No. 14 A 242/2018 – 40 Conformity with the original is confirmed by: M. V. CZECH REPUBLIC JUDGMENT ON BEHALF OF THE REPUBLIC The Municipal Court in Prague decided in a panel composed of President Štěpán Výborný and judges Karla Cháberová and Jan Kratochvíl in the case of the plaintiff: Widder Gilde s.r.o., IČO 051 01 034 registered office Zámostní 1155/27, Slezská Ostrava, Ostrava represented by attorney Mgr. Jiří Wytrzens with the headquarters of Politických vězňů 935/13, Prague 1 against the defendant: Office for the Protection of Personal Data with the headquarters of Pplk. Sochora 27, Prague 7 on the lawsuit against the decision of the Chairperson of the Office for the Protection of Personal Data of 27 September 2018, no. UOOU-05291/17-44, t a k t o : I. The lawsuit is dismissed. II. None of the participants is entitled to compensation for the costs of the proceedings. Arguments: I. Definition of the case and the course of the proceedings before the administrative body 1. The plaintiff, with the filed lawsuit, seeks the annulment of the decision indicated in the header, which rejected its dissolution and confirmed the decision of the Office for the Protection of Personal Data dated 6.5. 2018, No. UOOU-05291/17-38, by which the plaintiff was found guilty of committing offenses pursuant to § 11 paragraph 1 letter a) points 1 and 2 of Act No. 480/2004 Coll., on certain information services 14 A 242/2018 Conformity with the original is confirmed by: M.V. 2 of the company and on the amendment of certain laws, as amended (hereinafter referred to as "the Act on certain information services company"), for which he was fined 80,000 CZK. 2. From the content of the administrative file, the court found the following facts that are essential to the case. 3. The defendant inspected the plaintiff from 3 November 2017 to 8 February 2018. The basis for the initiation of the inspection were complaints about the dissemination of unsolicited commercial messages. The subject of the inspection was compliance with the obligations arising from the Act on Certain Information Society Services relating to the sending of business communications using electronic means. 4. During the proceedings, the plaintiff repeatedly claimed that the entity responsible for sending commercial messages can only be his partner, the company POLITEKS LTD, with its registered office at Peremogy str. 170, 880 00 Uzhgorod, Ukraine, ID number: 326 37 205 (hereinafter referred to as "partner"). The plaintiff drew attention to Article 3.1 of the contract concluded between him and the partner, according to which the partner undertook to promote his services for the plaintiff, including by sending messages about the plaintiff's products and services to e-mail addresses, for which the partner will have the consent of third parties. At the same time, in the contract, the plaintiff's partner expressly stated that the organization of the marketing campaign for the plaintiff would in no way violate legal regulations. The contracting parties also agreed that the plaintiff himself will not send any advertising messages and will not be given any personal data of third parties. The plaintiff also immediately contacted the

partner after being notified of a possible illegal act, but the latter assured him that he had consents to send commercial messages. 5. Based on the inspection findings, the defendant issued an order dated 26/02/2018, no. UOOU-05291/17-33, in which he found the plaintiff guilty of committing offenses pursuant to § 11 paragraph 1 letter a) points 1 and 2 of the Act on Certain Information Society Services, for which he imposed a fine of CZK 118,125. The plaintiff filed an objection against the order. 6. The defendant subsequently issued a decision dated 5 June 2018, no. UOOU-05291/17-38, by which he found the plaintiff guilty of committing an offense pursuant to § 11 paragraph 1 letter a) point 1 of the Act on Certain Services of the Information Society, because he repeatedly disseminated commercial messages to the electronic addresses specified in the statement (14 cases in total), without having the consent to send them or being customers within the meaning of Section 7, Paragraph 3 of the Act on some services of the information society, and also from the offense according to § 11 paragraph 1 letter a) point 2, because the commercial messages marked in the statement (3 cases) were disseminated without proper marking in the sense of § 7 paragraph 4 letter a) of the Act on Certain Information Society Services. A fine of CZK 80,000 was imposed on the plaintiff for the above-mentioned conduct. 7. In the statement of reasons, the defendant stated, among other things, that the plaintiff did not prove in any way that his partner had been granted consent to send business communications in favor of the plaintiff. He further pointed out that there is objective responsibility for the dissemination of commercial messages without the consent of the addressees, while legal obligations cannot be waived by contractual transfer of responsibility. The administrative body of the first degree justified the moderation of the amount of the fine by taking into account the documented corporate income tax return, from which it follows that at the end of 2016 the plaintiff was in a loss of CZK 191,274. 8. Regarding the dissolution of the plaintiff, the president of the defendant confirmed the first-instance decision. 9. In the justification, it stated that there was a harmful consequence foreseen by law, namely an interference with the privacy of the addressees of commercial communications, or their harassment. This happened as a result of mass or repeated dissemination of commercial communications by electronic means in favor of the plaintiff, without the consent of the addressee, or without properly labeling them as commercial communications. 10. The chairman of the defendant considered it proved that the actual sending of commercial messages took place at the will of the plaintiff based on the sending order issued by him. At the same time, it is undecided which predominant type of contract he concluded with the partner, as this contract is exclusively binding inter partes. Although the plaintiff cannot be denied the right to act freely at his discretion in private law matters, public law, including administrative responsibility for misdemeanors, is applied separately 14 A 242/2018

Concordance with the original is confirmed by: M. V. 3 and independently, while the contract cannot have any effects vis-à-vis the supervisory authority. In addition, the law assumes that the disseminator can spread the commercial message not only by his own efforts, but also through another entity, when according to § 7 paragraph 4 letter b) of the Act on Certain Information Society Services and conversely, every commercial communication must contain information about the sender on whose behalf the communication is made, or for whose benefit the commercial communication is disseminated. 11. The provisions of § 7 and § 11 of the Act on Certain Information Society Services must also be seen in the context of Act No. 101/2000 Coll. personal data"). In the given case, the plaintiff determined both the purpose and the means of personal data processing, thereby fulfilling the definition of a personal data controller in the sense of § 4 letter j) of the Act on the Protection of Personal Data, whereby it is the primary duty of the controller to ensure compliance of the processing with legal conditions. If it were possible to contractually transfer the responsibility for the illegal dissemination of commercial messages to another entity, including entities outside the local jurisdiction of state authorities, the principles of personal data protection, as well as privacy in the general sense of the word, would be completely nullified, at the current profit of the sender of business communications, who initiated and managed the actual mailing process. 12. Furthermore, the chairwoman of the defendant stated that § 11, paragraph 1 of the Act on Certain Information Society Services is constructed on the basis of objective responsibility, i.e. responsibility for a legal situation, where there is no need to examine the culpability of an illegal situation in relation to a legal entity. For this reason, those persons who gave an instruction, order, concluded a contract, or otherwise initiated the actual sending of commercial communications should also be considered as disseminators of commercial communications. And it was proven that for the contacts mentioned in the statement, the plaintiff did not have a legal title for the dissemination of commercial communications, nor did he verify in any sufficiently convincing manner that such legal titles were available to his partner, with whom he concluded a contract for the purpose of sending commercial communications. Moreover, in a situation where the plaintiff has been repeatedly warned about the illegality of the mailing, the mere verbal assurance of the partner cannot be considered as sufficient fulfillment of the reasonably expected steps to verify and ensure the legality of the further dissemination of business communications. 13. The president of the defendant then rejected that the amount of the imposed fine was disproportionately high. II. Content of the action 14. The plaintiff objects that the contested decision does not reflect the actual wording of the Act on Certain Information Society Services. The defendant cannot assess the meaning and purpose of this law on the basis of Directive No. 2002/58/EC of the European Parliament and Council on the processing of personal

data and the protection of privacy in the electronic communications sector (hereinafter referred to as "Directive No. 2002/58/EC"). Moreover, when interpreting what is prohibited, the state authority must interpret the obligations restrictively rather than expand them by interpretation. And opinions published on the defendant's website cannot be generally binding. 15. Plaintiff states that he was not the disseminator or sender of commercial communications via electronic mail and denies that he should be responsible for the actions of the partner. The latter undertook to carry out a marketing campaign for the plaintiff, while no legal regulation imposes an obligation on the plaintiff to verify whether the sender of commercial messages has all the permits it should have available. The plaintiff contractually bound the partner to the obligation to comply with legal regulations and explicitly had it confirmed that the partner has consents (the defendant greatly downplays the communication between the plaintiff and the partner). From the plaintiff's point of view, it is an exculpatory ground in the sense of § 21 of Act No. 250/2016 Coll., on liability for misdemeanors and their proceedings, as amended (hereinafter referred to as the "Act on Liability for Misdemeanors"). And the plaintiff is not aware that the defendant has initiated administrative proceedings against the partner, when, moreover, due to the nature of the matter, both entities cannot be responsible for one illegal act at the same time. 14 A 242/2018 Conformity with the original is confirmed by: M. V. 4 16. The plaintiff refers to the conclusions of professional literature, which does not equate the concepts of dissemination of a commercial message and dissemination of a commercial message by electronic means. Here too, according to the plaintiff, the defendant acts quite extensively. Plaintiff does not meet the definition of a spreader in general because he was only communicating as part of a business relationship with a partner. The plaintiff cannot then be considered as a spreader by electronic means, since he was not the sender of commercial messages via emails. The plaintiff points out that he had no real opportunity to verify whether the partner had been granted consent. For this reason, he already explicitly enshrined in the contract the contractual obligation of the partner to comply with legal regulations and was subsequently in good faith in fulfilling the contract. 17. The plaintiff therefore claims that he did not commit a legal act by which he would spread commercial communications in the sense of Section 7 of the Act on Certain Information Society Services, and therefore cannot be held responsible for the offense committed. The plaintiff refers to the commentary literature, according to which it is not possible to impose a sanction for a misdemeanor or an administrative offense on an entrepreneur who initiates the sending of commercial communications in violation of Section 7, Paragraph 4 of the Act on Certain Information Society Services. The plaintiff did not give specific instructions for specific shipments, so he could have committed an offense only and only by concluding the contract, because he did not actually do anything else. In

addition, the contract was concluded on 12 August 2016, i.e. before the Act on Liability for Misdemeanors came into force. Thus, the administrative authorities applied the wrong material-procedural regulation in the proceedings. 18. The plaintiff further objects that the general definition of the offense presupposes culpable conduct, which cannot be found on the part of the plaintiff even in the form of negligence. 19. The plaintiff objects that the interpretation put forward by the defendant is contrary to paragraph 60 of the preamble of Directive No. 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market (hereinafter referred to as "Directive No. . 2000/31/EC"). 20. The plaintiff also rejects his responsibility for the offense according to § 11 paragraph 1 letter a) point 2 of the Act on Certain Services of the Information Society, because here the objective responsibility is even more absurd than in the case of the control of consents. Here, too, the plaintiff emphasizes that he did not disseminate any commercial messages by electronic means. At the same time, he did not fulfill another prerequisite, namely the mass or repetition of dissemination, because the only communication of the documents for the business communication was communicated to the partner. With its interpretation, the Office de facto prevents normal business, when it forces the sponsor of a marketing campaign to check every output of its implementer. 21. The plaintiff also objects that the amount of the fine imposed on him is liquidating for him (despite its reduction). III. Statement of the defendant 22. In his statement, the defendant rejected the plaintiff's objections and referred to the justification of the contested decision. 23. The defendant states that the interpretation of a legal norm cannot be limited to its linguistic interpretation. Although the directives cannot be given direct effect, from the meaning of their adoption, i.e. the harmonization of law, it is clear that they cannot be dispensed with when interpreting national law. It follows from Directive No. 2000/31/EC and from Directive No. 2002/58/EC that the sender of commercial communications must be considered the person on whose order the commercial communication takes place, i.e. the person whose goods, services or image is marketing activity supported. 24. The defendant insists on the opinion that the plaintiff is the person responsible for the dissemination of commercial communications identified in the statement of the first instance decision. At the same time, it is a continuing delict, which is assessed according to the legislation effective at the time of the last partial attack against the interest protected by law, i.e. at the time of dissemination of the last commercial communication. Thus, the act cannot be assessed through the lens of Act No. 200/1990 Coll., on misdemeanors, as amended (hereinafter referred to as the "Misdemeanor Act"). 14 A 242/2018 Conformity with the original is confirmed by: M. V. 5 25. In the opinion of the defendant, the contested decision cannot be perceived as an excess, moreover, in direct contradiction to the

judgment of the Municipal Court in Prague dated 27.9.2017, file no. 5 A 82/2014-45, as stated by the plaintiff. 26. The defendant believes that it is the duty not only of the actual spreader, but also of the person who, for the purpose of his promotion, issued an order for such dissemination or initiated it in another way, to spread the commercial message in a legal way. Obligations from contracts and their possible violations are dealt with within the framework of liability arising from the contractual relationship. 27. In the defendant's opinion, the awarded fine fully corresponds to the circumstances and seriousness of the plaintiff's actions and is properly justified. At the same time, it was already moderated and reduced to the lowest limit of the possible rate by the administrative body of the first degree against the order. Any further reduction would especially devalue the preventive function of the fine, as the plaintiff was repeatedly warned about the need to ensure the legality of the procedure before it was imposed. IV. Assessment of the claim by the Municipal Court in Prague 28. The court decided on the matter without ordering an oral hearing in accordance with § 51 paragraph 1 of Act no. 150/2002 Coll., of the Administrative Code of Court, as amended (hereinafter referred to as "s. s. s."), as the participants accepted such court procedure. 29. Pursuant to Section 75 of the Civil Procedure Code, the court reviewed the decision contested by the lawsuit, as well as the proceedings that preceded its issuance, to the extent of the points of illegality alleged by the lawsuit, by which it is bound, according to the factual and legal situation on the date of the decision contested by the lawsuit, and concluded that the claim was without merit. 30. Pursuant to Section 7, Paragraph 1 of the Act on Certain Information Society Services, commercial communications may be disseminated by electronic means only under the conditions stipulated by this Act. 31. Pursuant to Section 7, Paragraph 2 of the Act on Certain Information Society Services, electronic contact details may be used for the purpose of disseminating commercial communications by electronic means only in relation to users who have given their prior consent. 32. According to § 7 paragraph 4 letter a) of the Act on Certain Information Society Services, sending electronic mail for the purpose of disseminating a commercial message is prohibited, unless it is clearly and clearly marked as a commercial message. 33. According to § 7 paragraph 4 letter b) of the Act on Certain Services of the Information Society, sending electronic mail for the purpose of disseminating a commercial message is prohibited if it hides or conceals the identity of the sender on whose behalf the communication takes place. 34. According to § 11 paragraph 1 letter a) point 1 of the Act on Certain Services of the Information Society, a legal entity commits an offense by mass or repeatedly disseminating commercial communications by electronic means without the consent of the addressee. 35. According to § 11 paragraph 1 letter a) point 2 of the Act on Certain Services of the Information Society, a legal entity commits an offense by mass or repeatedly

disseminating commercial communications by electronic means that are not clearly and distinctly marked as commercial communications. 36. According to § 11 paragraph 2 letter b) of the Act on Certain Information Society Services, a fine of up to CZK 10,000,000 can be imposed for an offense if it is an offense according to paragraph 1 letter and). 37. The court first emphasizes that, in general, sending unsolicited commercial messages is undesirable, as the sender transfers a decisive part of the costs of the marketing campaign to someone else. The costs of distribution are mainly borne by internet service providers and by extension also their beneficiaries (time or financial). In addition, sending them can disrupt the proper functioning of interactive networks, mail servers can be overwhelmed, etc. Nevertheless, sending unsolicited business messages is widely used in the field of marketing, because the costs of the sender of such messages are minimal and the message sent by him can reach a large number of people. addressees. 14 A 242/2018 Conformity with the original is confirmed by: M. V. 6 38. The protection of privacy in electronic communication is ensured by a number of laws (in addition to those mentioned below, e.g. the Civil Code or the Act on the Regulation of Advertising). However, in the case of sending marketing offers via e-mail, other Internet communication systems, text messages to mobile phones, etc., the law on certain information society services must first be applied. From the point of view of privacy protection, this acts as a special law, which has application priority over the general law, then before the Personal Data Protection Act, which generally regulated under what circumstances it is possible to process personal data for the purpose of offering business or services (see § 5 para. 5 of the cited law). Both of these laws regulated the protection of privacy against harassing communications, but the Act on Certain Information Society Services targeted (and targets) exclusively a narrow group of commercial communications disseminated by electronic means. However, the Personal Data Protection Act, as a general legal regulation also regulating the protection of individual privacy from annoying advertising and marketing communications, could not be ignored when interpreting the Act on Certain Information Society Services. The reason lay primarily in the torso-like regulation of the dissemination of commercial communications by electronic means in the Act on Certain Services of the Information Society, while it is clear that the interpretation of some general terms had to be subject to the meaning and content of the Act on Personal Data Protection. 39. At the same time, the court reminds that, in accordance with the theory of law, in the case of the lex specialis derogat generali rule, one can speak more about the relationship between individual norms, i.e. the rules of conduct whose conflict is assessed, than between individual legal regulations (see the judgment of the Supreme Administrative Court of 29 March 2007, No. 2 As 12/2006–111). Thus, it is necessary to determine which legal regulation is special in relation to each legal norm, respectively in

relation to each of the controversial issues currently being resolved. 40. In the matter in question, the plaintiff primarily questions whether he could be considered an entity disseminating the commercial messages in question, although he was not their direct sender. 41. The Act on Certain Services of the Information Society within the definitional provisions (see § 2 of the cited Act) defines only service providers (§ 2 letter d) and users (§ 2 letter e) from the point of view of entities involved in the dissemination of commercial communications by electronic means. It further defines commercial communication (§ 2 letter f) as all forms of communication, including advertising and invitations to visit websites, intended to directly or indirectly support the goods or services or the company image of a person who is an entrepreneur or performs a regulated activity. However, the concept of dissemination of commercial communication, which is dealt with in § 7 of the cited Act, is not defined by the Act on Certain Information Society Services. The law then does not enshrine the concept of commercial communication disseminator at all, but generally finds any legal entity that disseminates commercial communication by electronic means responsible for breaching the obligations set out in § 7 of the relevant law. 42. Due to the absence of a closer definition of the concepts of dissemination and disseminator of commercial communication by electronic means in the Act on Certain Services of the Information Society, it is therefore necessary to interpret their meaning in accordance with the general principles on which the Act on Certain Services of the Information Society is based, and with the general legislation contained in the Personal Data Protection Act. 43. Directive No. 2000/31/EC and Directive No. 2002/58/EC were transposed into the legal order of the Czech Republic by the Act on Certain Information Society Services. Directive No. 2000/31/EC defined the basic rules regarding the sending of unsolicited commercial messages, and Directive No. 2002/58/EC established the protection of personal data of natural persons as well as the legitimate interests of legal entities in connection with electronic communications. In the same way, the basic ideological premise of the Act on Certain Information Society Services is to strengthen the protection of the privacy of users of information society services, which can be any natural or legal person. At the same time, it is clear that the legislator is trying to ensure that the user does not have to pay any costs for commercial communications sent by e-mail that he did not request and which, as a result, annoy him. The basic purpose of the adoption (not only § 7) of the Act on Certain Information Society Services was therefore to protect the addressee from sending unsolicited commercial messages (including the proper identification of these messages and their originator), to prevent costs related to unsolicited commercial messages, and at the same time to transfer obligations to their spreaders (all this while maintaining the possibility of electronic contracting). 44. These reasons must create interpretive starting points for the interpretation of Section 7 and Section 11 of the

Act on Certain Information Society Services, as an interpretation that would deny their meaning and purpose cannot be accepted. 45. And thus the court must agree with the defendant that a person who spreads business messages by electronic means cannot be considered only their direct sender, but also the person who initiated their sending, gave an order for it or also profited from it. If the legislator's aim was primarily to protect the addressees of commercial communications from annoying marketing actions, the interpretation of the legal norms in question must correspond to this intention. The opposite interpretation, i.e. that only the actual sender is responsible for dissemination, would render the legal norms in question essentially ineffective, since in the current digital world, the actual spreader of a commercial message could very easily get rid of his responsibility by entrusting another person with the sending of commercial messages, typically one that would be outside the reach of Czech public authorities. In addition, one cannot ignore the fact that the law on certain information society services does not talk about the obligations of the one who sends out a commercial message, but of the one who spreads it. And in this way, it is necessary to consider as a spreader of commercial messages by electronic means not only the entity that actually "clicks on the mouse" to send out the given commercial messages, but the entity that initiated their dissemination to the final addressees. 46. After all, this interpretation also corresponds to the text of Directive No. 2002/58/EC, which states in Article 13, paragraph 4, that "in any case, the practice of sending electronic mail for direct marketing purposes must be prohibited if it hides or conceals the identity of the sender on whose behalf the message is transmitted, or send it without a valid address to which the recipient could send a request to stop sending such messages. It clearly follows from the cited legal norm that the key entity is not the sender, but the entity on whose behalf the message is transmitted. And this is clearly how the plaintiff acted in the given case, because the goods in question were offered on behalf of the plaintiff and the plaintiff's partner acted here only as a direct sender of commercial messages. In addition, the defendant correctly drew attention to the fact that the relevant article of the directive in its original wording even refers to the sender on whose behalf or on whose behalf the communication is made ("identity of the sender on whose behalf the communication is made"). In this sense, there can be no doubt at all that the plaintiff can be considered a person who disseminated commercial communications within the meaning of Article 13, Paragraph 4 of Directive No. 2002/58/EC and, by extension, also § 7 of the Act on Certain Information Society Services , which represents the transposition of the relevant article of the directive. 47. At the same time, the court cannot accept the plaintiff's reference to paragraph 60 of the preamble of Directive No. 2000/31/EC, according to which "in order to enable the undisturbed development of electronic commerce, the legal framework must be clear and simple, predictable and

coherent with the rules applicable at the international level, in order not to undermine the competitiveness of European industry and not to hinder innovative measures in this sector. This general statement in no way precludes an adequate interpretation of the statutory provisions, including the above interpretation of Section 7 of the Act on Certain Information Society Services. On the contrary, the court must remind that Article 6 letter b) of this directive explicitly stipulates that the natural or legal person on whose order the commercial communication takes place must be clearly identifiable. In other words, even this directive supports the interpretation put forward by the defendant and the court, that when sending commercial messages by electronic means, the "mechanical sender" does not have a fundamental position, but rather the "actual spreader", who initiated the sending of commercial messages by electronic means. 14 A 242/2018 Conformity with the original is confirmed by: M. V. 8 48. Regarding the applicability of the directives in the interpretation of § 7 of the Act on certain services of the information society, the court notes that the administrative authorities and courts of the member state have the national right to interpret as much as possible in accordance with the wording and the purpose of the directive and also to apply it in such a way as to achieve the objective pursued by the directive. The only exception is situations where the interpretation of the directive would expand or even create new facts or otherwise tighten the conditions of individual liability for public law offenses established by national law (see judgment of the Supreme Administrative Court of 17 June 2010, no. 7 As 16 /2010 – 64). However, this did not occur in the case under consideration, as the defendant (as well as the court subsequently) only used the wording of the directive in a supportive manner when interpreting the concept of dissemination of commercial communications contained in the applied standard. However, he did not expand the factual nature of the offense beyond the permitted framework, but applied it in such a way that it corresponded to the meaning of the law and the objectives of the directive. 49. On the basis of the above, it can therefore be concluded that from the meaning of § 7 of the Act on Certain Information Society Services, it follows that the entity that disseminates a commercial message cannot be considered only the direct sender of this message, but rather the entity that initiated its sending and on whose behalf there was their spread. And the same conclusion can also be reached by a supporting interpretation of the Personal Data Protection Act. 50. The Personal Data Protection Act included the concept of dissemination in a demonstrative example of the processing of personal data (Section 4 letter e) of the cited Act). The processing of personal data, i.e. also their dissemination, was carried out by the personal data administrator, as it follows from § 4 letter j) of the Personal Data Protection Act. 51. According to § 4 letter j) of the Act on the Protection of Personal Data means any entity that determines the purpose and means of personal data processing, carries out the processing and is

responsible for it. The defining feature of the controller was therefore primarily the fact that it determines the purpose of personal data processing. The purpose of the processing had to be understood as the goal to be achieved by the processing of the given data and in the specified manner, i.e. the meaning and reason for the processing as such. The second defining feature of the administrator was that he determines the means of personal data processing, that is, he determines the technical procedure by which personal data will be processed. These two defining features were essential for determining the administrator of personal data, since the administrator could already authorize or entrust the processor with the processing of personal data, unless a special law provided otherwise (see the second sentence of the cited provision, which regulated the possibility of transferring the processing to another entity different from the administrator). Even if he did not carry out the processing, he remained a data controller within the meaning of the Personal Data Protection Act, because he decided on it and chose its purpose and the means used. In such a situation, he was objectively responsible for the processing of personal data, even though the processing as a whole is actually carried out for him by a different entity. 52. If the court assessed the plaintiff's case against these conditions, it concluded that the plaintiff acted as a personal data controller. First of all, it cannot be disputed that the plaintiff determined the purpose of personal data processing. After all, this follows from the contract on marketing cooperation concluded between him and the partner, in which the partner's obligation to organize a marketing campaign for the benefit of the plaintiff is stated as the subject of the contract. In the same way, the contract in question clearly defines the means of personal data processing, where in point 3.1 it defines how the partner will promote the plaintiff's products and services. And it cannot be disputed that it was not the partner as a provider of advertising services, but the plaintiff who determined how the marketing campaign would take place. 53. As already mentioned, the plaintiff, as the controller of personal data, could then transfer their processing to another entity, because the Act on the Protection of Personal Data excluded the transfer only in situations where it was prohibited by a special law. However, the Act on Certain Information Society Services does not do so, on the contrary, in § 7 paragraph 1 letter b) expressly takes into account that the person of the sender may be different from the person on whose behalf the communication takes place. Therefore, the plaintiff could be considered a personal data administrator even though he authorized his partner to distribute business communications. 14 A 242/2018 Conformity with the original is confirmed by: M. V. 9 A based on their contractual arrangement, the data manager was not exempted from the obligations of the data controller resulting from legal regulations. 54. Therefore, if the plaintiff acted as a personal data administrator in the given case, it was his duty to ensure that personal data were also processed in

accordance with the then valid Personal Data Protection Act. And in this way it was also possible to derive his obligations according to Section 7 of the Act on Certain Information Society Services, as the cited provision represented a special norm to Section 5, Paragraph 5 of the Act on the Protection of Personal Data for cases where commercial communications are disseminated by electronic means. 55. For all the above-mentioned reasons, the court therefore concludes that the plaintiff disseminated the commercial communications in question by electronic means within the meaning of Section 7 of the Act on Certain Information Society Services. At the same time, according to the court, the above interpretation cannot be considered impermissibly expansive, as it only follows the main goal and purpose of the applied law, without expanding the range of entities that may be affected by the given offenses beyond its wording. And the plaintiff's references to the wording of the commentary literature do not change the stated conclusions, as they are in no way binding on the court. 56. The above interpretation is not based solely on the opinion published by the defendant on its website, but is based on the legal regulation of privacy protection against the sending of unsolicited commercial communications. The court agrees with the plaintiff that the defendant's published opinions cannot be attributed general legal binding. At the same time, however, it cannot be overlooked that the issuance of the aforementioned opinion could not have created a legitimate expectation in the plaintiff that his interpretation of the legal norm is correct, and therefore this objection of his also does not hold up. 57. The plaintiff is therefore responsible for non-compliance with obligations relating to the dissemination of commercial communications by electronic means in the cases under consideration, while his responsibility for non-compliance with legal obligations cannot be related only to the conclusion of the contract, but to the entire process of dissemination of commercial communications by electronic means. It was the plaintiff's duty to ensure that commercial communications by electronic means were disseminated only with the prior consent of the addressees and at the same time were clearly and distinctly marked as commercial communications, and if he did not do so, he is responsible for breaching the obligations arising from the Act on Certain Information Society Services. 58. And the plaintiff cannot transfer his responsibility to his contractual partner. To this, the court adds that the responsibility of legal entities for an offense according to Section 11 of the Act on Certain Information Society Services is an objective responsibility. Therefore, if it has been objectively established that there has been a breach of legal obligations, the plaintiff cannot absolve himself of responsibility for their breach by referring to a contractual arrangement or by referring to a breach of obligations by the contractual partner. The court is aware of the limited possibilities of the plaintiff to ensure that the actual sender of commercial communications complies with the rules given by law. However, this fact does not change the

plaintiff's responsibility for any failure to comply with legal obligations, as he was still the one who disseminated the business communications in question. The possible application of a recourse claim against the contractual party that did not comply with the contractual terms and violated the legal provisions does not represent a point of view that would be decisive for the administrative authorities when deciding on responsibility for the offense committed. 59. At the same time, the court points out that in the case of strict liability, it is not necessary to examine the perpetrator's culpability, as it is a matter of responsibility for an illegal result independent of the perpetrator's culpability. The mere fact of violation or non-fulfilment of the obligations established by law is sufficient to establish liability. Therefore, the plaintiff's objection that he cannot be found to have acted culpably, even in the form of negligence, cannot be justified either. 60. If the plaintiff invokes § 21 of the Act on Liability for Misdemeanors, according to which a legal entity is not liable for a misdemeanor if it proves that it made all the efforts that could be required to prevent the misdemeanor, the court reminds that the making of all the efforts that were possible to demand does not mean any effort that the legal entity makes, but it must be the maximum possible effort that the legal entity is objectively capable of making. Here, too, 14 A 242/2018 confirms the agreement with the original: M. V. 10 applies that the release of liability does not occur by reference to a contractual arrangement or by reference to a breach of duty by the contractual partner (judgment of the Supreme Administrative Court of 9 February 2011, no. j. 1 As 112/2010-52). Therefore, the contractual arrangement between the plaintiff and his partner does not establish a reason for liberation. And the plaintiff's communication with his partner, on the basis of which the plaintiff should have been assured of the fulfillment of legal obligations, cannot be considered as an exculpatory reason either. In order to be exonerated of responsibility for the offense committed, the plaintiff would have to make a significantly greater effort to demonstrate compliance with the law than simply accepting this partner's claim. The court did not find this objection justified either. 61. The illegality of the contested decision cannot be based on the plaintiff's claim that the defendant did not initiate administrative proceedings against the partner. First of all, the court must reject that both entities (i.e. the plaintiff and the partner) could not be responsible for the dissemination of business communications due to the nature of the matter. This is because in the event that part of the processing of personal data is carried out by the processor on behalf of the controller, both are responsible. At the same time, however, the court considers the question of the partner's possible tort liability to be irrelevant from the point of view of the plaintiff's responsibility for his actions. Even the fact that another person would not be affected for a potential illegal act cannot establish a legitimate expectation for the plaintiff that he himself will not be affected for his own illegal act. 62. In view of the above, the plaintiff's

objection that the contract between him and the partner was concluded before the law on liability for misdemeanors came into force does not stand either. The plaintiff was not affected for the conclusion of the contract, but for the sending of individual commercial communications, and this is also how the temporal scope of the applied standards must be assessed. The actions of the plaintiff fulfilled the signs of an ongoing offence, while according to § 2 letter a) of the Act on Liability for Misdemeanors, in the case of a continuing offence, the law in force at the time of the last partial attack shall apply. In the given case, the last partial tortious action took place on 23 November 2017, i.e. already before the Act on Liability for Misdemeanors came into force, and the administrative authorities therefore correctly applied this Act to the matter. 63. The court does not consider the plaintiff's reference to the conclusions of the judgment sp. No. 5 A 72/2014 (incorrectly referred to by both the plaintiff and the defendant as judgment no. 5 A 82/2014 - note of the court). In this judgment, the local court assessed the responsibility of an entity that provided a marketing campaign for another company, but this in no way excludes the possibility of punishment for the person who commissioned the marketing campaign as well. In this judgment, the court did not deal with the issue of the responsibility of individual entities for committing offenses under the Act on Certain Information Society Services, so the plaintiff's reference to the facts of this case cannot have a major impact on the assessment of the current case. 64. And the court cannot also accept the plaintiff's objection that he did not fulfill the requirement for the volume or frequency of dissemination of commercial communications. Re-distribution of commercial communications occurs when it is sent more than once. Mass as a sign of factual substance is fulfilled in the case where the offender sends commercial messages to multiple electronic contacts. It clearly follows from the content of the administrative file (mainly from the individual initiatives sent to the defendant) and the contested decisions that the plaintiff disseminated commercial communications repeatedly, as the judgment of the first-instance decision already lists 14 cases in which he disseminated commercial communications without the consent of the addressee, and 3 cases where the commercial message was not properly marked. Therefore, the element of repetition was fulfilled without dispute in the given case, and in this situation it was no longer necessary for the plaintiff to also fulfill the element of mass (see the conjunction or contained in § 11, paragraph 1, letter a) of the Act on certain services of the information society). 65. Regarding the objection to the liquidation amount of the fine, the court states that the obligation to take into account the personal and property circumstances of the offender falls on the administrative authority only if, based on the person of the offender and the amount of the fine that can be imposed, it is clear that the fine could have a liquidation nature (cf. . resolution of the extended senate of the Supreme Administrative Court of 20 April 2010, No. 1 As 9/2008-133, No.

2092/2010 Coll. NSS). In other words, the administrative authorities with property 14 A 242/2018 Conformity with the original is confirmed by: M. V. 11 circumstances of the accused must deal with the circumstances of the accused only if it follows from his statement, from the file or from the amount of the imposed fine that a liquidating effect could occur. When ascertaining personal and property circumstances, the administrative body must base itself on information that emerged during the proceedings or that was provided by the party to the proceedings. 66. In the case now being dealt with, the administrative authorities proceeded in this way, when they originally reduced the fine imposed by order to CZK 80,000, taking into account the established loss of the plaintiff at the end of 2016 in the amount of CZK 191,274 (first-instance decision), respectively the loss of CZK 66,039 in in 2017 (second instance decision). Despite this declared accounting loss, however, the court agrees with the defendant that the fine set at CZK 80,000 can be considered reasonable for the plaintiff's economic situation. In the case under consideration, the plaintiff was sanctioned for two administrative offenses consisting of a total of 17 partial illegal acts, and the fine was imposed at the very bottom of the legal range (in the amount of 0.8%). At the same time, the reference to the alleged liquidation amount of the fine cannot excuse and condone criminal behavior - the purpose of assessing the economic situation of the delinquent is that the imposed penalty does not actually mean his liquidation. However, this assessment certainly does not mean that any adverse economic consequence to the delinquent's property sphere would lead to the conclusion that the fine cannot be imposed. A fine is a punishment, and one of its aspects is, among other things, to economically disadvantage those entities that violate legal obligations, thus preventing them from gaining a competitive advantage at the expense of other entities operating on the same market. Therefore, the court does not believe that the payment of the fine would have liquidation effects for the plaintiff (all the more so since the fine could have been paid in installments). V. Conclusion 67. The plaintiff therefore failed with his objections; since no defects came to light in the proceedings on the claim, which must be taken into account as a matter of official duty, the municipal court dismissed the claim as unfounded. 68. The court decided on the reimbursement of the costs of the proceedings in accordance with § 60, paragraph 1 of the Criminal Procedure Code. The plaintiff was not successful in the matter, and therefore has no right to the reimbursement of the costs of the proceedings; the defendant did not incur any costs in the proceedings on the claim beyond the scope of normal official activity. Lesson learned: A cassation complaint can be filed against this decision within two weeks from the date of its delivery. The cassation complaint is submitted in two (more) copies to the Supreme Administrative Court, with its seat at Moravské náměstí 6, Brno. The Supreme Administrative Court decides on cassation appeals. The time limit for

filing a cassation complaint ends with the expiration of the day which, with its designation, coincides with the day that determined the beginning of the time limit (the day of delivery of the decision). If the last day of the deadline falls on a Saturday, Sunday or holiday, the last day of the deadline is the closest following business day. Missing the deadline for filing a cassation complaint cannot be excused. A cassation complaint can only be filed for the reasons listed in § 103, paragraph 1, s. s. s., and in addition to the general requirements of the filing, it must contain an indication of the decision against which it is directed, to what extent and for what reasons the complainant is challenging it, and an indication of when the decision was delivered to him. In cassation appeal proceedings, the complainant must be represented by a lawyer; this does not apply if the complainant, his employee or a member acting for him or representing him has a university degree in law which is required by special laws for the practice of law. 14 A 242/2018 Compliance with the original is confirmed by: M. V. 12 The Supreme Administrative Court collects the court fee for the cassation complaint. The variable symbol for paying the court fee to the account of the Supreme Administrative Court can be obtained on its website: www.nssoud.cz. Prague, April 7, 2020 JUDr. PhDr. Štěpán Výborný, Ph.D., former chairman of the senate