. 480/2004 Coll. reads: "Sending electronic mail for the purpose of disseminating a commercial message is prohibited if... b) hides or conceals identity the sender on whose behalf the communication takes place."

/16/ Provisions of § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll. reads: "The legal entity shall commits an offense by...a) mass or repeated dissemination by electronic means business message...1. without the consent of the addressee.'

/17/ Provisions of § 11 paragraph 1 letter a) point 3 of Act No. 480/2004 Coll. reads: "The legal entity shall commits an offense by...a) mass or repeated dissemination by electronic means commercial communication... 3. concealing or disguising the identity of the sender on whose behalf the communication made."

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/18/ Provisions of § 11 paragraph 2 of Act No. 480/2004 Coll. reads: "A fine may be imposed for an offense up to: ...b) CZK 10,000,000, if it is an offense according to paragraph 1 letter and)." "

IV.

Assessment by the Appellate Body

/19/ The appeal body reviewed the contested decision in its entirety on the basis of the submitted breakdown scope, including the process that preceded its issuance, and first dealt with argumentation accused.

/20/ The appellate authority first states that the law allows commercial messages to be disseminated also for the benefit of another entity. The sender and the entity for whose benefit the commercial communication sends, so it can be different people. Provisions in § 7 paragraph 4 letter b) Act No. 480/2004 Coll. then it contains a condition according to which the identity should be evident from the sent commercial message

the sender on whose behalf the communication takes place. This is precisely the entrepreneur, or a person whose goods, service or image is promoted, which is necessary as part of a commercial mailing to identify the message, and not the person who only carries out the actual mailing. This interpretation also supports the corresponding provisions of Article 6 letter b) Directive 2000/31/EC, which requires that the natural or legal person on whose order the commercial communication takes place was clear recognizable. Regarding this issue, you can also refer to the experienced practice and also to the rubric of questions and the answer to Act No. 480/2004 Coll., listed on the website of the Office, in particular on the answer to question No. 17, which concerns exactly who should be identified in commercial communications with regard to the fulfillment of the condition of the provisions of § 7 paragraph 4 letter b) Act No. 480/2004 Coll.; anyway thus we can recall the decision of the Municipal Court in Prague no. 14 A 242/2018 of April 7 2020. It is therefore necessary to reject the opinion of the accused, according to which the administrative authority of the first instance

The Office impermissibly expanded the factual nature of the offense pursuant to § 11 paragraph 1 letter a) point 3 Act No. 480/2004 Coll.

/21/ For the sake of completeness, the appellate body also reminds that in the text of the commercial communications in question

(XXXXX) sent by the accused, only links to websites and Facebook pages were given

websites, telephone contacts or e-mail addresses of third parties. However, they did not contain specifics identification of the person for whose benefit the message was disseminated. Furthermore, the appellate body refuses to mix provisions of § 7 paragraph 4 letter c) Act No. 480/2004 Coll., prohibiting the sending of business communications without a valid address to which the addressee could directly and effectively send information that he does not wish, that business information be sent to him by the sender, with the provision cited above

§ 7 paragraph 4 letter b) of Act No. 480/2004 Coll., as the accused did as part of the dissolution, since these are two completely different matters, or different obligations regarding commercial mailings communication aimed at providing proper information to the addressee of business communications.

/22/ The appellate body therefore established the commission of an offense pursuant to § 11 paragraph 1 letter a) point 3

Act No. 480/2004 Coll. by the accused in accordance with how he was qualified by the administrative authority first level of the Office. At the same time, however, he considers it necessary to point out that the administrative penalty was in accordance with the law imposed under the provision relating to a more serious offence, whereby was reasonably found to be an offense pursuant to § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll.

/23/ Regarding the offense according to § 11 paragraph 1 letter a) point 1 of Act No. 480/2004 Coll., respectively fine imposed above, the appellate authority refers to the reasoning of the contested decision, with which identified himself. In this context, it is recalled that the number of recipients of erroneous business mailings the message was not determined approximately, as the accused objected in the analysis, but was derived from the information obtained on the basis of the fulfillment of the duty of the accused as part of the control conducted according to the law

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No. 255/2012 Coll., on control (control order), namely from the list documented by the accused during local investigation (cf. point 5. above), from a total of 266,607 e-mail addresses sent by the commercial message in question, for which the accused did not have consent by sending commercial messages for the benefit of third parties, while for the purposes of describing the committed as a matter of fact, in the statement of the decision and the imposition of the fine, this number was rounded, relatively significantly, downwards, i.e. in favor of the accused.

/24/ In addition, it should be noted that the circumstances stated by the accused (including not intentional, unintentional and isolated misconduct, prompt detection of the error and adoption of corrective measures preventing repetitions) were, according to the appeals body, sufficient when determining the amount of the fine taken into account, to fulfill the conditions for the emergence of the responsibility of the accused as a legal entity for however, the committed offense is irrelevant because, as the administrative authority of the first correctly stated degree, culpability is not a condition for criminal responsibility in relation to legal entities (at the same time, however, he correctly pointed out the fact that the actions of a person whose actions are imputable accused, fulfilled at least the signs of unconscious negligence); quick adoption of correctives measures thanks to the proactive approach of the accused, as well as the addition of information about the sender, in which benefit the message is sent, based on the notification of the Office, then they were taken into account as

mitigating circumstances in determining the amount of the fine.

/25/ As a mitigating circumstance, the administrative body of the first instance of the Office when determining the amount fines, he also took into account the low number (two) of complaints received, and thus confirmed the claim alleged that the interference with the privacy of the addressees of the commercial communication was not significant.

Objective

however, the sending of commercial messages to approximately 250,000 addressees remains a reality, in absence consent of the persons addressed. Even without knowing the exact number of recipients of the message in question communicated by the accused

as an operator

of e-mail boxes of mailing addressees has e-mail contacts of users in rows

hundreds of thousands, or up to millions, while, as he claims, he also has consent for a large number of them

with the sending of business messages (as evidenced by the submitted order for mailing 500,000

commercial messages targeting the 45+ age group); i.e. in case of proven sending

XXXXX messages to users who have not given their consent indicates such misconduct in itself,

due to the automated evaluation of the parameters of the mailing during its implementation, on

violations on a large scale.

it can be reasonably assumed that the accused

/26/ The imposed fine could then, in accordance with § 11 paragraph 2 letter b) Act No. 480/2004 Coll. do

up to 10,000,000 CZK. The accused is a professional in a field where there is extensive mailing

commercial communications, which was found to be an aggravating circumstance, as was the fact that

by her actions, the accused committed several offenses under Act No. 480/2004 Coll. A fine of

250,000 CZK (when calculating a penalty of 1 CZK per violation against one addressee) was thus imposed at

the very lower limit of the possible rate, which the appellate authority considers to be

reasonable, also given the uniqueness of the treated misconduct.

/27/ The assessed fine also corresponds to the financial situation of the accused, and therefore does not have liquidation

character. In particular, it should be noted that the fine in question does not exceed the standard one

the amount of fines imposed by the Office in similar cases. The fine mentioned by the accused imposed in the proceedings sub sp. mark UOOU-05291/17 did, however, also relate to the dissemination of business communications

without a legal title, but an entity with a significantly less significant position on the market,

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apparently to a significantly lower number of addressees (cf. above), while the originally imposed fine in the amount of CZK 118,125 was reduced to CZK 80,000 due to the documented financial situation.

/28/ The accused's argument that she did not show any benefit from the erroneously sent mailing, administrative the first instance body of the Office correctly evaluated as irrelevant for the assessment of responsibility for a misdemeanor; however, it contributes to the credibility of others as part of the evaluation of factual statements the claim of the accused, namely that there was no intentional or systematic violation on her part.

/29/ Therefore, the appellate body rejected the argument of the accused and did not find it after an overall review no errors causing illegality in the procedure of the first-level administrative body of the Office decision.

/30/ For all the above-mentioned reasons, the appellate body therefore decided as stated in statement of this decision.

Lesson learned:

this decision in accordance with the provisions of § 152 paragraph 5 of the Act

Against

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

Prague, July 11, 2022

M.Sc. Jiří Kaucký

chairman

(electronically signed)

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