No. 14 A 181/2018 – 36 The agreement with the original is confirmed by: X CZECH REPUBLIC JUDGMENT ON BEHALF OF THE REPUBLIC The Municipal Court in Prague decided in a panel composed of President Štěpán Výborny and judges Karla Cháberová and Jan Kratochvíl in the case of the plaintiff: FTV Prima, spol. s.r.o., IČO 48115908 registered office at Na Žertvách 132/24, Prague 8 – Libeň represented by attorney Mgr. Ludmila Kutějová with the headquarters of Politických vězňů 935/13, Prague 1 against the defendant: Office for the Protection of Personal Data with the headquarters of Plk. Sochora 27, Prague 7 on the lawsuit against the decision of the Chairperson of the Personal Data Protection Office of 12 June 2018, no. UOOU-12027/17-24, item: 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 marked in the header, which rejected its dissolution and confirmed the decision of the Office for Personal Data Protection of 27 March 2018 , no. UOOU-12027/17-14 (hereinafter referred to as the "first-instance decision"), by which the plaintiff was fined CZK 20,000 for committing an offense pursuant to Section 45, paragraph 1 letter e) of Act No. 101/2000 Coll., on the protection of personal data and the amendment of certain regulations, as amended at the time (hereinafter referred to as the "Act on the Protection of Personal Data"), because he violated the obligation 14 A 181/2018 Confirms compliance with the original : X 2 established in Section 9 of the Act on Personal Data Protection, i.e. processed sensitive data without the express consent of the data subject outside of the cases specified in Section 9 letter b) to i) of the cited law. 2. From the content of the administrative file, the court found the following facts that are essential to the matter. 3. In the Krimi News program broadcast on 20 November 2017 at 7:25 p.m., the plaintiff provided the following information: "It is said that he did not infect one of these partners by chance, but the other allegedly did and is currently suffering from AIDS." However, S. (i.e. the accused; court's note) strongly denies that he ever had sexual intercourse with this man. And an expert from the field of psychology also gave S. the truth today. He called the Crown witness, who by the way had recently changed his name to J.D., unreliable. In layman's terms, he was not telling the truth about what happened. By the way, this is also evidenced by his criminal record, when he was punished fourteen times for property crimes. " 4. In the first-instance decision, the defendant found the plaintiff guilty of committing an offense pursuant to § 45 paragraph 1 letter e) of the Act on the Protection of Personal Data, as it processed personal data without the consent of the data subject outside of the cases specified in the Act, which, as a personal data administrator pursuant to § 4 letter j) of the Act on the Protection of Personal Data, committed by publishing information on the state of health of a witness and a victim in the

criminal proceedings covered by the report, who changed his name to J.D. (hereinafter referred to as the "data subject") in the Krimi news program, and the fact that he was infected with the HIV virus and currently suffers from AIDS, as well as information about his conviction for a crime, i.e. that he was punished for property crime a total of fourteen times, i.e. sensitive data in the sense of § 4 letter b) of the Personal Data Protection Act. In doing so, he violated the obligation set out in § 9 of the Personal Data Protection Act, i.e. to process sensitive data with the express consent of the data subject and without this consent only when fulfilling one of the provisions of § 9 letter b) to i) of the same law. 5. In the justification, the defendant stated that the right to privacy regulated in Article 10 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") prevails in the given specific case over the right to freedom of expression according to Article 17 of the Charter, taking into account the nature data that has been published. He further stated that even if the data subject provided the information in question in the context of a public trial, this does not entitle the plaintiff to further publish this information, including personal data, through the media, unless such publication to an unlimited circle of persons is evidenced by the public interest. 6. When determining the amount of the fine, the administrative authority took into account the nature and seriousness of the offence, considering that the seriousness of the offense increases above all the nature of the published personal data (information that someone suffers from AIDS is highly stigmatizing for such a person). The seriousness of the offense is further increased by the fact that the plaintiff's broadcast is available throughout the Czech Republic and that the plaintiff broadcast a report on a monitored news program in prime time, thereby making the data available to a wide range of recipients. On the other hand, the seriousness of the offense is reduced by the fact that the processing concerned a single data subject. Regarding the nature of the plaintiff's activity, the defendant stated that he is a professional in a field where personal data is extensively processed, which increases the degree of harmfulness of the offense. No mitigating or aggravating circumstances within the meaning of § 39 and 40 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"), the administrative body of the first degree did not find . 7. Regarding the dissolution of the plaintiff, the president of the defendant confirmed the first-instance decision. In the justification, she stated that the protection of personal data and the right to informational self-determination represents a legitimate limit to freedom of expression and the right to seek and disseminate information. At the same time, legal licenses according to the Civil Code and legal titles according to the Personal Data Protection Act cannot be mixed. The chairperson of the defendant agreed with the opinion of the first-level administrative body that public interest cannot be mere interest to the

public, but information should be necessary for public life, usable for forming political opinions and for perceiving and assessing the activities of state authorities, politicians and other public the life of society influencing officials. In the given case 14 A 181/2018, the agreement with the original is confirmed by: X 3, at the same time, it was possible to achieve the purpose of submitting information about criminal proceedings even without assigning sensitive data to the witness and victim in the proceedings, as this assignment only increased the audience attractiveness of the reportage and did not increase in any significant way its informational value, while intensively encroaching on the privacy of the data subject. In accordance with the first-instance decision, the chairperson of the defendant denied that the plaintiff could publish the data in question, as it was data that the data subject himself published as part of the public trial. The purpose of communication of information to law enforcement authorities by the witness is not to enable their free processing in the sense of § 9 letter g) of the Personal Data Protection Act. In conclusion, she stated that in order to assess sufficient harmfulness, it is not necessary to examine whether the social exclusion of the data subject has actually occurred, but the high degree of risk posed by this is already harmful. Moreover, it was not an interference with the rights of, for example, a convicted person, but of a person who appeared in the proceedings as an injured person and a witness. II. Content of the lawsuit 8. The plaintiff objects that the data subject voluntarily disclosed the personal data before the broadcast of the report, as provided for in § 9 letter g) of the Personal Data Protection Act, during a public court proceeding where he testified as a witness. Court proceedings are public and anyone can listen to them, which is why it is necessary to consider a statement before the court as a public communication (in the given proceedings, the public was not excluded from the proceedings). 9. The plaintiff states that it is his duty to inform the public about socially significant events and issues of public interest, and criminal activity undoubtedly falls into the category of issues of public interest. Part of the broadcast report had to include a justification of why the Court of Appeal changed the previously issued judgment and why the Crown witness (data subject) was labeled as unreliable. The provision of information about the expert opinion in the field of psychology, about numerous property crimes, and also about his state of health with regard to the fact of what crime was being tried before the court, were essential circumstances for understanding the change in the court decision. Moreover, the defendant did not even deal with this argument in his decisions. 10. The plaintiff further informs that the data subject does not belong to the special category of victims of exhaustively defined crimes in the sense of § 8b, paragraph 2 of the Criminal Code Act and is therefore not a victim according to § 8b, paragraph 3 of the same law. 11. The plaintiff invokes the protection of freedom of expression, arguing that the defendant did not conduct a proportionality test or

examine how the plaintiff's actions specifically affected the rights of the data subject. He did not even prove the social harmfulness of the act and its seriousness in the sense of Section 38 of the Act on Liability for Misdemeanors. He also did not establish for sure whether the data subject does not hide his personal data and does not disclose them even outside the court proceedings, or whether he suffered any damage. 12. The plaintiff claims that if a mistake were detected in the processing of personal data, the protection of privacy by civil law means is sufficient in the case of reporting (see the decision of the Constitutional Court file no. I. ÚS 4035/14). However, in the contested decisions, there was no justification as to why the private law remedies in the present case are not sufficient or why they are inappropriate. The plaintiff disputes the reference to the judgment of the Supreme Administrative Court no. stamp 6 As 144/2013, as the data subject in it was a minor. 13. According to the plaintiff, even the fine imposed above is completely unreviewable. First of all, the administrative authorities did not take into account the number of individual sub-attacks (it was only a one-time broadcast of the report), although the Personal Data Protection Act requires that privacy violations occur frequently and repeatedly. An important circumstance of the commission of the offense is also the nature of the plaintiff's activity, which the administrative authorities did not sufficiently consider and did not take into account the fact that the plaintiff's activity consists in operating a media and that therefore the imposition and amount of sanctions should be limited to a minimum. And finally, the defendant should have taken into account that it was an excess of circumstances excluding 14 A 181/2018 Conformity with the original is confirmed by: X 4 illegality (exercise of freedom of expression) and thus a mitigating circumstance was given in the sense of § 39 letter b) of the Act on Liability for Misdemeanors. III. Statement of the defendant 14. In his statement, the defendant rejected the plaintiff's objections and referred to the justification of the contested decision. 15. The defendant states that in the given case it is not decisive that the data subject does not fall into the special category of victims according to § 8b, paragraph 2 of the Criminal Code, because special legislation regarding the processing of sensitive personal data is applied. 16. The defendant repeats that the sensitive personal data published by the plaintiff did not fulfill the legal diction of published personal data, and therefore the plaintiff had no legal title to the processing of personal data. 17. The defendant states that the principle of freedom of expression and freedom of the press was suppressed by another constitutional principle in accordance with the law. 18. The defendant refers to the judgment of the Supreme Administrative Court, no. No. 6 As 144/2013, according to which accusations of being infected with the HIV virus constitute an unacceptable interference with an individual's right to the protection of personal data. 19. The defendant does not agree with the claim of the plaintiff regarding the need to include sensitive information in order to

understand the change in the court decision. 20. The defendant states that the possible enforcement of the rights of the affected entities through civil law takes place completely independently of the performance of the defendant's supervisory activities. The Personal Data Protection Act is a public law regulation serving to protect the right to personal data protection guaranteed by the Charter. In the given case, it is therefore a public law regulation serving to protect basic social values, which is not conditioned by the primary application of the rights of the persons concerned according to the regulations of private law within the framework of civil law proceedings. 21. Regarding the alleged insufficient justification of the amount of the fine, the defendant states that he already stated in the first-instance decision which circumstances increase and which decrease the seriousness of the offense. The one-time nature of the act was also taken into account, which follows from the sentence of the first instance decision. The degree of social harm and seriousness of the given act is also evident from the first instance decision. IV. Argumentation of the participants during the hearing 22. The plaintiff maintained his previous argument during the hearing. He emphasized that the contested decision is unreviewable, as it only contains general formulations on the protection of personal data. He stated that the necessary information for understanding the reported court case was published, while the right to freedom of expression and informing the public is essential here. According to the plaintiff, there was a public interest in publishing the name of the data subject due to his false testimony in a criminal case. In addition, the plaintiff stated that the published name is not the official name of the data subject. 23. During the hearing, the defendant referred to his previous submissions and emphasized that personal identification data should not have been published. He reminded that the data subject was not a public figure. V. Assessment of the claim by the Municipal Court in Prague 24. Pursuant to § 75 s. of the Code of Civil Procedure, the court reviewed the contested decision, as well as the proceedings that preceded its issuance, to the extent of the points of illegality claimed by the claim, by which it is bound, according to the factual and legal situation on the date of issue of the contested decision, and came to the conclusion that the action is unfounded. 25. According to § 4 letter b) of the Personal Data Protection Act, for the purposes of this Act, sensitive data means personal data indicating national, racial or ethnic origin, political 14 A 181/2018 Concordance with the original is confirmed by: X 5 attitudes, membership in trade unions, religion and philosophical beliefs , conviction for a crime, the state of health and sex life of the data subject and the genetic data of the data subject; sensitive data is also biometric data that enables direct identification or authentication of the data subject. 26. According to § 4 letter e) of the Personal Data Protection Act, for the purposes of this Act, personal data processing means any operation or set of operations that the controller or processor systematically performs with personal

data, either automatically or by other means. The processing of personal data means in particular the collection, storage on information carriers, making available, editing or changing, searching, using, forwarding, spreading, publishing, storing, exchanging, sorting or combining, blocking and disposal, 27. According to § 9 letter a) of the Personal Data Protection Act, it is possible to process sensitive data only if the data subject has given explicit consent to the processing. When giving consent, the data subject must be informed about the purpose of processing and to which personal data consent is given, to which administrator and for what period. The administrator must be able to demonstrate the existence of the data subject's consent to the processing of personal data throughout the processing period. The administrator is obliged to inform the data subject in advance about his rights according to § 12 and 21. 28. According to § 45 para. 1 letter e) of the Act on the Protection of Personal Data, a legal entity or a natural person conducting business in accordance with special regulations, as administrator or processor, commits an administrative offense by processing personal data without the consent of the data subject outside of the cases specified in the Act (Section 5 paragraph 2 and Section 9). 29. The court first dealt with the alleged non-reviewability of the contested decision, because in the case of the non-reviewability of the decision, it would not be appropriate to assess its legality. 30. Cancellation of an administrative decision due to unreviewability is reserved for the most serious defects of administrative decisions, when due to the absence of reasons or lack of understanding, the administrative decision cannot be reviewed on its merits. Unreviewability due to lack of reasons must, however, be interpreted in its true sense, i.e. as the impossibility of reviewing a certain decision due to the impossibility of ascertaining its content or the reasons for which it was issued (cf. the resolution of the extended senate of the Supreme Administrative Court of 19 February 2008 , No. 7 Afs 212/2006-76). Unreasonably high requirements cannot therefore be placed on the justification of the decisions of administrative bodies. It is not admissible to expand the institute of non-reviewability and apply it also to cases where, for example, the administrative body properly deals with the substance of the objection of a participant in the proceedings and explains why it does not consider the argumentation of the participant to be correct, even if it does not explicitly respond to all conceivable aspects of the objection raised in the justification of the decision and commits a partial lack of justification (see, for example, the judgment of the Supreme Administrative Court of 17 January 2013, no. 1 Afs 92/2012-45, point 28). Therefore, the decision is not unreviewable due to a partial error in the reasoning, when it must also be taken into account that the administrative proceedings form a single unit and nothing prevents the second-level authority from simply identifying itself and referring to the reasoning of the first-instance decision. 31. The city court did not find the contested decision unreviewable in

the above sense. The chairwoman of the defendant in the contested case and the defendant in the first-instance decision accordingly presented their reasoning and clearly explained why they reached the stated conclusions about the plaintiff's responsibility for the offense committed. At the same time, they carefully addressed the essence of the offense in question, as well as the actions for which the plaintiff was affected. In this way, they primarily evaluated the essence of the published data and the impact of its publication on the privacy of the data subject. In this context, they also assessed the plaintiff's argumentation as to why the disclosure of the information in question was necessary, but did not consider it relevant. At the same time, they did not overlook the plaintiff's right to freedom of expression, but found that the right to protect the privacy of the data subject according to Article 10 of the Charter prevails in the given case (see p. 4 of the first instance decision and p. 4 and 6 of the contested decision). If the plaintiff in this context objects that the defendant did not carry out a proportionality test, then according to the court this test is offered to be carried out in the event of a conflict between two fundamental rights, as it enables the administrative 14 A 181/2018 Conformity with the original confirms: X 6 authority to properly assess the individual aspects of the fundamental rights in question . However, its non-implementation in the given case does not render the contested decision unreviewable, as it is crucial that in both decisions the administrative authorities carefully addressed the conflict between the plaintiff's right to freedom of expression and the data subject's right to privacy and justified the conclusions for which they found it necessary to prioritize the right to privacy. In the same way, the chairman of the defendant dealt with the objection of the social (non)harmfulness of the plaintiff's actions and (non)causing any damage to the data subject, when she stated that it was not appropriate to investigate whether there had been a certain stigmatization of this person (see p. 6 of the contested decision). The president of the defendant also addressed why the application of personality protection only according to the Civil Code is not appropriate in the given case, when she pointed to the defendant's obligation to act out of official duty and the independence of private and public law protection of personal data (see p. 4 of the contested decision). And the administrative authorities (primarily the administrative authority of the first degree, whose conclusions the president of the defendant agreed with) also paid enough attention to the amount of the imposed sanction, when they indicated which circumstances increase the seriousness of the offense (the nature of the personal data and the form of publication through the watched news program in prime time and the fact that the plaintiff is a professional in a field where there is extensive processing of personal data) and which facts reduce the seriousness of the offense (the processing concerned a single data subject). 32. The court therefore found that the defendant proceeded in accordance with § 68, paragraph 3 of the

Administrative Code, and the challenged decision does not suffer from internal contradictions, incomprehensibility or insufficient justification. 33. Furthermore, the court dealt with the plaintiff's objections from a substantive point of view. 34. The court emphasizes at the outset that the purpose of the Act on the Protection of Personal Data is the protection of privacy, which is primarily based on Article 7(1) and Article 10 of the Charter of Fundamental Rights and Freedoms. The right to privacy, as one of the main guarantees of individual autonomy, includes not only the traditional definition of privacy in its spatial dimension (protection of the home in the broader sense of the word) and in connection with autonomous existence and public power, the undisturbed creation of social relationships (in marriage, in the family, in society), but also the guarantee of self-determination in the sense of the fundamental decision-making of an individual about himself, including the questions of whether, to what extent, in what manner and under what circumstances facts and information from his personal privacy should be made available to other subjects [cf. in particular, the decision of the Constitutional Court dated 22 February 2011, file no. stamp Pl. ÚS 24/10 (N 52/60 Coll. 625; 94/2011 Coll.)]. The aforementioned aspect of the right to respect for private life is referred to in jurisprudence as the right to informational self-determination [see the decision of the Constitutional Court dated 17 July 2005, file no. stamp IV. ÚS 23/05 (N 111/46 SbNU 41)]. Its essence is the right of each person to decide for himself what information about himself he will provide to other persons or make it public, while his consent is also necessary for their collection or publication by other persons. Specifically, the most confidential data is protected, the publication of which would most intensively encroach on the privacy of the data subject. This is how the Personal Data Protection Act talks about sensitive data, when the general rule prohibits their processing; deviating solutions represent an exception with which the requirement of a restrictive interpretation is linked. 35. At the same time, however, the right to privacy does not apply absolutely and can be limited, but it must be a limitation for the purpose of protecting another constitutional right or achieving a constitutionally approved public good, which must be established by law, in a manner corresponding to the claims arising from the principle of the rule of law (see, for example, the judgment of the European Court of Human Rights of 6/6/2006 in the case of Segerstedt-Wiberg and others v. Sweden, complaint no. 62332/00). In this way, the absolute prohibition of the publication of personal data does not follow from the legal regulation. The law imposes only on the administrator and data processor the obligation to ensure that the data subject does not suffer unacceptable damage to his rights in the sense of Article 10 of the Charter. At the same time, the rationale for interference with the right to privacy must be weighed in relation to each entity that has become the subject of published information, including the importance of the information for the public life of the person to

whom the information relates and the degree of impact on their rights (see the judgment of the Supreme Administrative Court of 3 May 2018, No. 2 As 304/2017-42, No. 3748/2018 Coll. NSS). 14 A 181/2018 Conformity with the original is confirmed by: X 7 36. If the court assessed the current case in accordance with the above-mentioned parameters, it found that the plaintiff did not justify the interference with the data subject's right to privacy. 37. Above all, the court emphasizes that the plaintiff has published sensitive data about the data subject. According to § 4 letter b) of the Personal Data Protection Act, sensitive data is also personal data indicating a conviction for a criminal offense or the health and sex life of the data subject. Therefore, if the plaintiff has published that the data subject is infected with the HIV virus and suffers from the AIDS disease, he has clearly published sensitive information about his medical condition. At the same time, information about the disease caused by the HIV virus evokes strong emotions in society due to the widespread awareness of its incurability and easy spread, which contributes to the isolation and social exclusion of the sick. This conclusion was already reached by the judgment of the Supreme Administrative Court no. zn 6 As 144/2013, the conclusions of which are, according to the court, fully applicable to the case currently under consideration. It does not change anything if, in the case at the time, the information about the AIDS disease concerned a minor. It follows from the reasoning of the cited decision that the Court of Cassation did not consider the fact that the information about the minor was published to be crucial, but the fact that the information about the disease in question was published at all (without acceptable reasons). And it cannot be contradicted that sensitive data was also the information that the data subject had already been punished fourteen times for property crimes, as the Act on the Protection of Personal Data explicitly designates data indicating a conviction for a criminal offense as sensitive. 38. In addition, it is crucial for the assessment of the matter that the name of the data subject was clearly mentioned in the report, including the information that it is a new, recently changed name. At the same time, his figure and partly also his face were repeatedly captured. The viewer could therefore easily associate the published sensitive data with a specific person, so the impact of the report in question on his private life was (or probably could have been) considerable. The court also took into account that the information in question was published as part of the main news program of the plaintiff, at the time of the highest viewership. 39. The court did not overlook the fact that the plaintiff's right to freedom of expression is also crucial in the given case. However, he found that, taking into account all the decisive circumstances of the case, the right to protect the privacy of the data subject should not give way to the plaintiff's right to freedom of expression. In this way, the court considered the legitimacy of the goal that the plaintiff should have achieved by broadcasting the report in question, and on the other hand

assessed the adequacy of the procedure used. Based on the comparison of these parameters, he found that for the plaintiff's declared goal of the report, it would be sufficient to state the facts on the basis of which the acquittal judgment discussed in the report was issued, and to refer to the data subject as a crown witness or victim. In this anonymized form, his criminal past could also be mentioned, since the report in question was not a priori focused on the risky behavior of this person, but was devoted to court proceedings, in which the data subject appeared only as a witness and victim. In the event of the publication of information in this anonymized form, the justification for a misdemeanor penalty would not have to arise, and at the same time, the purpose of the report in question, stated by the plaintiff, would be fulfilled to the same extent: to inform the public about the reasons for the court decision and about the allegedly socially significant event. The court considers the specific illness of the data subject and the number of his convictions for a crime together with the way the information is presented (publication of the name and partly the likeness of the data subject) and other circumstances (target audience group) to be an unauthorized publication of sensitive data without public interest in their publication. The behavior of the data subject in the reported criminal proceedings, in which he acted as a witness, certainly cannot be considered as this public interest, since it is not up to the prosecutor to punish him in any way for giving a false statement (even with "media shame"). The court therefore considers the publication of data on the state of health and on the previous multiple convictions of the data subject to be a serious and irreversible interference with the right to privacy, which is why it was appropriate for the plaintiff to be found guilty of committing an offense under the Personal Data Protection Act (and in this sense it is it is also necessary to look at the social harmfulness of the committed act and its seriousness). 14 A 181/2018 Compliance with the original is confirmed by: X 8 40. The stated conclusions do not change whether the data subject suffered any clearly quantified damage or not. After all, it is often very difficult to quantify the damage in the event of an invasion of privacy. For the assessment of guilt for committing an offense according to § 45 paragraph 1 letter e) of the Personal Data Protection Act, however, it is essential whether personal data were processed without the consent of the data subject and outside the cases permitted by law. This clearly happened in the above case, and at the same time it was possible to clearly identify the plaintiff's interference with the data subject's privacy. Thus, all the elements of the offense were fulfilled and a reason was given for the plaintiff to be found guilty of its commission. Any amount of damage caused to the data subject would be the subject of a civil dispute between the data subject and the claimant. However, its initiation by the data subject has no effect on the assessment of the plaintiff's criminal conduct under the Personal Data Protection Act. 41. In this context, the court must also reject the plaintiff's reference to the

sufficiency of the data subject's privacy protection through civil law means. The protection of the right to privacy according to Article 10, paragraph 3 is carried out in the form of private law and public law, but the objects of this protection cannot be equated. In terms of private law, the data subject could demand the protection of his personality according to § 81 et seq. of the Civil Code, while the civil courts would assess the matter from the point of view of the truth of the factual statements or the form and adequacy of the statements made. At the level of public law, there is a whole range of protection options, which is guaranteed at the constitutional level by the cited Article 10, paragraph 3 of the Charter (see, for example, the provisions of the Criminal Code, the Press Act, the Act on the Operation of Radio and Television Broadcasting). In the current case, the Act on the Protection of Personal Data was applied due to the unauthorized publication of sensitive data, and it follows from the above that the plaintiff should be punished for committing an offence. And it was undecided whether the data subject had the opportunity to defend against the publication of the information in question also in proceedings before civil courts. After all, even in the award cited by the plaintiff, no. stamp I. ÚS 4035/14 The Constitutional Court stated that the imposition of sanctions by public authorities is possible simultaneously with the individual defense of an individual who feels that his private interests have been harmed by the actions of the sanctioned person, or even independently of it. And he added that such a procedure of public authority has its place especially where other means of protecting the rights of persons are exhausted, ineffective or inappropriate, with the fact that public punishment serves to protect basic social values. In the case under consideration, according to the court, this necessity arose to protect basic social values, as the protection of privacy against the publication of personal data, especially sensitive ones, represents a significant social value. In addition, the civil law defense of the data subject against the publication of this information might not be suitable due to his fears of further ostracization, when in addition proving the truth of the given information or the adequacy of its publication before civil courts could bring further interference with the integrity of this person's personality. That is why the law provides for public law protection of personal data before their publication in such a way that privacy protection is strengthened to the maximum extent. And for the sake of completeness, the court states that the Constitutional Court in the cited decision assessed a violation of the obligation set forth in Act No. 231/2001 Coll., on the operation of radio and television broadcasting and on the amendment of other laws, as amended, while in the present case the plaintiff was affected according to the law on the protection of personal data. However much the court cannot and does not want to reduce the importance of the law on the operation of radio and television broadcasting, it is clear that the law on the protection of personal data more significantly aims

to protect the right to privacy as a fundamental value of a democratic society, which is why the conclusions of the cited decision of the Constitutional Court cannot be adopted without further ado now considered matter. 42. Regarding the plaintiff's objection that the data subject himself published information about his health during the trial, the court states the following. 43. The court must agree with the plaintiff that interference with a person's right to privacy does not constitute the publication of such data that the data subject himself has already publicly presented, i.e. he himself communicated it to the public verbally or through his actions. Such data may be processed by the personal data administrator without the consent of the data subject, as they were voluntarily published by the data subject himself. However, the fundamental question of 14 A 181/2018 Conformity with the original is confirmed by: X 9 in the given case, whether a statement made during an interrogation before the court can also be considered as such a voluntary disclosure of information. 44. The Court is aware of the fact that the judiciary is built on the principle of publicness, whereby all actors who turn to the courts largely leave their private space. In support of these conclusions, one can point to the decision of the European Commission for Human Rights in the case of A.H. v. the United Kingdom, Complaint No. 3868/68, in which it was held that self-statements made in the course of a public hearing before a court do not generally fall within a person's private life at all and are thus not subject to the protection of Article 8 of the Convention for the Protection of Human Rights rights and fundamental freedoms. 45. At the same time, however, one cannot ignore the fact that the data subject acted only as a witness in the criminal case in question. In this regard, his position is significantly different, since it was not the data subject himself who was trying to gain personal benefit by participating in the court proceedings, but was merely fulfilling his duty as a witness. At the same time, the data subject was obliged to tell the whole truth and not withhold anything as part of the statement, while the fulfillment of this obligation cannot be interpreted secondarily as the claimant having published personal sensitive personal data, which was further possible in accordance with § 9 letter g) of the Personal Data Protection Act to process and publish. The court already refers to what was said above, that the publication of sensitive data represents an exception with which the requirement of a restrictive interpretation is connected. The court also refers to Article 8 paragraph 2 letter e) Directive 95/46/EC, which corresponds to § 9 letter g) of the Personal Data Protection Act, according to which the exception to the publication of sensitive data includes the processing of data obviously published by the data subject. Although the Czech regulation does not include the term "obvious", the wording of the relevant article of the directive supports the interpretation that consent to the publication of sensitive personal data cannot be interpreted broadly to the detriment of the data subject. And in this way, the publication of information as part of a witness

statement cannot be considered an obvious publication of sensitive data. The above does not change the principle of public court proceedings, because this principle connected with criminal law, or with the law in general, cannot be combined with the principles of personal data protection. The fact that the public was not excluded from the trial in question does not change the stated conclusions. 46. As a side note, the court states that it was not the duty of the defendant to investigate whether the data subject had published the relevant information about his health status in another way. The defendant found that the plaintiff had committed an offense by publishing the incriminated data. If the plaintiff considered that this data had been disclosed by the data subject (outside of the court proceedings he invoked), it was his duty and not the defendant's duty to prove this fact. If the plaintiff did not do so (and after all, he does not do so in the lawsuit, except for a general statement), it was not the duty of the defendant to examine in detail whether the information in question was not disclosed by the data subject. 47. The court also found the plaintiff's objection that the data subject does not belong to a special category of victims according to Section 8b, paragraph 2 or 3 of the Criminal Code, to be unfounded. The plaintiff was not affected for committing an offense according to § 45a paragraph 1 of the Act on the Protection of Personal Data, which explicitly referred to the violation of the ban on the publication of personal data established by another legal regulation, i.e. the Criminal Code. In the case of a penalty against the plaintiff under the aforementioned provision, it would be appropriate to examine whether or not the data subject was a victim in the criminal proceedings. However, if the plaintiff was affected for an offense according to § 45 paragraph 1 letter e) of the Personal Data Protection Act, the assessment of the position of the data subject in the criminal proceedings in question was completely irrelevant. 48. The court could not even accept the plaintiff's argument that it was only a one-time publication of the information in question. The Act on the Protection of Personal Data affects actions that are not accidental (i.e., on the contrary, they are targeted, intended, wanted), whereby the publication of the data subject's illness together with his name and information about the number of his convictions for criminal activity in a nationwide broadcast in so-called prime time, cannot be considered random. The fact that sensitive information was broadcast only once does not mean that systematic work attributable to the plaintiff was not an inseparable prerequisite for such disclosure. After all, the definition of information processing in the Act on the Protection of Personal Data 14 A 181/2018 Conformity with the original version confirms: X 10 (see § 4 letter e) works with the concepts of operation or system of operations or any action or set of actions, which allows to assess from the point of view of the provisions of these regulations, in addition to multiple actions together, as well as individual ones. It always depends on the specific factual circumstances, whether the factual substance of the administrative

offense according to § 45 paragraph 1 letter e) of the Act on the Protection of Personal Data is fulfilled by only one partial action or a summary of several actions. In this case, the defendant imposed a sanction only for the publication of sensitive information, while the publication alone was sufficient to fulfill the essence of the offense in question, i.e. the processing of personal data without the consent of the data subject outside of the cases specified in the law. 49. If the plaintiff's representative stated at the court hearing that it is not certain whether the published name of the data subject is his real name, the court must emphasize that the said objections were raised after the deadline set in § 72, paragraph 1 of the Administrative Court Code. According to the court, in the case of this objection, it is not an argument developing the objection stated in the lawsuit, but a new objection to the lawsuit. At the same time, proceedings before administrative courts are governed by the principle of concentration of proceedings, where the court does not consider objections raised late. However, just for the sake of completeness, the court states that not only the real name of a person is protected, but also the surname under which he appears. Therefore, if the data subject used the name published by the plaintiff, it is irrelevant whether it was a real name or not from the point of view of the interference with his right to privacy and the punishment of the plaintiff for the offense committed. 50. Finally, the court did not find the plaintiff's reasonable objections to the amount of the imposed fine. 51. The court emphasizes that the imposition of fines for administrative offenses takes place in the sphere of free administrative discretion (discretionary right) of the administrative body, i.e. the law allows the freedom of the administrative body to decide within defined limits, or choose some of the several possible solutions that the law allows. Compliance with the principle of the legality of punishment and the principle of individualization of the sanction is important for the correct and fair imposition of the sanction. The principle of the legality of punishment consists in the fact that administrative authorities must follow the rules for imposing sanctions established by law. The principle of individualization of sanctions requires that the type, combination and intensity of sanctions correspond to all the circumstances and peculiarities of a specific case. (cf. judgment dated No. 3 As 32/2007 –48). Free administrative discretion can be subject to judicial review when assessing the legality of a decision only if the administrative body exceeded the limits of this discretion established by law, deviated from them or abused free discretion. However, it is not within the jurisdiction of the administrative court to step into the role of an administrative authority and substitute judicial discretion for administrative discretion and decide for itself what fine should be imposed. The court could do this according to § 78, paragraph 2 of the Civil Code only at the request of the plaintiff (however, the plaintiff did not make such a request in the case under consideration now), if it came to the conclusion that the fine was imposed by the administrative

body in an obviously disproportionate amount (cf. judgment of the Supreme Administrative Court of 21 August 2003, No. 6 A 96/2000-62, No. 225/2004 Coll. NSS). 52. The court further notes that the fine imposed in the amount of CZK 20,000 represents 0.4% of the legal maximum of CZK 5,000,000 according to the relevant provisions of the Personal Data Protection Act, while according to the judgment of the Supreme Administrative Court of 21 August 2003, No. j 6 A 96/2000 – 62, published under No. 225/2004 Coll. NSS, it is not an obviously disproportionate amount of the sanction in the case when the fine was imposed just above the lower limit of the legal range (in the cited judgment, the sanction was 4% of the upper limit). 53. At the same time, it follows from the challenged decisions that the defendant properly dealt with the individual aspects that are important for determining the amount of the fine (including the social harmfulness of the act and its seriousness in the sense of § 38 of the Act) and his considerations are described in the contested decisions in a sufficiently understandable, certain and in a logical way. The administrative authorities also took into account aggravating and mitigating circumstances, which resulted in the imposition of a fine at the lower limit of the statutory rate. In this way, it is not possible to convince the plaintiff that the number of individual sub-attacks would not have been taken into account, because the defendant considered the fact that the processing concerned only a single data subject in one 14 A 181/2018 Match with the original confirms: X 11 report as a mitigating circumstance and as such taken into account when determining the amount of the penalty. In the same way, when determining the amount of the sanction, the administrative body of the first degree took into account the nature of the plaintiff's activity, emphasizing that the report in question was broadcast nationally in prime time, and pointed out that the plaintiff is a professional in the field who should be aware of his obligations when processing personal data. The court agrees with this assessment and, on the contrary, must reject the plaintiff's claim that the fact that he runs a national media should be taken into account as a mitigating circumstance in order to avoid the risk of a "chilling effect". The court states that the so-called chilling effect cannot be confused with the broadcaster's responsibility for the information it publishes. A reference to this risk would only have its place in a situation where the plaintiff would be fined an disproportionately high amount. However, a fine of CZK 20,000 cannot be considered unreasonably high and, according to the court, does not have an impermissible deterrent effect. On the contrary, it represents an adequate sanction for violation of the Personal Data Protection Act and interference with the privacy of the data subject. 54. According to the court, the defendant could not consider the exercise of freedom of expression as a mitigating circumstance for determining the amount of the sanction, or the exercise of this fundamental freedom could not be considered as a circumstance excluding illegality. The Act on Liability for Misdemeanors

and Proceedings Regarding Them includes extreme emergency (Section 24), necessary defense (Section 25), consent of the victim (Section 26), permissible risk (Section 27) and authorized use of a weapon (Section 28) among the circumstances excluding illegality and for each of them, it sets the conditions for their fulfillment. If, therefore, referred to by the plaintiff § 39 letter b) of the Act on Liability for Misdemeanors is related to exceeding the limits of circumstances excluding illegality, among which, however, the exercise of freedom of expression cannot be subordinated in any way, nor can the exercise of this freedom be taken into account as a mitigating circumstance. VI. Conclusion 55. 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. 56. The court decided on reimbursement of the costs of the proceedings in accordance with § 60 paragraph 1 of the Civil Code. The plaintiff was unsuccessful in the case and therefore has no right to 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 181/2018 Compliance with the original is confirmed by: X 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, February 26, 2020 JUDr. PhDr. Štěpán Výborný, Ph.D., former chairman of the senate