OFFICE FOR PERSONAL DATA PROTECTION

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* UOOUX00D66SQ *

Ref. UOOU-12081 / 17-63

DECISION

Chairwoman of the Office for Personal Data Protection as an appellate body competent pursuant to § 2, § 29

and Section 32 of Act No. 101/2000 Coll., on the Protection of Personal Data and on the Amendment of Certain Acts,

and pursuant to § 10 and § 152 para. 2 of Act No. 500/2004 Coll., Administrative Procedure Code, and pursuant to § 10 para.

and)

Act No. 480/2004 Coll., on certain information society services and on the amendment of some

Acts, decided on 13 March 2019 pursuant to the provisions of § 152 para. a), § 152 par. 5

and § 90 par. 1 let. c) of Act No. 500/2004 Coll., Administrative Procedure Code, as follows:

Decision of the Office for Personal Data Protection ref. UOOU-12081 / 17-56 of 30 November

2018, based on the dissolution of the accused, the company

, registered in the United Kingdom,

number:

, which acts on the territory of the Czech Republic through

, changes that in

the words "fine in the amount of CZK 46,000" are replaced by the words "fine" in the statement of the contested decision

in the amount of CZK 23,000 ", the remainder of the contested decision is confirmed.

Justification

Administrative proceedings for suspicion of committing an offense pursuant to § 11 para. (a) point 1, point 2

and point 4 of Act No. 480/2004 Coll., on certain information society services and on change

of some laws was initiated by order no. UOOU-12081 / 17-51 of 10 October 2018, which

He was accused by the company

registered in the United Kingdom, company number:

which

in the territory of the Czech Republic acts through

(hereinafter also "accused"), delivered on

October 13, 2018.

The basis for initiating the proceedings was the inspection protocol ref. UOOU-12081 / 17-45 of 6 August

2018 acquired pursuant to Act No. 255/2012 Coll., On Inspection (Inspection Rules), by the Inspector of the Office

for personal data protection Ing. Josef Vacula as part of the inspection of the accused

from March 4, 2018 to September 26, 2018, including the file material collected

as part of this inspection. The inspection procedure was carried out on the basis of submissions received by the Office

for the Protection of Personal Data (hereinafter referred to as the "Office") in the period from 10 November 2017 to 26 April

2018. The content of these submissions were complaints about unsolicited commercial communications.

As part of the inspection, it was proved that the disseminator in question

commercial communications is charged.

On 19 October 2018, the defendant received an objection against the above order.

In accordance with § 150 paragraph 3 of Act No. 500/2004 Coll. the order was canceled by the resistance

and the administrative authority continued the proceedings. Because the accused in the resistance filed

did not provide any justification for the opposition, she was invited on 22 October 2018 to his

justification or addition of any new facts, provided that this is the case

from previous findings.

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The accused sent the Office a statement of the accused's director on 1 November 2018

lodged a statement of opposition by documenting its medical records

in which Mr.

and describes his health and mental condition,

, taking into account this

medical condition, he proposed an assignment to a forensic psychiatrist to assess

whether and to what extent his health and mental condition affects the conduct performed and whether

is able to fully participate in administrative proceedings. On November 9, 2018 administrative body

the first instance sent the accused a note informing her of the possibility of acquainting himself with the documents

decision, which was delivered to the accused on November 18, 2018.

Subsequently, on 30 November 2018, the administrative body of the first instance issued a decision no. UOOU-

12081 / 17-56 ('the contested decision'), in which he found the accused guilty of an offense

offense according to § 11 par. 1 let. a) point 1 of Act No. 480/2004 Coll., which she committed

by repeatedly disseminating unsolicited commercial communications within the meaning of § 2 letter f) of the Act

No. 480/2004 Coll., when she sent a business message to 18 e-mail addresses specified in the statement

I. of the contested decision, the addressees of those communications not agreeing to the transmission

commercial communications and customers have not been charged in the sense of § 7 paragraph 3 of the Act

No. 480/2004 Coll. By doing so, the accused violated the obligation set out in § 7 para. 2

Act No. 480/2004 Coll., ie the obligation to use electronic contact details

for the purpose of disseminating commercial communications by electronic means only in relation to

to users who have given their prior consent. The accused was also found guilty

from committing an offense according to § 11 par. 1 let. a) point 2 of Act No. 480/2004 Coll., as 15

reports sent by the accused referred to in II. the operative part of the contested decision

the commercial communication was not properly identified as a commercial communication, thus violating the accused

the obligation stipulated in § 7 par. 4 let. a) of Act No. 480/2004 Coll., ie clearly and unambiguously

mark sent messages as business messages. The accused was also found guilty

from committing an offense according to § 11 par. 1 let. a) point 4 of Act No. 480/2004 Coll., as 3

reports referred to in III. of the contested decision containing the commercial communication sent

the accused did not contain valid addresses or other information to unsubscribe from further transmission

business communications. The accused hereby violated the obligation stipulated in § 7 par. 4 let. C)

Act No. 480/2004 Coll., ie to disseminate commercial communications only if these reports state

a valid address to which the addressee could directly and efficiently send information that you

does not wish the business information to continue to be sent to him by the sender.

She was accused of the above conduct pursuant to § 35 letter b) of Act No. 250/2016 Coll.

and in accordance with § 11 par. 2 let. b) of Act No. 480/2004 Coll. imposed a fine of CZK 46,000.

The administrative authority of the first instance in the statement of reasons for the contested decision to the opposition

and its addition stated that the health and mental condition of Mr.

, which is

.

accused, cannot rid the accused

responsibility for disseminating the commercial communications referred to in the operative part of the contested decision.

At the same time, the administrative body of the first instance stated that § 11 par. 1 of Act No. 480/2004 Coll. Yippee

constructed on the basis of strict liability, ie liability for an illegal situation, when in

there is no need to examine the fault of the legal person in relation to the legal person. Further

stated that if the state of health of a person who is the only statutory body does not allow

this person to take part in the proceedings before the administrative authority, there is nothing to prevent this statutory

the authority has authorized another person to negotiate with the administrative authority.

The operative part of the first contested decision by which the accused was found guilty of the offense

according to § 11 par. 1 let. a) point 1 of Act No. 480/2004 Coll., the administrative body of the first instance

He said that the messages sent by the accused by e-mail undoubtedly had

the nature of commercial communications, as they contained commercial offers of services in the form of

seminars and lectures on GDPR and invitations to meetings of power engineers, electrical engineers

and electrical maintenance. The communications state the possibility of logging in through the so-called

Clicks and bids are sent with the company name

or with a link

to the website

At the same time, as stated by the administrative body of first instance, there was no doubt that the accused in question she sent messages repeatedly. Regarding the notion of repetition, the administrative body of the first instance pointed out that the repetition of the dissemination of commercial communications is considered to be an objective criterion in the relationship

to the actions of the responsible person and thus consists in the repetition of the activity, ie in the fact that the disseminator distributes business messages more than once. Repetition in the sense of the law does not lie

in multiple sending a business message to the same addressee.

During the review procedure, the accused stated that the e-mail addresses in question had been obtained

from the purchased database, that in these cases it is not about customers or clients

company

, and that email addresses have been retrieved

also from your own internet search. Consent of the addressees with the sending of commercial messages

however, the accused did not document it, either during the control proceedings or during the administrative proceedings.

In their complaints, all the addressees of the commercial communications in question

that they have never consented to the sending of commercial messages to the sender, they are not the sender's customers (ie accused), nor are they registered users.

User email address

business declined, on November 10, 2017 to the e-mail address

and also in the form of a so-called click in the received e-mail, yet he had another business message

Sent on December 12, 2017. Also a user email address

said

and proved that he had previously refused to send commercial communications on 16 January 2018 to

stated and proved that

sending before

, yet another business message was sent to him on

e-mail adress

February 12, 2018

In view of the above, the administrative body of the first instance

for proving that the accused acted in violation of the provisions of Section 7, Paragraph 2 of the Act

No. 480/2004 Coll., ie that it used the details of electronic contact for the purpose of dissemination

commercial communications by electronic means without the need for users of electronic addresses

gave prior consent, thereby committing an offense under § 11 para. a) point 1 of the Act

No. 480/2004 Coll.

On the statement II. of the contested decision by which the accused was found guilty of the offense

offense according to § 11 par. 1 let. a) point 2 of Act No. 480/2004 Coll., the administrative body of the first

stated that a clear and unambiguous indication of the commercial communication means such

a sign which, at first sight, evokes a commercial dimension to the addressee of such a communication

sent messages. On the basis of such a designation, the addressee has the opportunity to decide whether

accept (open) the message or not. Such a label is also necessary because

so that the addressee is able to distinguish the business message from others at first sight

delivered messages. If the label were only in the content of the message itself, then it would

brought higher costs for the addressees, which means that the addressee has to send the whole message first

to accept from its content that the subject of this communication is a commercial offer.

In the case of commercial communications sent to the e-mail addresses specified in statement II.

did not comply with the accused provisions of § 7 par. 4 let. a) of Act No. 480/2004 Coll., since

the reports in question were marked only with the texts: "All about the protection of personal data of the GDPR",

"Privacy Policy GDPR", "General Data Protection Regulation", "Training:

GDPR and technical means, camera systems "," National Meeting of Power Engineers,

of Electrical Engineers and Electrical Maintenance "and" National Meeting of Power Engineers, Electrical Engineers and

Maintenance,

representatives of cities and municipalities ", which cannot be considered a sufficient indication of a commercial communication,

as it is not clear from this text that this is a commercial offer of services of the accused.

On the basis of the above, it was therefore, in the view of the administrative authority of first instance, evident that the accused has committed an offense under § 11 para. a) point 2 of the Act No. 480/2004 Coll., as it did not clearly mark the reports stated in the statement as commercial communication.

On the statement III. of the contested decision by which the accused was found guilty of an offense offense according to § 11 par. 1 let. a) point 4 of Act No. 480/2004 Coll., the administrative body of the first stated that each commercial communication must include the option to unsubscribe, if applicable a valid e-mail address to which you can directly and efficiently send information that you the addressees do not wish the business information to continue to be sent to them by the sender. Accused however, in the cases of commercial communications referred to in operative part III. of the contested decision did not comply with the condition, as these messages did not contain a valid unsubscribe address or no other information on the possibility of unsubscribing from further sending of commercial communications. From above Thus, in the opinion of the administrative authority of the first instance, it was clear that the accused committed an offense under § 11 para. a) point 4 of Act No. 480/2004 Coll.

When imposing an administrative sanction, the first-instance administrative body applied the so-called "absorption principle", enshrined in Section 41, Paragraph 1 of Act No. 250/2016 Coll., on Liability for Misdemeanors and Proceedings

and

about them, according to which “two or more offenses of the same offender are discussed in the joint proceedings shall impose an administrative penalty in accordance with the provisions relating to the most severely criminal offense.

If the upper limits of the fine rates are the same, an administrative penalty shall be imposed in accordance with the provisions applicable

the most serious offense '. The administrative body of the first instance thus had to

absorption principles to assess which offense committed by the accused is the most serious and matured

to the conclusion that it is an offense under § 11 par. 1 let. a) point 1 of Act No. 480/2004 Coll.,

as this offense applies to the dissemination of commercial communications without the consent of the addressees,

whereas legal title, ie consent, is a key point in electronic protection

communication and thus privacy in electronic communication.

As part of the imposition of a fine, the administrative authority of the first instance in connection with the assessment

the nature and gravity of the offense, he assessed that the accused had intervened by his infringement

to a legally protected interest (privacy in electronic communications) falling under

the criterion of the seriousness of the offense stated in § 38 letter a) of Act No. 250/2016 Coll. Further administrative

The first instance body also took into account the fact that in the case of users of e-mail addresses

were seriously infringed on their privacy

in the sense of § 38 letter c) of Act No. 250/2016 Coll., as the commercial communication was

sent to these addresses even after their addressees are sending commercial communications demonstrably

they refused. Pursuant to Section 40 of Act No. 250/2016 Coll. reviewed by the administrative authority of the first instance

conduct also accused in terms of aggravating circumstances and concluded that the accused

committed several offenses, which is an aggravating circumstance specified in § 40 letter b) of the Act

No. 250/2016 Coll., specifically offenses according to § 11 par. 1 let. a) points 1, 2 and 4 of the Act

No. 480/2004 Coll. The administrative body of the first instance did not take into account the amount of the administrative

sanction

to any of the mitigating circumstances listed in Section 39 of Act No. 250/2016 Coll.

As regards the amount of the fine, the administrative authority of the first instance stated at the end of its decision that it had

Aware of the conclusions of the Supreme Administrative Court of the Czech Republic, which are based on the judgment

Ref. 1 As 9 / 2008-133, however, at the time of making the contested

decisions were not made

no accounting records are kept for the accused in the Commercial Register on the portal www.justice.cz,

on which the administrative sanction could be based. Therefore, the administrative body of the first

imposed a fine as set out in the operative part of the contested decision.

The contested decision was served on the defendant on 1 December 2018 and on 11 December 2018

the accused was lodged with an appeal, through

which is

while

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The defendant argued in the appeal that the administrative body of the first instance was wrong

evaluated the company

registered in the United Kingdom, company number:

, acts

in the territory of the Czech Republic through

, to which she stated that the company

,

does not carry out any activity as this company is managed

as a dormant and states that this is evidenced in the form of a solemn declaration that

is established in the file in the Commercial Register, Slezská ul. 9, 120 02 Prague 2. Further accused

stated that it carried out all its activities

which has a separate

whereas, as stated in the dissolution, the UOOU admits

legal personality, see ID:

that the statutory representative is

“.

through

In the next part of the filed appeal, the accused stated that the Office refused to deal with the health care

although all available medical records were sent to him

condition

She further recalled that the lawyer

indicative of

, requested by the administrative authority of the first instance

on the review of overall health

forensic expert in the field of psychiatry.

The defendant stated that an expert assessment of the state of health was in this case

most important because the administrative body of the first instance did not take into account the state of health

that it is irrelevant to its decision and the imposition of the fine;

the accused also referred to the inspection of the file on 2 August 2018. Assessment

a forensic expert in the field of psychiatry is necessary according to the accused,

health status

because if

committed an offense,

according to the administrative body of the first instance, there was no other person in the company who could

commit offenses.

In the last part of the appeal, the accused stated that the administrative body of the first instance

did not take into account the liquidating nature of the sanction, again referring to the aforementioned insight

to the file, when the Office expressed the opinion that the fine imposed by the Office cannot be liquidating, as

its filing will be based on the amount of the tax return. The accused further stated that

that the corporate income tax return was filed in due time with the Tax Office

CZK was duly paid and it is therefore clear

in Mělník. Assessed tax in the amount of

that in the event of a fine of

CZK is actually the liquidation amount of the fine,

particularly in view of the fact that

has been in business for one and a half years. The accused also referred to the case-law relating to interpretation

liquidation amount of the fine.

At the end of her appeal, the defendant requests, in view of the above, the reduction imposed

fines of CZK 10,000.

The appellate body examined the contested decision in its entirety, including the process which

preceded its publication, and came to the following conclusions:

As regards the legal personality of the branch, the appellate body states that the branch

plant (as an organizational unit of a legal person registered in the Commercial Register which:

shows economic and functional independence and which the entrepreneur has decided to be

branch) has no legal personality and therefore cannot be as such

party to the administrative proceedings (accused person). As stated by the Municipal Court in Prague in its

judgment no. 5 Ca 25 / 2005-83 of 24 November 2006: “By registration of an organizational unit

foreign organizational unit in the Commercial Register, this organizational unit does not become a legal entity

person, he does not have the right to act in legal relations on his own behalf

responsibility. The fact that the organizational unit of a foreign legal entity located at

The territory of the Czech Republic is registered in the Commercial Register, so it does not mean that this

the organizational unit is the holder of legal personality and an eligible party to the proceedings. Subject

legal relations, the foreign legal entity that is the founder of the organizational unit remains,

including in matters relating to the organizational unit '. It also follows from the above that

if the branch plant or other organizational unit of the company does not have legal personality, it cannot be granted

nor procedural capacity. Thus, she was reasonably the administrative body of the first instance for the accused

designated foreign company (ie company

because this

the company, unlike the subsidiary, is endowed with full legal personality, ie

eligibility to rights and obligations. The company acquires legal personality by its establishment,

ie registration in Companies House, which is the English equivalent of the Commercial Register and loses it

termination, ie deletion from this register under the English law called The Companies

Act 2006 (this Act harmonises the regulation of Community corporate law). That is

it is a so-called "dormant" company, it does not have the existence of its legal personality

no influence, because as can be seen from the above, the company loses legal personality until

its demise.

The appellate body also states that the head (director) of the branch plant is not statutory

the statutory body has unrestricted authority to represent the legal person,

which, in accordance with the provisions of Section 164, Paragraph 1 of Act No. 89/2012 Coll., the Civil Code,

represent in all matters. Authorization to represent the head of the branch law,

which is also legal, on the other hand, is limited as it only concerns matters

branch plant. Pursuant to Section 503 (2), second sentence, of Act No. 89/2012 Coll., He is the manager

"authorized to represent entrepreneurs

(thus accused foreign

company) in all matters relating to the subsidiary from the date on which it was

entered in the Commercial Register as the head of the branch plant ". According to the data available at

web address

covering

based in London, is

to the accused, ie the foreign company

director, ie the statutory body of this company, as well

, therefore the administrative body

first instance in the contested decision

not only for the manager

accused, but also for the statutory body (director) accused foreign

company.

In the case of the administrative proceedings in question, there is a connection with an organizational unit (ie a branch office)

race) unquestionable. Therefore, the administrative body of the first instance in the administrative proceedings

he discussed the offense with the director of the branch plant

, as an authorized person

representing the branch plant in the sense of § 503 paragraph 2 of Act No. 89/2012 Coll. Documents

related to the administrative proceedings, the administrative body of the first instance delivered to the address

branch plant, in accordance with the provisions of § 21 paragraph 1 of Act No. 500/2004 Coll., which

stipulates that "… in the case of a foreign legal entity, it is delivered to the address of the registered office of its organizational

unit

established in the Czech Republic, if the document relates to the activities of this organizational unit '.

Regarding health status

in connection with the fulfillment of the facts of the offenses

referred to in the operative part of the contested decision, the appellate body finds that

that objection has already been properly dealt with by the administrative body of first instance in the contested decision

decision, when he stated that the offense under § 11 paragraph 1 of Act No. 480/2004 Coll. is constructed

on the basis of strict liability, ie liability for the legal situation when in a relationship

there is no need to examine the fault of the legal person with the legal person. As far as

procedural capacity

which is according to § 503 paragraph 2 of Act No. 89/2012 Coll. person

representing the subsidiary (as well as the director, ie the statutory body

accused), the appellate body states that according to § 30 par. 1 of Act No. 500/2004 Coll. makes a name

legal person acts "one who is authorized to do so in court proceedings under the special

of the Act '. This special law means Act No. 99/1963 Coll., The Code of Civil Procedure, according to

whose § 21 par. 1 let. c) acts on behalf of the legal entity head of its subsidiary,

in the case of matters relating to this plant. Pursuant to the provisions of Section 29 of Act No. 500/2004 Coll.

regulating the procedural capacity of a natural person, the natural person has a procedural capacity in it

to the extent that § 30 et seq. Act No. 89/2012 Coll. acknowledges autonomy.

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has not proved that he is a person limited in his own right within the meaning of the provisions of Section 29 (2)

Act No. 500/2004 Coll., therefore the administrative body of the first instance treated it as a person

with full procedural capacity representing the accused in the present proceedings.

proved

to the administrative authority of the first instance only an opinion

who came along with

. Moreover, this document is dated 25 April 2016 and therefore is not

for a current medical report. The appellate body also observes in that regard that, as is apparent

from file material,

established two months after the issuance of the above

medical report on his

foreign company with registered office

in London, who is accused in this case. According to the provisions of § 32 par. G)

Act No. 500/2004 Coll. obliged to appoint a guardian for persons affected by the transitional

mental disorder only if that disorder prevents them from acting independently and if it is

necessary to defend their rights. If all the conditions listed are not met

provisions, in particular if the person concerned is able to act independently in the proceedings, the administrative authority

does not appoint a guardian for that person.

The allegations alleged that the health condition of the head of the branch plant

does not allow

his personal participation in the administrative proceedings, the appellate body further states that he could at any time

during the proceedings to authorize another person to negotiate with the administrative body of the first instance.

to consult the file (before

by sending the inspection report) on 2 August 2018 (see official record of access to

control file ref. UOOU-12081 / 17-44), in this view or in others

acts (such as opposition or appeal) did not submit to the administrative authority of the first instance

no power of attorney to represent the accused.

The alleged disregard

liquidation nature of the administrative sanction imposed

by the first instance body, the appellate body states that the accused did not file itself

to the administrative authority of the first instance during the administrative proceedings no documents from which

it was possible to draw that conclusion and they were not accused before the contested decision

(resp. u

) in the public register of the Ministry

justice, no accounting records are kept on the website www.justice.cz, of which it would be

possible to base the amount of the sanction. Of the records listed in the collection of documents accused is

obvious financial statements

as the most current

accounting document, reached the court of registry on December 2, 2018 and the collection of documents

branch was established on 4.

January 2019. At the time of the previous issue

the contested decision could not therefore have that information

available. At the time of the decision of the Appellate Body, the above-mentioned accounting documents

the accused were in the public register of the Ministry of Justice at www.justice.cz

imposed by them and the appellate body could therefore base them in assessing the administrative charge imposed above

sanctions and its economic impact on the accused.

According to the information provided in the income statement of the accused as at 31 December 2017, it was her

CZK. Of this amount, she was charged under the provisions

Profit before tax

§ 21 paragraph 1 of Act No. 586/1992 Coll., On income taxes assessed 19% tax in the amount of

CZK.

According to the judgment of the Constitutional Court file no. Pl. ÚS 3/02 of 13 August 2002, is a liquidation fine

if it means such an "interference with property, as a result of which it would be" destroyed "

property base for further business activities ". It is therefore evident that the sanction imposed

was not an administrative body of the first instance of a liquidation nature. However, the appellate body

considers that, given the economic situation of the accused, the amount of the fine imposed is disproportionate

high, also given the nature of the case. The appellant took the appeal into account when proposing to change the amount of

the fine

authority in particular to the fact that, although the gravity of the conduct in question is

invasion of privacy by the persons concerned is not as high as seen by the administration

first instance, in particular with regard to the content of the commercial communications sent, which

concerned educational activities. In view of this, the appellate body therefore ruled

on the change of the amount of the fine imposed by the administrative body of the first instance from the amount of CZK

46,000

for the amount of CZK 23,000. In that regard, the Appellate Body points out that it is so

possible as the appeal will be upheld, as the accused objected to the disproportionate nature

fines imposed by the administrative authority of the first instance and at the same time no damage can be caused

none of the parties to the proceedings. Conditions of the provisions of § 152 par. 6 let. a) of the Act

No. 500/2004 Coll., concerning the change of the decision of the administrative body of the first instance in the proceedings

about decomposition, so they were fulfilled.

In conclusion, the Appellate Body therefore concludes that the defendant 's arguments are set out in the application

dismissed the appeal and, after an overall examination, did not find the contested decision illegal,

nor did it find any errors in the procedure which preceded the adoption of this decision.

Lessons learned:

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

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

Prague, March 13, 2019

For correctness of execution:

official stamp imprint

JUDr. Ivana Janů, v. R.

chairwoman