CZECH REPUBLIC

JUDGMENT
JM É NEMREPUBLICS

The Supreme Administrative Court decided in a panel composed of the chairwoman JUDr. Miluš Došková and judges Mgr. Eva Šonková and JUDr. Karel Šimka in the plaintiff's legal case: **SOLUS, interest association of legal entities,** with registered office at Antala Staška 510/38, Prague 4, represented
M.Sc. Marií Janšová, lawyer with registered office at Václavská 316/12, Prague 2, against the defendant: **Office for the Protection of Personal Data,** with registered office in Plk. Sochora 27, Prague 7, in the presence of the person involved in the proceedings: **Mgr. RL,** against statements I. – VII. and IX. – XI. decision of the chairman of the defendant dated 12 February 2013, no. INSP2-4684/12-38, on the cassation complaint of the plaintiff against statements II. and III. of the judgment of the Municipal Court in Prague dated 8 March 2017, No. 10 A 72/2013 - 86,

as follows:

I. The cassation complaint **is rejected.**

II. Neither the plaintiff nor the person involved in the proceedings **has** the right to compensation for the costs of the proceedings about a cassation complaint.

III. The defendant **is** not awarded compensation for the costs of the cassation appeal .

Justification:

I. Definition of the matter

The plaintiff is an association of legal entities (non-banking financial institutions, banks, [1] providers of electronic communications services, energy suppliers and others), whose main activity is the organization and management of databases enabling the assessment of consumers' ability to pay. Based on the initiative of a person involved in the proceedings and JR, the defendant carried out an inspection of the complainant from 7 June to 24 August 2012 focused on compliance with the obligations arising from Act No. 101/2000 Coll., on the protection of personal data, as amended (hereinafter referred to as the "Personal Data Protection Act"), when processing the personal data of JR and persons involved in the proceedings in the so-called negative register of natural persons.

Statements I. - VII. in the header of the marked decision of the chairman of the defendant (hereinafter referred to as [2] "challenged decision"), the plaintiff's objections against the control findings stated in the control report of the defendant dated 30 October 2012, no. INSP2-4684/12-33 (hereinafter referred to as " control log"). In the inspection report, four corrective measures were also imposed on the plaintiff. Statement VIII. of the contested decision, remedial measure No. 1, by which the plaintiff was ordered to dispose of JR's personal data recorded in the negative register, was annulled, given that at the time the control report was issued, the period during which the plaintiff was legally obliged to To eliminate JR, it was superfluous to impose the given duty on him. Statements IX. and XI. objections to remedial measures No. 2 and No. 4, by which the plaintiff was ordered to inform JR and the person involved in the proceedings about the disposal of their personal data, were rejected.
By the X. statement of the contested decision, corrective measure No. 3 was changed in such a way that the plaintiff was ordered to delete the personal data of the person participating in the proceedings in the negative register, which was entered by Home Credit, as

The lawsuit filed against statements I. - VII. and IX. – XI. of the contested decision of the Municipal [3] Court in Prague in the heading of the judgment (hereinafter referred to as "municipal court" and "contested judgment") in the part relating to the annulment of judgments I to VII. rejected the contested decision and in the part concerning the annulment of statements IX. – XI. rejected the contested decision. The municipal court stated first of all that the decision on objections to inspection findings is not a decision in the sense of § 65 of Act No. 150/2002 Coll., Administrative Code of Court, as amended (hereinafter referred to as "the Code of Administrative Procedures"), because it does not directly interfere with the legal sphere of the controlled entity. The lawsuit against them is therefore according to § 68 letter e) s. r. s. inadmissible. On the contrary, the statements of IX. - XI. of the contested decision, the plaintiff was required to take corrective action, and it is therefore indisputable that the action against them is admissible.

[4] In the case itself, the city court first dealt with the revocability of the personal data subject's consent granted for a fixed period. If personal data is processed on the basis of consent, this is done with regard to the exhaustive list in § 5 paragraph 2 letter a) to g) of the Personal Data Protection Act on situations where the administrator does not necessarily need to process personal data and may do so only because the data subject has waived his right to have his personal data not processed through consent. This is not even a situation where the controller needs the data in connection with the contractual relationship between the data subject and the controller [§ 5 para. 2 letter b) of the Act on the Protection of Personal Data], nor on the processing of personal data necessary to comply with the administrator's legal obligations [§ 5 para. 2 letter a) of the same law]. Neither the Personal Data Protection Act nor the Personal Data Protection Directive contain any special regulation of consent for a fixed period.
The difference between consent granted for an indefinite period and for a fixed period consists mainly in the fact that the consent granted for an indefinite period can only be released by the data subject by actively withdrawing the consent, while after the expiry of the consent granted for a fixed period, the controller's authorizations expire without further the subject's activities. However, it does not follow that the consent granted for a fixed period is irrevocable. Consent is a unilateral act of the data subject towards the administrator, not a contract between the administrator and the data subject. The meaning of the consent is that the subject can take it back, because only he is supposed to have control over who may process his personal data beyond the scope of cases established by law [the working group established pursuant to Article 29 of the Directive of the European Parliament and the Council reached similar conclusions 95/46/EC of 24 October 1995 on the protection of natural persons in connection with the processing of personal data and on the free movement of such data (hereinafter referred to as "Directive 95/46/EC") in its opinion of 13 July 2011 on the definition of consent, WP187, pp. 32 - 33]. Related to this is the controller's obligation under Section 5, Paragraph 4 of the Personal Data Protection Act to prove the granting of consent for the entire period of processing. Regarding the plaintiff's reference to the historical interpretation of Section 5, Paragraph 4 of the Personal Data Protection Act, the municipal court stated that from the omission of the wording that the subject may

continuation

to revoke the processing, unless otherwise agreed with the administrator, it cannot be concluded that all consents are irrevocable from the effective date of the amendment, but only that the law does not now explicitly allow for the possibility of an agreement between the administrator and the subject that the consent cannot be revoked. According to the city court, the analogy between the consent of the subject of personal data to their processing and the consent of the owner of the neighboring property to the implementation of the announced construction in the construction procedure is not applicable. The consent of the owner of the neighboring property is the basis for the permit act issued by the building authority. Apart from the term "consent", this institute does not show any similarities with the actions of the subject of personal data.

in The municipal court then proceeded to assess the alternative argumentation of the plaintiff consisting [5] the claim that he was authorized to process personal data without the consent of the data subjects in order to protect the legitimate interests of its members in the sense of § 5 paragraph 2 letter e) of the Personal Data Protection Act. The municipal court first stated that the cited provision implements Article 7 letter f) of Directive 95/46/EC, and must therefore be interpreted in a Euro-compliant manner. Interpretation of Article 7 letter f) of the directive was, according to the municipal court, sufficiently interpreted by the jurisprudence of the Court of Justice, thus it is a so-called *acte éclairé* in the sense of the judgment of the Court of Justice in the *CILFIT case.* He therefore did not consider it necessary to submit a preliminary question to the Court of Justice.

[6] The term "legitimate interest" cannot be limited by a member state to only a specific type of rights or interests, it can be, for example, an interest in the proper functioning of websites (judgment of the Court of Justice in the Breyer case) . Application § 5 paragraph 2 letter e) of the Personal Data Protection Act is not limited to the protection of constitutionally guaranteed rights, but to the protection of legitimate interests in a broader sense. The municipal court therefore convinced the plaintiff that it has a legitimate interest in its members being able to effectively verify the creditworthiness of consumers who apply for consumer credit. However, this legitimate interest must be measured by the test of proportionality to the interference with the right to privacy of the subjects of the collected data, while the measure under consideration does not pass the second step of the test, i.e. the assessment of necessity. Although this is a measure suitable for verifying the creditworthiness of consumers (the first step of the test) and certainly effective, it is not the only tool. Claimant members can and do request information about the ability to repay the loan primarily from consumers. Information is also often publicly available, e.g. in the insolvency register. Of course, a situation may arise when it will not be possible to find out reliable data testifying to his creditworthiness for a specific consumer, but in such a case, the plaintiff's members will have no choice but to not grant the loan.

[7] For the sake of completeness, the municipal court added that even if it accepted that the maintenance of databases of debtors in arrears without their consent is necessary for the fulfillment of the legitimate interests of the plaintiff, it would have to come to the conclusion that such interference with the right of the subjects of personal data to protect privacy cannot pass the test of reasonableness (third step of the proportionality test). On the part of the subjects of personal data in the case under consideration, there is an interference with the right to protection against unauthorized interference in private and family life arising from Article 10, paragraph 2 of the Charter of Fundamental Rights and Freedoms (see the decision of the Constitutional Court, file no. Pl. ÚS 24/ 10). Article 8, paragraph 1 of the Charter of Fundamental Rights of the European Union, which guarantees everyone's right to the protection of personal data, also applies in the case under discussion. Finding out information about consumers applying for consumer credit is the plaintiff's legitimate interest, but it is not one of the constitutionally guaranteed rights. The protection of Article 11 of the Charter of Fundamental Rights and Freedoms is subject only to the right to a specific increase in property, the acquisition of which an individual legitimately relies on on the basis of valid legal regulations (cf. e.g. the judgment of the European Court of Human Rights in the case of Glaser v. Czech Republic) . However, such a legitimate expectation is not the case in the case under consideration. Plaintiff members are not guaranteed by law to be ideally informed about consumer affordability and it is up to their discretion and business risk to ensure that they provide services to consumers who can afford them. In this way, the case under consideration differs from the judgment of the Court

dvora in the *Ryneš case,* in which the protection of far stronger interests was on the side of the personal data administrator, as he was protecting the very core of his right to private and family life, namely the integrity of the home, and thus the lives and health of himself and his family members. The plaintiff's interference with the rights of the person involved in the proceedings and another consumer was thus not proportional to the legitimate interest that the plaintiff protected, therefore § 5 para. 2 letter cannot be applied to the plaintiff's actions. e) of the Personal Data Protection Act.

[8] The plaintiff's claim that he processed consumers' personal data without their consent, but did not provide it to his members unless they had the consumer's consent, does not change the aforementioned conclusion. The very fact that the plaintiff collects personal data constitutes processing of personal data within the meaning of § 4 letter e) of the Personal Data Protection Act. In addition, the municipal court noted that the logic of the matter is that in order to ensure the effectiveness of the database claimed by the plaintiff, the other members of the plaintiff must also have access to the data stored in it without the consent of the data subject. The municipal court therefore evaluated this partial argument as incoherent and purposeful in the context of the rest of the lawsuit. The municipal court did not accept the plaintiff's argument that he is obliged to keep a register of debtors as a result of the obligation to act with professional care. It cannot be inferred from the obligation to act with professional care that entrepreneurs have an obligation to create broad databases of consumer solvency. The legal basis for the operation of the debtor database in the case under consideration is not even § 20z para. 1 of Act No. 634/1992 Coll., on consumer protection, as amended, since Act No. 378/2015 Coll., which was the provision in question on consumer protection, entered into force on February 1, 2016. The transitional provisions only mean that the administrators of consumer debt data databases are authorized to process after the amendment also the data that was contained in them before it came into effect. According to the city court, even the explanatory report to the amendment proposed by Deputy Vondráÿek, on the basis of which Section 20 of the Act on Consumer Protection was adopted, has no influence on the above conclusions. The opinion of a single deputy does not hold up in the context of the above-mentioned argumentation, and it cannot be inferred that if the Chamber of Deputies accepted the amendment, it also agreed with the explanatory report.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free movement of such data and on the repeal of Directive 95/46/EC (General Regulation on the protection of personal data), because not only was it not effective at the time of the contested decision, but it was not effective at the time of the court's decision either. Moreover, it does not result in any change in the legislation relevant to this proceeding. Regarding the presented decision of the Rotterdam court from 2010, the city court stated that the importance of the decision of the Dutch court of first instance for the interpretation of European Union law cannot be overestimated. In addition, the court dealt with the activities of a public organization (Bureau Krediet Registratie), which maintains a central register of information on consumer debts based on Dutch legislation. It was therefore a substantially different factual and legal situation from the matter currently being discussed.

[9] Regarding the plaintiff's argument that he is obliged to maintain a database of unreliable debtors in order to be able to fulfill his obligations arising from § 9 paragraph 1 of Act No. 145/2010 Coll., on consumer credit and on the amendment of certain laws, as amended (hereinafter referred to as " Consumer Credit Act"), or Article 8(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on consumer credit agreements and repealing Council Directive 87/102/EEC (hereinafter referred to as "Directive 2008/48/EC"), municipal the court stated that it does not follow from the cited article of the directive that consumer credit providers are obliged to systematically verify the claims of loan applicants in debtor databases. This obligation can be enshrined in national legislation.
The directive only requires that credit should not be granted to a consumer about whom the provider has no or completely unreliable information (Court judgment in *CA Consumer Finance* SA). The provisions of Section 9(1) of the Act on Consumer Credit cannot therefore be interpreted as stipulating the obligation of a consumer credit provider to maintain and use a database

creditworthiness of consumers. The provider should primarily require the consumer who applies for a consumer loan to prove that he will be able to repay the loan. As a subsidiary means of verifying the creditworthiness of the consumer, the provider may also use relevant databases, but only those that are operated in accordance with the law. If the consumer credit provider finds itself in a situation where it is unable to verify the consumer's ability to repay the loan from the information provided by the consumer, and at the same time does not have access to any alternative sources of information, it would not be able to grant the loan to the consumer. However, such an option does not contradict the Consumer Credit Act. Regarding the plaintiff's alleged public interest in maintaining a register of debtors, the municipal court stated that the general principle of administrative proceedings enshrined in § 2, paragraph 4 of Act No. 500/2004 Coll., Administrative Code, as amended, which leads administrative authorities to took into account the compliance of the adopted decisions with the public interest, it cannot influence the interpretation of the applied substantive legal regulations by the administrative body or even serve as a substitute for such regulations. In the conclusion of the reasoning, the city court dealt with whether the plaintiff did not, based on the defendant's administrative practice, have a legitimate expectation that his procedure consisting in the collection of personal data in the debtors' database without the consent of the data subject, or rather on the basis of irrevocable consent, does not contradict the law, and concluded that the plaintiff had no document at his disposal from which such an expectation could arise.

II. Content of the cassation complaint

[10] Against the challenged judgment, the plaintiff (hereinafter referred to as the "complainant") filed a cassation complaint based on the grounds of § 103 paragraph 1 letter a) and d) s. ÿ. s., i.e. incorrect legal assessment by the municipal court and unreviewability of the contested judgment.

[11] The applicant primarily criticizes the municipal court's legal assessment for the incorrect implementation of the proportionality test in relation to § 5 para. 2 letter e) of the Personal Data Protection Act and Article 7 letter f) Directive 95/46/EC. Instead of conducting a proportionality test with respect to the legitimate interests claimed by the applicant (the interest in fulfilling the general duty of professional care and the special duty to verify solvency), the municipal court conducted a comparison between the constitutionally guaranteed fundamental rights, namely between the right to the protection of property rights and the right to the protection of personal data . Category of legitimate interests according to § 5 paragraph 2 letter e) of the Personal Data Protection Act is, however, broader, as it may also include interests that are not enshrined in the constitutional order. Unlike the municipal court, the applicant considers the limitation of business risk to be a legitimate interest. It draws attention to Article 8, paragraph 1 of Directive 2008/48/EC and point 28 of the same directive, which show the clear intention of the EU legislator to search information databases for the purpose of verifying the creditworthiness of consumers. According to the judgment of the Court of Justice in the *CA Consumer Finance SA* case, the assessment of whether the information provided by the consumer is sufficient is entrusted to the credit provider, who can carry out a database check for this purpose. Such a legitimate interest meets the criterion of necessity and Member States should not place excessive obstacles in its exercise. The complainant refers to the European Commission's document of 23/03/2017 "Consumer Financial Services Action Plan: Better Products, More Choice", in which the European Commission explicitly mentions credit assessment as one of the means of preventing irresponsible processing of consumer loans and intends to develop a minimum set of data , which are supposed to exchange credit registers with each other for this purpose. Art. 8(2) of Directive 2008/48/EC allows Member States to require creditors to assess the creditworthiness of consumers based on a search of the relevant database.

According to Article 9, paragraph 1 of Directive 2008/48/EC, the Member State is obliged to provide foreign providers with access to debtor databases. The EU legislator apparently did not take into account the possibility that the database of debtors would not exist in a member state or that its existence might even be in conflict with another regulation of the European Union.

According to the complainant, when carrying out the proportionality test, it is also necessary to take into account [12] the contractual obligation of providers of electronic communications services (§ 63, paragraph 4 of Act No. 127/2005 Coll., on electronic communications, as amended) and energy traders in the position of suppliers of last resort [§ 12a of Act No. 458/2000 Coll., on business conditions and on the performance of state administration in the energy sector and on the amendment of certain laws (Energy Act), as amended], who make up a substantial part of the plaintiff's members.

A significant part of the complainant's members must also provide their services to consumers, with whom they would carefully consider the provision of services in the case of a free business strategy. They therefore have an urgent need for detailed information about the creditworthiness of the future customer so that they can appropriately set the conditions for the provision of the service. In addition, information about the existence of a substantial delay in fulfilling the financial obligation towards the provider of electronic communications services is also of fundamental importance for preventing irresponsible access to consumer loans. If the municipal court concluded that the service providers' efforts to prevent the emergence of new unpaid claims do not fall under the protection of the right to protect property, it did not take into account that for many of the complainant's members it is an attempt to prevent the devaluation of their own property by causing the consumer to incur additional claims from other entrepreneurs.

[13] According to the complainant, the municipal court interpreted the right of the person involved in the proceedings to protect personal data disproportionately broadly, to the detriment of the complainant and its members. The right to the protection of personal data is not identical to the right to the protection of private life, but only related to it.
According to Article 10, paragraphs 2 and 3 of the Charter of Fundamental Rights and Freedoms (as well as according to Articles 7 and 8 of the EU Charter of Fundamental Rights), interference with the right to the protection of personal data must reach the intensity of abuse. The complainant considers the reference to the decision of the Constitutional Court no. stamp Pl. ÚS 24/10 as irrelevant, because in the case under consideration the processed data do not directly indicate the personal privacy of the data subject. For the application of the criterion of necessity, the applicant refers to the opinion of Advocate General Bobek in *Valsts policijas Rïgas* and the judgment of the European Court of Human Rights *in Handyside v. the United Kingdom.* The criterion "necessary" should be understood rather as necessary, not inevitable or useful or desirable. In order to meet the condition of necessity, there must be a serious need and the measures must be proportionate.

not When comparing the considered case with the judgment of the Court of Justice in the case of *Ryneš* mÿšský [14], the court did take into account the fact that in the given case there was a stronger interference with the rights of the data subject (for example, arrivals and departures from the adjacent apartment building were recorded), in the case currently being considered it was only about the processing of a limited range of personal data and only about persons who are in arrears with the fulfillment of their contractual obligations. Only the identification data of the subject (name, surname, place of residence, social security number) and data on the extent and nature of the breach of contractual obligation were processed (amount owed, number of installments or other overdue payments, date when the conditions for inclusion in the register were fulfilled, written code characterizing the circumstances of the breach of duty and, where appropriate, the date of payment, write-off or assignment of the claim). In addition, the person participating in the proceedings apparently considers it an interference with his rights that, according to the data recorded in the database, a proper assessment of his creditworthiness is taking place, which makes it difficult for him to further over-indebt.

The complainant points out that when carrying out the proportionality test, it should be taken into account [15] that the alleged interference with the right to protect private life consisted in the fact that information about the existing delay of the consumer vis-à-vis another entrepreneur was not kept secret from another service provider.
It is therefore necessary to consider whether it was really an interference with the right of the data subject or, on the contrary, an attempt by the subject to abuse the right. The concealment of information about the existence of arrears towards another service provider could thus have a major impact on the incorrect assessment of the consumer's creditworthiness and could lead to his irresponsible over-indebtedness. Such conduct is contrary to the principle of honesty in legal proceedings pursuant to § 6 of Act No. 89/2012 Coll., Civil Code, as amended.

Failure to provide essential information when negotiating a loan can even be a criminal offence. The challenged judgment deprived creditors of an effective tool to prevent potential criminal conduct. The existence of a serious need for consumer creditworthiness registers is also evidenced by the statements of the Czech National Bank and the security forces, which the city court did not take into account.

[16] The complainant further objects that the municipal court did not understand the way in which the complainant and its members proceed in practice when verifying the financial creditworthiness of consumers. In his assessment, he based his assessment on the facts in the proceedings that were not ascertained, and from the contested judgment it is not clear what considerations he was guided by when assessing the facts, the contested judgment is therefore unreviewable. At the time the contested decision was issued, the complainant recorded data on consumers' creditworthiness in the database even without the consent of the data subject, however, data from this database was always transferred only with the consent of the data subject. Without the consent of the data subject, the service provider was not authorized to request data from the database on the existence of a substantial delay in previous contractual relationships. If the consumer's consent is a condition for the request for data from the database, this is only a certain administrative burden for the service provider. However, if consent is a condition for inclusion in the database, the service provider does not know whether there is no information in the database because the consumer has no overdue obligations or because he has withdrawn his consent to their inclusion, so the database is unusable for the service provider. Conditional processing of personal data on the existence of consent, enhanced by its revocability, could in practice lead to the fact that the data subject would withdraw his consent at the moment when the claim would not be paid.

This action would then allow the borrower to obtain a loan despite his unpaid obligations. Requiring consent to the request for data from the database minimizes interference with the rights of the data subject, as it preserves a greater degree of control over how his personal data is handled.

[17] The Municipal Court also erred in refusing to refer a preliminary question to the Court of Justice.
If a municipal court took a completely different opinion than a court in another member state, it cannot be a so-called *acte clair,* or *acte éclairé,* because there are different interpretations of European Union law and the Court of Justice has not yet made an interpretation. Moreover, the municipal court misinterpreted the Dutch judgment.
In the given case, it was a private foundation, not a public institution, and the only legal basis for its activity is the Dutch transposition of Article 7 of Directive 95/46/EC. The statement of the working group of the European Commission WP 164 is not only an internal material, but a document that was submitted for public consultation within the European Commission. The defendant's argumentation with document WP 65 is purposeful. In the conclusion of his cassation complaint, taking into account that the Supreme Administrative Court is the court of last instance, the applicant proposes that, in accordance with Article 267 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"), he asks the Court of Justice the following preliminary questions:

1) It is necessary to interpret Article 7 letter f) the Personal Data Protection Directive, so that among the processing of personal data that is necessary for the realization of the legitimate interests of the administrator or a third party, or persons to whom the data is communicated, the processing of personal data in a special register kept by the personal data administrator for the purpose of preventing irresponsible indebtedness of consumers, namely the data of data subjects who are in substantial delay in fulfilling their monetary claim, while the personal data of the data subject kept in such a special register are transferred to another person only at the request of the data subject to enter into another contractual relationship with this person , solely for the purpose of assessing the creditworthiness of the data subject?

2) Would the fact that personal data contained in a special register kept for the purpose of preventing irresponsible consumer indebtedness be requested by third parties solely on the basis of the consent of the data subject provided to this third party with such a request, for the purpose of assessment of the creditworthiness of the data subject when negotiating the conclusion of a contractual relationship of the data subject with such a third party?

3) It is necessary to interpret Article 7 letter f) directive on the protection of personal data so that, for the purposes of assessing whether the legitimate interests of the administrator or a third party, or persons to whom the data are communicated, do not exceed the interest or fundamental rights and freedoms of the data subject, which require protection pursuant to Article 1 para. 1 of the aforementioned directive, it is necessary on the part of the data subject to assess the specific interests, fundamental rights and freedoms of the data subject in relation to the specific categories of personal data processed in the given case (e.g. data on the existence of a substantial delay by the data subject in fulfilling a monetary claim) in relation to specific the purpose of the processing (e.g. keeping a special register to prevent irresponsible consumer indebtedness), and not just a general interest, the data subject's fundamental rights and freedoms to protect privacy and the data subject's right to informational self-determination?

4) Article 8(1) of the Consumer Credit Directive must be interpreted in such a way that this article prevents Member States from adopting measures that would hinder the existence and effective functioning of negative debtor registers of natural persons - consumers, including such measures that would make it impossible keeping such registers on the legal basis of Article 7 letter f) the directive on the protection of personal data, as well as measures according to which Member States would require as a condition for the maintenance of such registers the consent of data subjects to the processing of their data in these registers, in connection with the right of the data subject to withdraw consent, including after a delay has occurred ?

III. The statement of the defendant and the person involved in the proceedings and the reply of the complainant

[18] In his statement on the cassation complaint, the defendant identifies himself with the contested judgment and refers to his statement in the proceedings before the municipal court. Regarding the proportionality test carried out, the defendant states that, given that the right to personal data protection is a constitutionally guaranteed fundamental right, it is quite correct that the municipal court compared it with another fundamental right, which is the right to protect property, but not the interest in fulfilling general obligations of professional care or special obligations of verification of solvency. The complainant does not relate his arguments in any way to the specific circumstances of the case under consideration, while neglecting that in the *Ryneš* case there was a real threat to the data subject, which was measured against the rights of a relatively clearly defined group of persons. The defendant rejects the argument that the right to the protection of personal data is only related to the right to privacy.

Provision § 5 paragraph 2 of the Act on the Protection of Personal Data requires a measurement to be carried out against the right of the data subject to protect his private life, Article 7 letter f) Directive 95/46/EC permits the processing of personal data only if the interest and rights of the data subject do not exceed the need for processing.

[19] The processing of personal data must be based on one of the legal titles enshrined in the Personal Data Protection Act. The basic legal title is the consent of the data subject. If respect for a person's dignity and privacy is to be maintained, it is up to the data subject to decide when to allow and when to withdraw permission to interfere with his privacy. Argumentation with the exception enshrined in § 5 paragraph 2 letter e) of the Personal Data Protection Act is purposeful. The application of this statutory exception is also called into question by the adoption of amendment No. 378/2015 Coll., which bases the management of the database on the creditworthiness and trustworthiness of consumers on § 20z and § 20za of the Act on Consumer Protection and § 5 paragraph 2 letter a) of the Personal Data Protection Act, not § 5 para. 2 letter f) of the same law.

[20] The contested judgment does not call into question the actual need to assess the consumer's creditworthiness, but rather the necessity of maintaining the assessed database and, as a result, its legality.
Directive 2008/48/EC does not require the maintenance of databases on the creditworthiness of consumers, it is only one of the alternative options, which was only introduced into the Czech legal system by amendment No. 378/2015 Coll. Assessment of the consumer's creditworthiness is also possible by other methods, primarily by obtaining information directly from the consumer. As a result, the limitation of contractual freedom of some members of the complainant calls into question the need to maintain the database in question, and thus also the application of § 5 para. 2 letter e) of the Personal Data Protection Act. If the conclusion of the contract cannot be refused,

it is not possible to fulfill the declared purpose of fulfilling the general obligation of professional care, while the mere establishment of special conditions is not sufficient to justify interference with the right to the protection of personal data. The aspect of good manners was taken into account when enshrining the legal titles for personal data processing in the Personal Data Protection Act. In conclusion, the defendant states that the legislation and jurisprudence are unambiguous in relation to the question under consideration, therefore there is no reason to submit a preliminary question to the Court of Justice. In addition, the filing of a preliminary question has no significance for future disputes in view of the change in legislation.

[21] The person involved in the proceedings in his statement on the cassation complaint states that the complainant records in the negative register everyone whom his member, a private entity, designates as a debtor (regardless of the amount of the debt). By being included in a database maintained by the complainant, the individual is completely removed from everyday life and the ability to arrange any service from a mortgage to a contract with a telephone operator. Such extortion by the threat of discredit is considered by the person involved in the proceedings to be inadmissible in a state governed by the rule of law. In addition, entrepreneurs can use the data to pressure consumers in the event of a potential lawsuit. Credibility can be verified in another way, fraudsters can bypass the database. The person participating in the proceedings joins the complainant's considerations *de lege ferenda,* so that the law does not allow withdrawing consent to the processing of personal data in some cases. However, negative registers should only be based on valid decisions about debt or on officially verified recognition of debt, not on any record by a private entity. The person participating in the proceedings points to his case, where consent to the processing of personal data was disguised in small print on the adhesion contract concluded with the company Home Credit, as, while the lawsuit against the person participating in the proceedings was rejected by the civil court, but the complainant, however, the personal data of the person participating in the proceedings continued to record and provide to third parties. In conclusion, the person participating in the proceedings states that the right to do business cannot be prioritized over the right to protect personal data and protect human dignity.

In his reply to the statement of the defendant and the person involved in the proceedings, the complainant states [22] that, unlike the *Ryneš* case, in the case under consideration, the data of only those entities that gave the reason for this by their previous non-payment of the debt were processed. Neither the defendant nor the municipal court took into account the nature of the processed data, unlike the case of *Ryneš ,* the complainant does not process data indicating the private and intimate life of the data subjects.
The complainant further objects to the defendant's reference to amendment No. 378/2015 Coll., which on the one hand was not effective at the time the contested decision was issued, and on the other hand does not exclude the application of § 5 paragraph 2 letter e) of the Personal Data Protection Act as the legal basis for personal data processing. Moreover, according to the complainant, it is not true that she was questioned several times. Regarding the issue of the contractual obligations of some of its members, the complainant states that the negotiation of specific conditions such as advance payment or the payment of an extraordinary advance significantly affects the possibility of collecting a potential unpaid claim and helps to prevent over-indebtedness of the consumer. The complainant further points out that the data listed in the database are encrypted, they are only used in the event of a query. The aspect of good morals was not taken into account by either the defendant or the municipal court in the proportionality test, contrary to the defendant's claim. To the preliminary question, the applicant adds that in a number of other member states, for example in the United Kingdom or Italy, the courts choose an interpretation similar to the submitted decision of the Dutch court. Regarding the adoption of the new legislation, the complainant states that the general regulation on the protection of personal data contains an almost identical legal norm as in the considered provision. In addition, the General Regulation on the Protection of Personal Data will only enter into force on 25/05/2018. The person participating in the proceedings states circumstances relating to his registered claim, which were not mentioned in the administrative proceedings or in the proceedings before the municipal court. Regarding the correctness of the recorded data, the complainant states that in the event of a claim being disputed, he blocks and checks the data in accordance with the Personal Data Protection Act. The person involved in the procedure or other consumers correctness of the data

did not dispute, the subject of administrative proceedings was not the incorrectness of the data, but the existence of consent to their processing. The members of the complainant are obliged to regularly check the recorded data by an independent auditor. In conclusion, the complainant points out that the person involved in the proceedings was not excluded from ordinary life, because at the time when her data were recorded in the complainant's database, she obtained a loan from the company Raiffeisen stavební spoÿitelna, as, which is a member of the complainant.

IV. Assessment of the cassation complaint by the Supreme Administrative Court

[23] The Supreme Administrative Court first examined the formal requirements of the cassation complaint and stated that the complainant is a person authorized to file it, as he was a party to the proceedings from which the challenged judgment arose (§ 102 s. ÿ. s.). The cassation complaint was filed on time (§ 106 para. 2 s. s. s. s.) and the complainant is represented by a lawyer (§ 105 para. 2 s. s. s. s.).

[24] The Supreme Administrative Court weighed the merits of the cassation complaint within the limits of its scope and the reasons applied and examined whether the challenged judgment does not suffer from defects that it would have to take into account as an official duty (§ 109 par. 3 and 4 s. ÿ. s.).

[25] The Supreme Administrative Court therefore first had to deal with the question of the conditions of the proceedings on the claim, specifically whether the corrective measure contained in the control protocol is an administrative decision with attributes according to § 65, paragraph 1 of the Civil Code. The Municipal Court correctly stated, that the decision on objections to the inspection finding is not a decision in the sense of § 65 s. s. s., as it does not directly interfere with the legal sphere of the controlled entity (for this see, for example, the judgments of the Supreme Administrative Court of 25 September 2007, no. j. 4 Ads 32/2007 – 36, dated 24/04/2013, no. 3 Aps 9/2012 - 29, or dated 20/11/2014, no. 2 Ads 126/2014 - 79 , available as well as the other decisions of the Supreme Administrative Court listed here at www.nssoud.cz), and thus rejected the lawsuit in the part relating to the statements of the contested decision, with which the defendant only rejected objections to the conclusions of the control protocol. Subsequently, however, he stated in a rather simplistic way that the statements of IX. – XI. of the contested decision, the applicant was required to take remedial measures, and it is therefore indisputable that the action against these statements is admissible.

[26] It is true that the earlier jurisprudence of the Supreme Administrative Court emphasized its material aspect when defining an administrative decision, and therefore considered the control protocol in the part imposing corrective measures on the controlled entity to be an administrative decision, without dealing with the prescribed form (cf. the judgment from on 14 November 2007, No. 1 As 13/2006 - 90). However, when assessing the admissibility of the claim, the resolution of the extended panel of the Supreme Administrative Court of 16 November 2010, No. 7 Aps 3/2008 – 98, publ. under No. 2206/2011 Coll. NSS, according to which it is necessary to consider as a decision in the sense of § 65 paragraph 1 s. s. s. the said act is usually preceded by administrative proceedings and that the act itself has legal requirements. The defendant proceeded against the complainant in accordance with Act No. 552/1991 Coll., on state control, as amended, and drew up a report of the control findings, which included corrective measures in accordance with § 40 of the Personal Data Protection Act. The control process according to the Act on State Control [and now according to Act No. 255/2012 Coll., on control (control regulation), as amended] does not in itself have the character of an administrative procedure aimed at issuing an administrative decision. With regard to § 41 of the Act on the Protection of Personal Data, as amended until 30 April 2014, it can nevertheless be concluded that if a violation of legal regulations was detected during the control in the area of personal data protection, which had to be addressed by taking corrective measures, it should have been part of the control protocol according to the Act on State Control, as well as the administrative decision according to § 41 of the Act on the Protection of Personal Data, by which the controlled

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the subject and appropriate corrective measures imposed. The defendant did not proceed in the prescribed manner in the present case, did not issue an administrative decision on corrective measures and made them a formal part of the control protocol. However, the mentioned procedure cannot be detrimental to the controlled entity. If the imposition of the obligation to take remedial measures within the specified period meets the material requirements of an administrative decision and the legal regulation also prescribes the form of an administrative decision, then an act of an administrative body that does not have this form as a result of its misconduct must also be considered an administrative decision (judgment of the Supreme of the Administrative Court of 12 August 2015, No. 3 As 182/2014 – 34). In the challenged decision of the chairman of the defendant, which was issued in the proceedings on the remedy filed by the complainant, the form and content were unified. The Supreme Administrative Court therefore came to the conclusion (albeit on the basis of a slightly different legal argument) that the municipal court proceeded correctly when the lawsuit in the part directed against the statements of IX. – XI. discussed the contested decision on the merits.

[27] The Supreme Administrative Court further had to consider whether the municipal court acted in accordance with the law when it dealt with RL as a party to the proceedings (for the reasons set out below, the Supreme Administrative Court continues to refer to him as a party to the proceedings in this judgment).

[28] Pursuant to Section 34 of the Civil Code, *"[p]ersons involved in the proceedings are persons who were directly affected in their rights and obligations by the issuance of the contested decision or by the fact that the decision was not issued, and those who may be directly affected by its cancellation or issuance according to the draft judgment of the court's decision, if they are not participants and have expressly announced that they will exercise the rights of the persons participating in the proceedings" (paragraph* 1). *"The proposer is obliged to indicate in the proposal the persons who come into consideration as persons participating in the proceedings, if they are known to him. The president of the senate shall inform such persons of the ongoing proceedings and invite them to announce within the time limit he sets for them at the same time, whether they will exercise the rights of a person participating in the proceedings in the proceedings; such notification can only be made within this period. At the same time as notification, they will be educated about their rights. Similarly, the chairman of the panel proceeds if it is discovered during the proceedings that there is another such person" (paragraph* 2). *"A person participating in the proceedings has the right to submit written statements, inspect the file, be informed of the ordered proceedings and request that he be granted the floor during the proceedings. It is served with the lawsuit, the resolution granting suspensive effect, the resolution on preliminary measures and the decision ending the court proceedings. A person participating in the proceedings cannot dispose of its subject" (paragraph* 3). *"The court shall issue a ruling that the person who claims the status of a person participating in the proceedings and does not meet the conditions for this, is not a person participating in the proceedings" (paragraph* 4).

[29] According to the established jurisprudence of the Supreme Administrative Court, an entity becomes a party to the proceedings only by cumulatively meeting the material (impairment of rights) and formal (explicit notification) conditions set out in § 34 paragraph 1 of the Civil Code. If the claiming entity fails with the procedural status of a person participating in the proceedings within the period set by the court pursuant to § 34, paragraph 2, sentence two of the Criminal Code, does not fulfill the formal condition and is not a person participating in the proceedings, which the court will pronounce by resolution (§ 34, paragraph 4 of the Criminal Code .). If the regional court acted as a person participating in the proceedings with someone who does not belong to this status, the Supreme Administrative Court will cancel the contested decision in the event that there is reasonable doubt about the legality of the contested decision in a causal connection with this procedural defect (judgment of the Supreme Administrative Court dated 17 12. 2010, No. 7 As 70/2009 – 190, publ. under No. 2341/2011 Coll. NSS).

[30] In the case under consideration, the municipal court, in accordance with § 34, paragraph 2, s. proceedings, informed her about the rights of the person participating in the proceedings and invited her to announce within a period of two weeks from the delivery of the notification whether she will exercise the rights of the person participating in the proceedings in the proceedings, with the understanding that the notification can only be made within the specified period. Note No. 10 A 72/2013 – 66 was delivered to her mailbox on 29 October 2016, the two-week period for exercising the rights of a person participating in the proceedings therefore expired on Monday 14 November 2016. A person participating in the proceedings

responded to the notification sent with a submission dated 18 November 2016, in which she stated that she would exercise the rights of the person involved in the proceedings. The city court ignored the delayed exercise of the rights of a person participating in the proceedings and continued to deal with her as a person participating in the proceedings.
However, the person involved in the proceedings did not submit any statement in the proceedings on the claim and did not participate in the oral proceedings.

[31] For the reasons stated above, the Supreme Administrative Court concluded that the municipal court erred when, after the person involved in the proceedings had belatedly announced his entry into the proceedings after the expiry of the set period, he did not issue a resolution pursuant to § 34, paragraph 4, s. ÿ. pp. and instead dealt with her as a party to the proceedings. However, this defect could not affect the legality of the decision in the case, since the person involved in the proceedings did not comment on the matter after the announcement of entry into the proceedings, did not propose any evidence, nor was he otherwise active in the proceedings. Thus, it could not influence the assessment of the matter itself in any way (compare *a contrario* the already mentioned judgment of the Supreme Administrative Court No. 7 As 70/2009 – 190). In the cassation complaint proceedings, the Supreme Administrative Court continued to deal with the person participating in the proceedings, because according to the previous jurisprudence, the cassation complaint proceedings must be based on who the regional court dealt with as a person participating in the proceedings, even if dealt with an entity that does not belong to this position. Pursuant to § 105 paragraph 1 of the Code of Criminal Procedure, in the vast majority of cases, the range of participants in the cassation complaint proceedings is factually the same as the range of participants in the proceedings on the claim. In addition, a consistent distinction between the persons participating in the proceedings on the claim and in the cassation complaint would lead to the necessity to once again demand the fulfillment of a formal condition in the proceedings on the cassation complaint, i.e. to invite the entities that come into consideration as persons participating in the proceedings to repeatedly announce that they exercise the rights persons involved in the proceedings. However, such a procedure would be formalistic and contrary to the principle of procedural economy (already mentioned judgment No. 7 As 70/2009 – 190). In the given case, the Supreme Administrative Court could not even pronounce itself that the person involved in the proceedings is not one, because it follows from Section 34 of the Civil Code that the resolution pursuant to paragraph 4 of the cited provision is issued by the court before which the proceedings are conducted, in which during the process, a certain entity claims the status of a person involved in the proceedings, i.e. in the given case the municipal court. In addition, if the Supreme Administrative Court were to decide on its own according to § 34, paragraph 4 of the Administrative Code, it would deprive the person involved in the proceedings of the opportunity to defend himself against such a decision with a cassation complaint and would also eliminate the opportunity to request a waiver of the missed deadline.

[32] The Supreme Administrative Court further notes that the challenged judgment does not suffer from any of the deficiencies that establish the non-reviewability of the decision. The reasons that led the municipal court to reject the lawsuit can be seen from the justification. The municipal court described the specific factual circumstances on which it based its decision, stated the considerations that guided it in assessing the merits of the lawsuit, and described the conclusions it reached on the basis of these considerations. The Supreme Administrative Court also did not find that the municipal court neglected to address any of the objections raised in the lawsuit.

[33] If the complainant objects that the municipal court based its decision on the facts in the proceedings of the undetected, this is a cassation ground according to § 103 paragraph 1 letter b) s. ÿ. s. d) s. r. s. The incorrect qualification of the cassation objection does not, however, constitute a lack of proposal, as the subsumption of cassation grounds under statutory provisions is part of the court's legal assessment (cf. the judgment of the Supreme Administrative Court of 8 January 2004, no. 2 Afs 7/2003 – 50, published under No. 161/2004 Coll. NSS). However, the Supreme Administrative Court does not consider this objection to be justified. The complainant contradicts the conclusion of the municipal court that, in order to ensure the effectiveness of the negative register, the members of the complainant must have access to the data contained in it without the consent of the data subjects. However, the municipal court expressed the aforementioned conclusion beyond the scope of the necessary justification, as it primarily stated that the very collection of personal data by the complainant constitutes the processing of personal data according to § 4 letter e) of the Personal Data Protection Act, regardless of whether the subsequent provision of data from the negative

registry occurs with or without consent. Therefore, the Supreme Administrative Court did not consider it necessary to verify the factual conclusions of the municipal court more closely, because even if the municipal court were to make a mistake in the above-mentioned conclusion, it could not affect the legality of the contested judgment. The complainant also cannot be convinced that the municipal court did not take into account the statements of the Czech National Bank and the Ministry of the Interior, the National Security Office and the General Inspection of the Security Forces. As can be seen from page 18 of the contested judgment, the municipal court dealt with the statements, but came to the conclusion that the opinions of these authorities regarding the usefulness of negative registers cannot replace the legal reason for processing personal data according to § 5, paragraph 2 of the Personal Data Protection Act.

[34] In the case itself, the disputed question is whether the complainant is authorized to process the personal data of consumers in the so-called negative register without their consent. The Supreme Administrative Court emphasizes that in its assessment it was based on the definition of the dispute in the cassation complaint (in the cassation complaint proceedings there was no dispute between the parties to the proceedings that consent to the processing of personal data was not given at the relevant time), and therefore did not deal with the exact wording of the terms and conditions , in which consent to the processing of personal data is usually indicated.

[35] The Supreme Administrative Court is aware that proceedings before the Constitutional Court under sp. stamp Pl. ÚS 10/17 proceedings on the proposal to cancel § 20z para. 1 *in fine* of Act No. 634/1992 Coll., on consumer protection, as amended. The given provision, which was inserted into the Consumer Protection Act with effect from 1 February 2016 by parliamentary amendment to Act No. 378/2015 Coll., stipulates that no consent is required for the processing of personal data in information databases on the creditworthiness and trustworthiness of consumers consumers. The subject of the review in the considered procedure was the corrective measures listed in the control protocol, not the decision on guilt and punishment. Therefore, the municipal court was not obliged to take into account the principle expressed in the second sentence of Article 40, paragraph 6 of the Charter of Fundamental Rights and Freedoms, according to which the criminality of the offense is assessed and the punishment is imposed according to the legislation that came into force only after the offense was committed. if it is more favorable for the offender (for details, see the resolution of the extended senate of the Supreme Administrative Court of 16 November 2016, No. 5 As 104/2013 – 46, publ. under No. 3528/2017 Coll. NSS).

Therefore, the Supreme Administrative Court did not interrupt the proceedings according to § 48 paragraph 3 letter d) s. s. s. until the decision of the Constitutional Court, as the result of the proceedings before the Constitutional Court cannot have an effect to the court's decision on the merits.

[36] It follows from the administrative file that the assessed negative register is a register of natural persons who have fallen into arrears with the payment of their financial obligations to one of the members of the complainant. The negative register contains the following information about consumers: name, surname, social security number, full address of residence, amount of overdue amount, date of default, date of registration in the information system, date of payment of amount owed, date of last change and name of creditor.

[37] Personal data means *"any information relating to an identified or identifiable data subject. The data subject is considered determined or determinable, if the data subject can be identified directly or indirectly, in particular on the basis of a number, code or one or more elements specific to his physical, physiological, psychological, economic, cultural or social identity" [§ 4* letter a) of the Personal Data Protection Act], by processing *"any operation or set of operations that the controller or processor systematically performs with personal data, 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" [§ 4* letter e) of the Act].

[38] Section 5, paragraph 1 of the Personal Data Protection Act lists the basic principles of personal data protection, such as the principle of fair and lawful processing, the principle of purpose limitation, the principle of minimality or the principle of data quality. These principles are succinctly described in point 28 of the rationale of Directive 95/46/EC (referring to Article 6 of Directive 95/46/EC, which is implemented by § 5, paragraph 1 of the Personal Data Protection Act), according to which "any processing of personal data must *be conducted in a lawful and fair manner to the individuals concerned; that, in particular, it must relate to data that are adequate, substantial and in quantity proportional to the purposes of the processing; that these purposes must be explicit and legitimate and must be established at the time of data collection; that the purposes of data processing subsequent to their collection must not be incompatible with the originally established purposes." The* legal reasons for the processing of personal data are set out exhaustively in § 5, paragraph 2 of the Act on the Protection of Personal Data (similarly, Article 7 of Directive 95/46/EC), according to which the processing of personal data basically requires the consent of the data subject to data processing. Exceptions to the obligation to consent are enshrined in § 5 paragraph 2 letter a) to g) of the Personal Data Protection Act.

[39] According to § 5 paragraph 2 letter e) of the Personal Data Protection Act *"[t]he controller may process personal data only with the consent of the data subject. It may process them without this consent if it is necessary to protect the rights and legally protected interests of the controller, recipient or other person concerned; however, such processing of personal data must not be in conflict with the data subject's right to the protection of his private and personal life."*

[40] The right to the protection of personal data is constitutionally guaranteed. According to Article 10(3) of the Charter of Fundamental Rights and Freedoms, *"[e]veryone has the right to be protected against the unauthorized collection, disclosure or other misuse of data about his person."*

[41] The protection of personal data is also harmonized at the EU level by Directive 95/46/EC.
According to Article 7 letter f) Directive 95/46/EC *"[Member States] stipulate that the processing of personal data can only be carried out if the data subject has unquestionably given consent; or the processing is necessary for the realization of the legitimate interests of the controller or a third person or persons to whom the data are communicated, provided that they do not exceed the interest or fundamental rights and freedoms of the data subject that require protection pursuant to Article 1, paragraph 1." According to point 30* sentence before the semicolon of Directive 95/46/EC *"given that, in order to be lawful, the processing of personal data must also be carried out with the consent of the data subject or must be necessary for the conclusion or performance of a contract binding the data subject or for compliance with an obligation arising from legal regulations or for the fulfillment of a task in the public interest or resulting from the exercise of public authority or for the exercise of the legal interest of a natural or legal person on the condition that the interests or rights and freedoms of the data subject are not predominant." For the sake of completeness, the Supreme Administrative Court states that from 25.5 .* 2018, the General Data Protection Regulation will be applicable. Regardless of its temporal scope, however, the Supreme Administrative Court did not deal with it in more detail, because due to the issue at issue in the cassation complaint proceedings, it does not differ in any way from the applicable legislation.

[42] The right to the protection of personal data is also explicitly enshrined in the Charter of Fundamental Rights of the European Union. According to Article 8 of the Charter of Fundamental Rights of the European Union, *"[e]veryone has the right to the protection of personal data concerning him" (paragraph* 1). *"These data must be processed correctly, for precisely defined purposes and on the basis of the consent of the person concerned or on the basis of another legitimate reason established by law.*
Everyone has the right of access to the data that has been collected about him and the right to have it corrected" (paragraph 2).
According to Article 52, paragraph 1 of the Charter of Fundamental Rights of the European Union, *"[e]ach restriction on the exercise of the rights and freedoms recognized by this Charter must be established by law and respect the essence of these rights and freedoms. In compliance with the principle of proportionality, restrictions may only be introduced if they are necessary and if they genuinely correspond to the general interest objectives recognized by the Union or the need to protect the rights and freedoms of others."*

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[43] The Supreme Administrative Court must therefore take into account all the mentioned dimensions of personal data protection and § 5 para. 2 lit. e) of the Personal Data Protection Act to be interpreted not only in a constitutionally compliant manner, but also in a Euro-compliant manner.

[44] According to the established jurisprudence of the Constitutional Court, the right to privacy also guarantees the right of an individual to decide at his own discretion whether, or to what extent, in what manner and under what circumstances facts and information from his personal privacy should be made available to other subjects. This is an aspect of the right to privacy in the form of the right to informational self-determination, expressly guaranteed by Article 10, paragraph 3 of the Charter of Fundamental Rights and Freedoms (see, for example, findings of 22 March 2011, file no. Pl. ÚS 24/10, dated 17/07/2007, file no. IV. ÚS 23/05, or dated 1/12/2008, file no. I. ÚS 705/06 or dated 20/12/2016, file no. Pl. ÚS 3/14, available like the other decisions of the Constitutional Court listed here at http://nalus.usoud.cz/). The right to informational self-determination, together with personal freedom, freedom in the spatial dimension (domestic), freedom of communication and other constitutionally guaranteed basic rights completes the personal sphere of the individual, whose individual integrity must be respected and consistently protected as an absolutely necessary condition for the dignified existence and development of human life . If the individual is not guaranteed the possibility to monitor and control the content and scope of personal data and information provided by him, which are to be published, kept or used for purposes other than the original, and therefore he himself will not be able to recognize and evaluate the trustworthiness of his potential communication partner and possibly adapt their actions to this, then there is necessarily a restriction or suppression of their rights and freedoms, which is not acceptable in a free and democratic society (finding of the Constitutional Court of 20 December 2011, file stamp Pl. ÚS 24/11) .

[45] The European Court of Human Rights derived the protection of the right to informational self-determination from the right to respect for private and family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In a number of its decisions, this court emphasized that the collection and storage of data relating to an individual's private life fall within the scope of the aforementioned article, as the expression private life must not be interpreted restrictively (judgments of the Grand Chamber in the case of Rotaru v. Romania of 04/05/2000, *no . .Complaints* 28341/95, and *S. and Marper v. United Kingdom* of 4/12/2008, Nos. 30562/04 and 30566/04, Full Judgment in *Malone v. United Kingdom* of 2/8/1984, Complaint No. 8691/79, and the judgment in *Kopp v. Switzerland* of 25/03/1998, complaint No. 23224/94, available like the other decisions of the European Court of Human Rights mentioned here at https://hudoc.echr.coe .int). In the *Rotaru v. Romania* judgment , the European Court of Human Rights further confirmed that the mere retention of personal data constitutes an invasion of privacy. Any use is then a separate intervention.

In the judgment in *Bouchacourt v. France* of 17/12/2009, complaint no. 5335/06, the European Court of Human Rights dealt with the maintenance of a national automated register of sex offenders, concluding that the proportionality of the measure in relation to the legitimate the goals of public safety and crime prevention were maintained. However, national law must provide sufficient safeguards against misuse and ensure that personal data are accurate and not disproportionate to the purposes for which they are processed.

[46] In view of the above, it is necessary to unequivocally reject the claim of the complainant that the interference with the right to the protection of personal data must acquire the intensity of abuse. The determination of an interference with a fundamental right represents the second step of the five-step test applied by the European Court of Human Rights when reviewing violations of rights under Articles 8 to 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The term interference is interpreted very broadly by the European Court of Human Rights, in the case of the right to the protection of personal data, interference is any systematic collection and storage of personal data. In order to assess whether a fundamental right has been violated, the remaining three steps of the test must be carried out, namely the test of legality, legitimacy and necessity in a democratic society (KMEC, J., KOSAÿ, D., KRATOCHVÍL, J., BOBEK, M. *European Convention on Human Rights.*

Comment. Prague: CH Beck, 2012, p. 99 ff.). The argument of the complainant, according to which the previous actions of the data subject, i.e. non-payment of the claim, excludes the protection of his personal data, is in conflict not only with the jurisprudence of the European Court of Human Rights and the Constitutional and Supreme Administrative Courts, but also with the very essence of fundamental rights, according to which protection of fundamental rights for everyone without further ado (the Charter of Fundamental Rights and Freedoms itself stipulates that fundamental rights and freedoms are inalienable, inalienable, non-expirable and non-revocable). Only in extreme cases of abuse of basic rights and freedoms to oppose the free democratic order, can the protection of these rights be removed (WAGNEROVÁ, E., ŠIMÍýEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. Charter of Basic Rights and Freedoms. *Commentary .* Wolters Kluwer, 2012, Article 1, available from the legal information system aspi). As follows from the previous case law, the protection of personal data also belongs to the perpetrators of criminal offences; see, e.g., the issue of maintaining a register of sexual offenders assessed by the European Court of Human Rights in the aforementioned *Bouchacourt v. France* judgment or the review of the fine for the dissemination of a photograph of the perpetrator of theft in the judgment of the Supreme Administrative Court of 06/08/2016, no. 3 As 118 /2015 – 34. With a logical interpretation according to the principle *a maiori ad minus,* it is not possible to unjustifiably interfere with the right to the protection of personal data even for persons who are late in fulfilling their financial obligations.

[47] Multi-level legal regulation of personal data protection leads to a clash of different forms of the proportionality test. According to the jurisprudence of the European Court of Human Rights, interference with the right to the protection of personal data is possible only if the given measure passes the test of legality, legitimacy and necessity in a democratic society. The criteria of legality and legitimacy tend not to be problematic when assessing an intervention; interference with rights must be carried out on the basis of law and must pursue a legitimate purpose. On the contrary, the necessity test in a democratic society is criticized in the professional literature for its unpredictability and the absence of a fixed algorithm (cf. e.g. GERARDS, J. How to improve the necessity test of the European Court of Human Rights. International Journal of Constitutional Law, vol . 11 , No. 2, 2013, pp. 466 – 490), however, it can be generally concluded that it consists of two steps. The interference with the right in question must correspond to a pressing social need (ie the reasons given by the national authorities to justify this interference must be "relevant and sufficient"); and in the light of the given case as a whole it must be "adequate to the pursued legitimate goal" (KMEC, J., KOSAÿ, D., KRATOCHVÍL, J., BOBEK, M.
European Convention on Human Rights. Comment. Prague: CH Beck, 2012, p. 113 ff.).

[48] According to the established jurisprudence of the Constitutional Court, the assessment of proportionality (in a broader sense) consists of three steps. In the first step, the suitability of a specific measure to fulfill its purpose (or its appropriateness) is assessed, which means whether it is at all capable of achieving the pursued legitimate goal, which is the protection of another fundamental right or public good.
Furthermore, its necessity is examined from the point of view of whether the one of them, which is the most gentle to the fundamental right, was used when choosing the means. Finally, in the third and at the same time the last step, the subject of assessment is its proportionality in a narrower sense, i.e. whether the harm to a fundamental right is not disproportionate in relation to the intended goal. This means that measures restricting basic human rights and freedoms must not, in the case of a collision of a basic right or freedom with the public interest, with their negative consequences exceed the positives that represent the public interest in these measures (finding dated 12 October 1994, sp. ÚS 4/94 and subsequent jurisprudence, see e.g. findings of 8/13/2002, ÚS 3/02, 1/28/2004, ÚS 3/02, 1/28/2004 Pl. ÚS 41/02 or dated 20 February 2018, file stamp Pl. ÚS 6/17).

[49] The proportionality test applied by the Czech and German Constitutional Courts is therefore only applied in the last fifth step within the five-step test of the European Court of Human Rights.
However, compared to the unclear and inconsistently applied criterion of necessity in a democratic society, the three-step assessment of appropriateness, necessity and adequacy is more predictable and doctrinally anchored. The Supreme Administrative Court is of the opinion that both tests can be applied simultaneously

as the Constitutional Court did, for example, in the judgment of 22 March 2011, file no. stamp Pl. ÚS 24/10, when he first stated that interference with the constitutionally guaranteed right to informational self-determination is *"possible only through imperative legal regulation, which must first of all correspond to the requirements arising from the principle of the rule of law and which fulfills the requirements arising from the proportionality test, when in cases of conflicts fundamental rights or freedoms in the public interest, or with other fundamental rights or freedoms, the purpose (goal) of such intervention must be assessed in relation to the means used, while the criterion for this assessment is the principle of proportionality (in a broader sense). Such legislation must be precise and clear in its wording and sufficiently predictable to provide potentially affected individuals with sufficient information about the circumstances and conditions under which the public authority is authorized to intrude on their privacy, so that they may adjust their behavior in such a way as to avoid into conflict with a restrictive norm... The assessment of the admissibility of a given intervention from the point of view of the principle of proportionality (in the broader sense) then includes three criteria." He* then continued with the application of the standard three-step proportionality test.

[50] The proportionality test formulated by the jurisprudence of the Court of Justice requires that the measure in question is capable of achieving the legitimate goals pursued by the legislation in question and does not exceed the limits of what is reasonable and necessary to achieve these goals (see the judgment of 04/08/2014 in the combined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd and Seitlinger and others,* paragraph 46 and the case law cited here, available like the other decisions of the Court of Justice mentioned here at https://curia.europa.eu). Thus, it is necessary to examine whether the measure under consideration is capable of achieving the set legitimate goal and whether there are no other, less restrictive means to achieve it.

[51] In the considered case § 5 paragraph 2 letter e) of the Personal Data Protection Act (similarly also to Article 7 letter f) of Directive 95/46/EC) enshrines the obligation to balance conflicting interests at the legal level, while it is only a matter of determining the legal basis for lawful data processing (and therefore essentially assessment of fulfillment of the legality criterion). This provision provides an exhaustive and restrictive list of cases in which the processing of personal data can be considered lawful (judgment of the Court of Justice of 24 November 2011 in the joined cases C-468/10 and C-469/10, ASNEF AND FECEMD) . As stated by GA Bobek in his opinion of 26/01/2017 in case C-13/16, *Valsts policijas Rÿgas,* Article 7 of Directive 95/46/EC contains three types of grounds for the legal processing of personal data: first, the granting of consent by the subject data [Art. 7 letters and)]; secondly, situations where the legitimate interests of the controller or third parties are assumed to a certain extent [Article 7 letter b) to e)]; and thirdly, situations where conflicting legitimate interests must not only be demonstrated, but these interests must also prevail over the interests or rights and freedoms of the data subject [Article 7 lit. F)]. According to the judgment of 4/5/2017 in case C-13/16, *Valsts policijas Rÿgas,* Article 7 letter f) Directive 95/46/EC establishes three cumulative conditions for the processing of personal data to be lawful, namely, firstly, the monitoring of the legitimate interest of the controller or a third person or persons to whom the data are communicated, secondly, the necessity of personal data processing for the realization of the monitored legitimate interests and, thirdly, the fulfillment of the condition that they do not take precedence over the fundamental rights and freedoms of the person to whom data protection applies (balancing of interests).

[52] With regard to the condition of monitoring the legitimate interest, the Court of Justice in its jurisprudence considered, for example, the protection of the property, health and life of the data controller to be a legitimate interest (judgment of 11 December 2014 in case C-212/13, Ryneš) , proper functioning of websites (judgment of 19/10/2016 in case C-582/14, *Breyer),* transparency (judgment of 9/11/2010 in joined cases C-92/09 and C-93/09, *Volker und Markus Schecke and Eifert)* or the interest of a third party to obtain personal data about the person who damaged his property, in order to sue for damages (the already mentioned judgment in *Valsts policijas Rÿgas case).* Opinion 06/2014 of the data protection working group on Article 29 adds that the legitimate interest must be distinguished from the purpose of personal data processing. While the purpose is the reason for which the data is processed,

legitimate interest represents an important value or benefit for the administrator. The concept of legitimate interest covers a wide range of interests, but they must be properly established and must be real, not just potential (opinion 844/14/EN WP 217, available at http://ec.europa.eu). Regarding the second condition, the Court of Justice stated that exceptions to the principle of personal data protection and its limitations must be made within the limits of what is absolutely necessary (judgments of 7 November 2013 in case C-473/12, IPI, *of* 27 9. 2017 in case C-73/16, *Puškár,* or the already mentioned judgments in the case *Ryneš* and *Volker und Markus Schecke and Eifert).* The condition of necessity corresponds to the basic test of proportionality as formulated by the Court of Justice in its previous jurisprudence. The chosen means must not go beyond what is necessary, but at the same time it must be able to achieve the set goal [the already mentioned judgment in the *Puškár* case and the already mentioned opinion of GA Bobka in the *Valsts policijas Rÿgas case;* generally on the proportionality test, see, for example, the judgment of 10/12/2002 in case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco,* point 122 and the case law cited here]. The third condition concerns the balancing of conflicting rights and interests and, according to the Court of Justice, always depends on the specific circumstances of individual cases (see the already mentioned judgments *ASNEF AND FECEMD, Breyer* or *Valsts policijas Rÿgas).*

[53] The court-defined algorithm for assessing the fulfillment of the conditions of Article 7 letter f) Directive 95/46/EC thus basically corresponds to the proportionality test formulated in the jurisprudence of the Constitutional Court (and applied by the Supreme Administrative Court in a number of its decisions, see e.g. judgments of 25/02/2015, no. 1 As 113/ 2012 – 133, published under No. 3222/2015 Coll. As 245/2016 – 41). The processing of personal data must be suitable for achieving a legitimate interest, but at the same time there must not be other, less restrictive means.

In the final step, competing interests must be balanced, taking into account the specific conditions of each individual case. When balancing conflicting interests, however, it is not enough to compare the nature of the interests concerned, because in such a case no legitimate interest other than an interest equal to a constitutionally guaranteed fundamental right could stand, which is inadmissible with regard to the interpretive principle of a rational legislator. If the Union legislator stipulated in Article 7 letter f) Directive 95/46/EC, the possibility of processing personal data for the purpose of realizing the legitimate interests (not only fundamental rights) of the administrator, this possibility cannot be completely denied by an overly restrictive approach to the balancing condition. On the contrary, it follows from the jurisprudence of the Court of Justice that balancing depends mainly on the specific conditions of the given case, where, in addition to the seriousness of the interest concerned, it is necessary to examine, for example, the existence of data in public registers, the age of the data subject or the quality and extent of the processed data. In this direction, the opinion of the municipal court needs to be partially corrected.

[54] In the case under consideration, one can agree with the municipal court that the members of the applicant have a legitimate interest in verifying the creditworthiness of consumers before entering into a contractual relationship with it. Verification of the creditworthiness of the consumer serves the members of the applicant to limit the business risk, to set favorable contractual terms and, for those entities that are required by the Consumer Credit Act, to properly assess the creditworthiness of consumers. The Supreme Administrative Court, on the other hand, found the complainant's argument unfounded that the legitimate interest can also be seen in the protection of the property rights of the complainant's members. From the right to ownership, the creditor's right to prevent the debtor from entering into further contractual relationships or to defend against the debtor's further indebtedness cannot be derived. Basic rights protect individuals primarily against interference by the state, in exceptional cases also in horizontal relationships. However, an individual cannot interfere in the legal relations between two other private persons in order to protect his rights. The mention of the general duty of professional care was not elaborated in detail by the complainant, therefore the Supreme Administrative Court could not deal with it in more detail.

continuation

[55] The issue of assessing the creditworthiness of consumers before concluding a credit agreement is extensively regulated at the EU and national level, therefore the Supreme Administrative Court considers it necessary to deal more closely with the legitimate interest in properly assessing the creditworthiness of consumers.
First of all, two facts must be emphasized. First of all, the complainant's members are a number of entities that do not have the obligation to verify the creditworthiness of consumers at all (see, for example, the companies AVON Cosmetics, spol. s ro, E. ON ÿeská republika, sro, or O2 Czech Republic, as).
Secondly, the law on consumer credit effective at the relevant time (nor from directive 2008/48/EC) does not result in the obligation to verify the creditworthiness of consumers in the negative register maintained by the complainant.

[56] Pursuant to Section 9 of the Consumer Credit Act, the creditor is obliged to assess the consumer's ability to repay the consumer loan with professional care, on the basis of sufficient information also obtained from the consumer and, if necessary, by consulting databases enabling the assessment of the consumer's creditworthiness. Beyond what is necessary, it can be stated that Act No. 257/2016 Coll., on consumer credit, as amended (hereinafter referred to as the "new act on consumer credit"), similarly provides in § 86 that the entrepreneur is obliged to assess the consumer's creditworthiness on the basis of necessary, reliable, sufficient and reasonable information obtained from the consumer and, if necessary, from a database enabling the assessment of the consumer's creditworthiness or from other sources. Similarly, Article 8 of Directive 2008/48/EC states that *"[Member States shall ensure that, before concluding a credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information obtained from the consumer, if necessary, and, if necessary, on the basis of a search in the relevant database."* In the second sentence of the cited provision of the directive, the directive allows member states to maintain the obligation to verify creditworthiness using information databases, but it does not specify this obligation itself. Art. 9 of the directive then ensures equal access to databases for entrepreneurs established in another member state and the information obligation of entrepreneurs regarding the data contained in the databases. According to point 26 of the preamble to Directive 2008/48/EC *"[Member States], taking into account the special characteristics of their credit markets, should take appropriate measures to promote responsible practices at all stages of the credit relationship." These measures may include, for example, information and education of consumers, including warnings about the risks associated with late payments and excessive indebtedness.*

Above all, in an expanding credit market, it is important that lenders do not engage in irresponsible lending or provide loans without a prior creditworthiness assessment, and Member States should exercise the necessary supervision to prevent such behavior and should establish the necessary means to sanction lenders in such cases . … For this purpose, they should be allowed to use the information provided by the consumer not only during the preparation of the given credit agreement, but also during the long-term business relationship. Member State authorities could also issue appropriate guidelines and general guidelines for creditors. The consumer should also act prudently and comply with his contractual obligations." According to point 28 of the justification of the directive "[to] *assess the creditworthiness of the consumer, the creditor should also search the relevant databases; legal and factual circumstances may require this search to vary in scope. In order to avoid distortion of competition between creditors, it should be ensured that creditors have access to private or public databases relating to consumers in the Member State in which they are not established, under conditions which do not lead to discrimination against creditors in that Member State." According to* point 45 justification of the directive "[t]his *directive respects fundamental rights and respects the principles recognized in particular by the Charter of Fundamental Rights of the European Union. It primarily strives to ensure full compliance with the rules on personal data protection, property rights, non-discrimination, protection of family and professional life and consumer protection according to the Charter of Fundamental Rights of the European Unio*

[57] According to the judgment of the Court of Justice of 27/03/2014 in case C-565/12, *LCL Le Crédit Lyonnais,* the creditor's pre-contractual obligation to assess the creditworthiness of the debtor aims to protect the consumer from the risks of over-indebtedness and insolvency. In the judgment of 18/12/2014 in case C-449/13, *CA Consumer Finance SA,* the Court of Justice confirmed that Directive 2008/48/EC does not oblige credit providers to systematically check the veracity of information provided by consumers in information databases. According

on the circumstances of each individual case, the credit provider must consider whether the information obtained is sufficient to assess the creditworthiness of the consumer. The sufficiency of the stated information may vary according to the circumstances under which the credit agreement is concluded, according to the personal situation of the consumer or according to the amount of the loan specified in this agreement. The assessment can be carried out using documents about the financial situation of the consumer, or previously acquired knowledge about the financial situation of the applicant for a loan. However, mere unsubstantiated statements by the consumer cannot be qualified as sufficient in themselves if they are not supported by any documents.

[58] With regard to the above, the Supreme Administrative Court concluded that the legislation on consumer protection in the provision of loans shows an emphasis on protecting consumers from irresponsible conclusion of credit agreements that exceed their financial capabilities and may lead to their insolvency. This regulation is based on the public interest of the state and the European Union in limiting the over-indebting of natural persons, which in the case of long-term loans can have negative effects on the functioning of the state's economy. For this purpose, credit providers are obliged to verify the creditworthiness of consumers before concluding a contract. Failure to fulfill this obligation is an administrative offense according to § 20 paragraph 2 letter e) of the Act on Consumer Credit, for which a fine of up to CZK 20,000,000 can be imposed according to Section 20, Paragraph 5 of the same Act. However, as Directive 2008/48/EC itself emphasizes in point 45 of the justification, ensuring the objectives of the Directive, including the fulfillment of the obligation to verify creditworthiness by entrepreneurs, must be in line with the protection of fundamental rights, including the explicitly mentioned protection of personal data. The fact that some member states stipulate the obligation to access databases, as stated by the complainant, does not change the fact that the Czech legislator has not enshrined this obligation in the legal system, nor does it regulate the management of the relevant databases in any way.

[59] The Supreme Administrative Court further agrees with the municipal court that the assessed negative register is a suitable means of achieving the aforementioned legitimate interests. The collection of information on consumers' outstanding claims against credit providers, telecommunication service providers, energy suppliers or other important economic entities is eligible to help assess the creditworthiness of consumers in order to assess their creditworthiness or optimally set contractual terms. The Supreme Administrative Court therefore proceeded to assess the condition of necessity, i.e. whether the assessed interference with the right to personal data protection goes beyond what is necessary to achieve the set goal.

We can agree with the complainant that the condition of consent to the processing of personal data in the negative register leads to a significant reduction in the reliability of the records in the register and thus to its inefficiency. The essence of the current functioning of the negative register is that if the consumer is not listed in the register, he has no outstanding claims against the members of the complainant.
If consent were required to be included in the register, it would not be clear when looking at the register whether the consumer is not listed in the register because he has no outstanding claim or because he has not given consent to the processing of his data. However, as the municipal court already stated, while the complainant did not dispute this conclusion, the management of information databases is not the only tool for assessing the creditworthiness of consumers. The necessary information must first of all be requested from the consumers themselves, while entrepreneurs have the right to demand documents about the consumer's financial situation. With regard to the significantly stronger legal and informational position of entrepreneurs compared to consumers, it cannot be concluded that the complainant's members are completely powerless against the failure to provide or incorrect provision of information from consumers, which the complainant neither claimed nor substantiated.
A number of essential information can also be obtained from publicly accessible registers, such as the insolvency register, or from information that consumers voluntarily disclose about themselves.
If the complainant objects that personal data were processed only to the extent necessary, taking into account that the consumer's consent was needed to access the databases, then it must be stated in accordance with the municipal court that the considered procedure concerns the absence of consent

for the collection of personal data itself. From the essence of the matter, it cannot be argued that further processing requires the consent of the data subject.

12a The complainant must be convinced that energy suppliers of last resort within the meaning of [60] Section of the Energy Act are in a less favorable position compared to other entrepreneurs due to their contractual obligations. On the other hand, taking into account that the energy supply needs to be secured by the consumer, as a rule, throughout his life, these suppliers can easily require the consumer to present documents about his previous payment history, if he is a new customer, and in case of refusal, set a contractual conditions as if it were a person listed in the negative register. The complainant cannot be convinced that telephone service providers are in a similar position to energy suppliers of last resort, with regard to Section 63(4) of the Act on Electronic Communications.

Pursuant to Section 65(2) of the Act on Electronic Communications, the entrepreneur has the right to limit services if the participant has not paid within the due date stated on the invoice for the price for the services provided, has been demonstrably warned by the entrepreneur of non-payment and has been given an alternative performance period of no less than 1 week from the date of delivery of the notice. Furthermore, the entrepreneur has the right to terminate the contractual relationship in accordance with Section 65, paragraph 3 of the same law, in cases where the participant intentionally provided incorrect personal or identification data or consistently paid late or consistently did not pay the price for the services stated in the price statement, and only after a demonstrable warning from the participant. Consistent late payment for the purposes of this provision means payment of at least 2 consecutive price statements after the due date. Consistent non-payment for the purposes of this provision means the existence of at least 3 unpaid invoices.
The Supreme Administrative Court is therefore, in agreement with the municipal court, that the complainant did not prove the condition of necessity arising from § 5 paragraph 2 letter e) of the Personal Data Protection Act.

[61] The Supreme Administrative Court further dealt with the condition of balancing conflicting rights and interests for completeness. In the case under consideration, it must be taken into account that although the interest in properly assessing the creditworthiness of consumers is essential with regard to the public interest in the fight against excessive indebtedness, credit providers do not have the right to fully ascertain all relevant information. On the contrary, the assessment of creditworthiness is their duty, and in the event of a negative assessment, and due to insufficient information, they are obliged not to grant the loan.
In addition, the complainant brings together a number of entities that are neither credit providers nor suppliers with contractual obligations. In their case, it is only a purely private, economically motivated interest in reducing business risk. Furthermore, it must be taken into account that it is a private database maintained by an association of economically significant entities, while the legislation effective during the relevant management period did not regulate the way personal data is processed in these databases. In balancing the rights and interests concerned, it is also necessary to take into account that the members of the applicant, as economically significant entities, have in themselves a considerable contractual advantage over consumers. Although the control carried out by the defendant mainly concerned the issue of the legal title for the processing of personal data, the administrative file shows a number of facts referring to insufficient guarantees in the processing of personal data. The data kept in the register were not updated frequently enough, there was no proper communication between the complainant and its members regarding the processing of specific data, and the data subjects were not properly informed.

[62] In conclusion, the Supreme Administrative Court states that it did not comply with the applicant's proposal to ask a preliminary question. Pursuant to Article 267(3) TFEU, if a question arises concerning the interpretation of the founding treaties or the validity or interpretation of acts adopted by the bodies of the European Union in proceedings before a court of a Member State whose decision cannot be challenged by remedies under national law, that court is obliged to refer to the Court of Justice of the European Union with a request for a preliminary ruling. The procedure established by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, thanks to which the Court provides

to national courts the interpretation of Union law that is necessary for them to resolve the disputes that these courts are to decide. Its purpose is to ensure the proper application and uniform interpretation of EU law in all member states (judgment of the Court of Justice of 6 October 1982 in case 283/81, *Cilfit and others,* point 7).

A national court, whose decision cannot be challenged by remedies under [63] national law, is obliged to refer to the Court of Justice, unless it has concluded that the question raised is not relevant or that the relevant provision of EU law has already been interpreted by the Court of Justice or that the correct application of EU law of law is so obvious that no room for reasonable doubt is left (judgment *in Cilfit and others,* paragraph 21). In its current jurisprudence, the Court of Justice nevertheless emphasizes that it is only for the national court to which the dispute has been brought and which must bear responsibility for the judicial decision that will be issued, to assess, taking into account the specific circumstances of the case, the necessity of a preliminary ruling in order to issue its judgment , as well as the relevance of the questions it asks the Court of Justice (judgment of 16/02/2012 in case C-118/11, *Eon Aset Menidjmunt,* point 76, of 09/09/2015 in joined cases C-72/14 and C -197/14, *X and TA van Dijk,* or from 9/9/2015 in case C-160/14, *João Filipe Ferreira da Silva e Brito and others).* The need for rationality and efficiency in the judicial dialogue between national courts and the Court of Justice is also emphasized by professional literature [cf. Komárek, J. "In the court(s) we trust?" on the need for hierarchy and differentiation in the preliminary ruling procedure. *European Law Review,* 2007, Vol. 32, No. 4, pp. 467–491, and cited here Chalmers, D. The Dynamics of Judicial Authority and the Constitutional Treaty. In: Weiler, JHH, Eisgruber, CL (eds), *Altneuland: The EU Constitution in a Contextual Perspective,* Jean Monnet Working Paper 5/04].

[64] As follows from the jurisprudence referred to in paragraphs [51] and [52] of this decision, the Court of Justice has already sufficiently interpreted the conditions of application of Article 7 letter f) Directive 95/46/EC consisting in the identification of the legitimate interest of the data controller, the assessment of the necessity of processing and the balancing of conflicting interests. The meaning of the applicant's proposal of the first and second preliminary questions, as they were formulated, lies not in the interpretation, but in the application of the provision in question. However, as the Court of Justice has consistently emphasized, the responsibility for deciding a legal dispute rests with the national court, the Court of Justice only interprets ambiguous provisions of EU law (see the aforementioned judgments *X and TA van Dijk* and *João Filipe Ferreira da Silva e Brito and others,* or in general e.g. judgment of 10/09/2015 in case C-106/14, *FCD and FMB).* The answer to the third proposed preliminary question has already been sufficiently clarified in the previous jurisprudence of the Court referred to in this decision. As regards the fourth question, it follows from the previous jurisprudence of the Court of Justice (mentioned in paragraph [57] of this decision) that the essence of Article 8, paragraph 1 of Directive 2008/48/EC is the introduction of the obligation of entrepreneurs to verify the creditworthiness of consumers, the entrepreneur will take advantage of this, which is not regulated by EU law, it only stipulates that the verification must be thorough and conclusive. The national court is entitled to assess itself that the means of verifying creditworthiness must be in accordance with other legal and constitutional regulations. The court's conclusion that this is a so-called *acte éclairé* is not changed by the applicant's reference to the judgment of the civil law panel of the court in Rotterdam, sp. No. 337940/HA RK 09-171, nor a more specific reference to the case law of British and Italian courts. The decisions of other member states are relevant above all to assess whether the legislation in question is so obvious that no room for reasonable doubt is left, i.e. whether it is a so-called *acte clair.* According to the already mentioned judgment *Cilfit and others,* the assessment of whether it is a so-called *acte clair depends,* among other things, on taking into account the different language versions of the given regulation and the meaning of the given provision in different national legal systems. In the case under consideration, this was a question already sufficiently clarified by the Court of Justice, the conclusions of the Dutch Court of First Instance from 2010 (that is, before the issuance of all the above-cited relevant jurisprudence of the Court of Justice) cannot call into question the interpretation made by the Court of Justice. In addition, it should be recalled that when assessing the issue of balancing, the specific circumstances of each individual

the case. In view of the limited information resulting from the referenced decision, the Dutch decision cannot be compared more closely with the case under consideration. Taking into account all of the above, the Supreme Administrative Court concluded that the conditions for the application of the exception from the obligation to submit a preliminary question to the Court of Justice pursuant to Article 267 of the TFEU are met in the case under consideration, as all relevant questions of the interpretation of EU law have already been sufficiently resolved by previous jurisprudence of the Court of Justice (this is a so-called *acte éclairé,* see judgment of the Court of Justice of 6 October 1982, case 283/81, *Srl CILFIT).*

V. Conclusion and decision on the costs of the proceedings

[65] The Supreme Administrative Court came to the conclusion, for the above reasons, that the cassation complaint is not well-founded, and therefore rejected it according to § 110 paragraph 1 *in fine* s. ÿí s.

[66] The Supreme Administrative Court decided on the reimbursement of the costs of the proceedings in accordance with § 60 paragraph 1 s. s. s. in conjunction with § 120 s. s. . The successful defendant did not claim to have incurred the costs of the cassation appeal proceedings, nor does it appear from the file of the Supreme Administrative Court that he incurred any costs beyond the scope of his normal activities, therefore he could not be granted the right to their compensation.

[67] Pursuant to § 60, paragraph 5 of the Civil Procedure Code, a person participating in the proceedings has the right to reimbursement of only the costs of the proceedings incurred by him in connection with the fulfillment of the obligation imposed on him by the court. In this proceeding, however, no obligations were imposed on the person participating in the proceeding, therefore he is not entitled to compensation for the costs of the proceeding.

Lesson learned: No appeals are admissible against this judgment .

In Brno on April 19, 2018

JUDr. Miluše Došková,
president of the senate