

OFFICE FOR PERSONAL DATA PROTECTION

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\* UOOUX00CYH7V \*

Ref. UOOU-06831 / 16-239

DECISION

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

and § 32 of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain acts, according to

§ 10 and § 152 paragraph 2 of Act No. 500/2004 Coll., Administrative Procedure Code, and according to § 10 paragraph 1

letter a) and § 12

paragraph 1 of Act No. 480/2004 Coll., on certain information society services and on change

certain laws, decided on 14 December 2018 pursuant to § 152 para. b) of the Administrative Procedure Code

thus:

Appeal filed by the accused, the company

based

, against the decision of the Office for Personal Data Protection

Ref. UOOU-06831 / 16-228 of 20 August 2018, is rejected and the contested decision is upheld

confirms.

Justification

Proceedings on suspicion of committing an offense pursuant to § 11 par. 1 let. a), c) and d) of the Act

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

wording effective as of 30 June 2017 (hereinafter referred to as "Act No. 480/2004 Coll.")

accused, companies

, with its registered office at J

(hereinafter referred to as the "accused") was initiated by order no. UOOU-06831 / 16-215 of

April 3, 2018. The basis for initiating the proceedings was the protocol on control ref. UOOU-06831 / 16-209 of 13 November 2017, acquired pursuant to Act No. 255/2012 Coll., on Inspection (Inspection Rules), inspector of the Office for Personal Data Protection Ing. Josef Vacula, including the file material collected during the inspection. However, the accused filed against the order proper resistance.

Subsequently issued decision no. UOOU-06831 / 16-228 of 20 August 2018 (hereinafter referred to as "Decision"), however, found the Office for Personal Data Protection (hereinafter "the Office") to be indicted again guilty of committing an offense under § 11 para. a) of Act No. 480/2004 Coll., as it should repeatedly distribute unsolicited electronic addresses specified in the statement commercial communication in the sense of § 2 letter f) of Act No. 480/2004 Coll. The accused was further found also guilty of committing offenses pursuant to § 11 par. 1 let. c) and d) of Act No. 480/2004 Coll., because commercial communications concealed or concealed the identity of the sender and were sent without valid addresses enabling direct and effective unsubscribe from the mailing. For the above offenses was the accused was fined a total of CZK 1,400,000.

A proper appeal was filed against the decision within the statutory time limit. In the opinion of the accused, it should have happened in particular to an error of law and procedural irregularities, and therefore suggested that the contested decision was annulled in its entirety and remanded.

The accused refused to fulfill the facts of the offense and considers that she was not against her proceeded in accordance with § 6 paragraph 3 of Act No 500/2004 Coll., Administrative Procedure Code (note: the accused had probably in mind § 6 paragraph 2 of the Administrative Procedure Code). She further stated that the administrative body of the first instance had apply Act No. 250/2016 Coll., on liability for misdemeanors and proceedings against them, in full, as it has not been proven that the conditions of imputability pursuant to Section 20 above have been met of the law, and the accused could therefore not be found guilty in accordance with the wording of the law.

The retroactive application of the law that was to be enforced would thus work in favor of the offender.

In support of its view that the defendant has failed to prove its facts, the defendant states, first of all, that

It is not possible to determine who sent unsolicited commercial communications, taking decisions in a relationship

in addition to the conclusions drawn from the analysis of e-mail headers

unreviewable. As the accused further states, the administrative body of the first instance also resigned from

Demonstration of an increase in sales accused as a result of sending commercial communications and therefore not possible

considered to promote e-commerce

. Further accused

in the appeal, it submits that the commercial communications could have been sent on the initiative

considers that the connection between this company and the accused

company

cannot be found in

for no person by that name

she was not accused by the managing director. Finally, the defendant further argues that it is objective

The liability of the accused in the event of distribution of commercial communications affiliate partners considers

completely absurd, the administrative body of the first instance proceeded in violation of the principle

presumption of innocence and it is not clear from the grounds of the decision how the complainants

who is the disseminator of commercial communications, when this is not evident to this day.

The appellate body reviewed the decision in its entirety, including the previous process

its release.

The appellate body states, first of all, that the dissemination of commercial communications is permitted only

provided by law on the basis of a valid legal title, which may be consent

according to § 7 paragraph 2 of Act No. 480/2004 Coll. or customer relationship according to § 7 paragraph 3 of the same Act.

It is the disseminator's responsibility to have a legal title and to prove its existence. When

commercial communications sent from

was an administrative body

demonstrated without any reasonable doubt that the disseminator is charged.

The same can be deduced in the case of other addresses from which commercial communications were sent (see further). Thus, the accused cannot be accused of being treated in breach of duty

laid down in § 6 para. 2 of the Administrative Procedure Code, ie to burden the persons concerned as little as possible when invited to prove the existence of a legal title for dissemination. Addressees of commercial communications in

In their complaints, they agreed that the accused had not given their consent and that they were not its customers either.

At the same time, it is logical that they considered the disseminator to be the one whose goods were commercial communications

promoted.

, Mr.

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At the same time, the legislator himself assumes that the disseminator can disseminate commercial communications not only on his own

forces, but also through another entity. According to the provisions of § 7 par. b) of the Act

No. 480/2004 Coll. a contrario, each commercial communication must contain information about the consignor,

on whose behalf the communication takes place, resp. in whose favor the commercial communication is disseminated.

Only such an interpretation is, in the view of the Appellate Body, Euroconform and in line with the purpose

of the law. As the title of Directive 2002/58 / EC of the European Parliament and of the Council

on the processing of personal data and the protection of privacy in the electronic communications sector

also referred to as the "Directive"), as well as its preamble, this Directive protects the privacy of individuals and complements others

personal data protection regulations. The reason for its adoption was mainly special increased

privacy risks that are undoubtedly associated with the use of the Internet and electronic

means of communication. Due to the importance of the protected interest and a very high level

The threat of the directive sets a high level of protection, including that among the protected

entities also includes legal entities, in contrast to the standard regulation of personal data protection.

At the same time, it must be emphasized that privacy is not the only protected public interest.

The volume of commercial communications can cause network problems in some cases

electronic communications and terminal equipment. It should also be emphasized that with regard to

increasingly easy to disseminate commercial communications in large volumes and with increasingly extensive annexes

their acceptance is often associated with an ever-increasing burden of time as well as financial. Reality,

that the meaning of the directive and therefore of Act No. 480/2004 Coll. is to protect addressees from subjects,

in whose favor the commercial communication is disseminated, resp. that this entity is the consignor

also from Article 13 (4) of the Directive. Czech version of the last mentioned provision in principle

corresponds to the above-cited § 7 par. 4 let. b) of Act No. 480/2004 Coll. Maybe still

however, this conclusion is clearer from the wording of the English version of the Directive, where Article 13 (4)

provides: "In any event, the practice of sending electronic mail for the purposes of direct marketing

disguising or concealing the identity of the sender on whose behalf the communication is

A concentration on whose behalf can also be translated in this context as

on whose behalf or for whose benefit the communication takes place. A similar situation follows from Art. b)

Directive 2000/31 / EC (Electronic Commerce Directive), according to which "natural or legal

the person to whom the commercial communication is made must be clearly identifiable. "

The defendant testifies in favor of the conclusion

and the systematics and purpose of the law

No. 480/2004 Coll. The provisions of § 7 and § 11 of Act No. 480/2004 Coll. it is necessary to perceive not

separately, but in the context of especially Act No. 101/2000 Coll., on the protection of personal data

and amending certain laws. As is clear from the submitted file documentation, commercial

notices should not be addressed exclusively to legal persons, and therefore in the light of the judgment

Of the Supreme Administrative Court ref. 9 As 34 / 2008-68 is required for electronic details

contact as personal data. If a person entrusts another entity with the promotion of its products

or services through commercial communications, the customer determines the purpose,

as well as the means of personal data processing, ergo meets the definition of a personal data controller.

Because it is primarily the administrator's responsibility to ensure that the processing is consistent with legal conditions, it is the administrator who has the main responsibility for any violation of the law.

One of the key principles of personal data protection, namely law, can be pointed out the data subject to access the information. This right is applicable in particular to the administrator of personal data, as he is responsible for the lawfulness of the processing and for the person who disposes of it personal data of a particular entity and therefore it is necessary to be aware of the identity of the controller.

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This is the only way to invoke the right to access, change or destroy personal data. From this For this reason, the legislator enshrined the obligation to state identity in every commercial communication the sender - the person for whose benefit the commercial communication is disseminated. If possible by contract transfer responsibility for the illegal dissemination of commercial communications to another entity, including entities outside the local jurisdiction of state authorities, the above rights and principles of protection personal data, as well as privacy in the general sense, would be completely annulled, for the current profit of the sender of the business message that initiated the factual mailing process.

In situations where Directive No. 2002/58 / EC, resp. Act No. 480/2004 Coll. were accepted just for in order to increase the security and protection of personal data, taking into account the specific risks of the Internet and electronic communications, such a conclusion would be absurd and completely against the meaning of presumption a reasonable legislator who intended to ensure the highest possible level of protection.

It is then necessary to add to the whole procedure that § 11 par. 1 of Act No. 480/2004 Coll. is constructed on on the basis of strict liability, ie liability for the legal situation, when in relation to the legal there is no need to examine the person's fault in the illegal situation. That's why and in order to fulfill the will of the legislator, ie to protect privacy as far as possible, it is necessary also consider as disseminators of commercial communications those persons who have granted the factual dispatch instruction, order, entered into a contract, or otherwise de facto sending a commercial message initiated. Therefore, it is necessary for disseminators of commercial communications, whether it be the contracting authority

(customer) or de facto shippers, have always sufficiently checked whether the addressees of the business messages have given their consent for such sending, resp. in general, whether the distribution is lawful way. The defendant's view that she was approached during the proceedings through the presumption of presumption guilt must therefore be rejected. Based on the same argumentation, the opinion must also be rejected on non-compliance with the imputability of the conduct and the appellate body therefore concluded that the administrative body first instance applied the relevant legislation.

As regards the objection of failure to demonstrate a real increase in sales of the goods alleged as a result commercial communications, it must be stated that there is no evidence to that effect provided that the factual substance of the offense is fulfilled pursuant to § 11 par. 1 let. a) of the Act No. 480/2004 Coll. Commercial communications must be in accordance with § 2 letter. f) of Act No. 480/2004 Coll. primarily intended for direct or indirect support and is therefore sufficient if the administrative authority has demonstrated first instance that the communications in question encouraged the defendants to visit their websites and promoted her goods.

The accused cannot be convicted even in the alleged absence of justification, which the Office found out from the analysis of the headers of the e-mails in question, and also in the objection that the domain names are registered to untraceable entities. It follows from the context of the decision that the headers e-mails, the data of the delivery, IP addresses and e-mail addresses, resp. domain, of which the distribution actually took place. These data were subjected to further analysis, including their comparison with the data found during the inspection at the company sp. UOOU-

10555/15, the synthesis of all information thus obtained by the administrative body of the first instance reached the conclusions described in the contested decision. The identity of the entity in whose name it is domain is registered, however, it represents only one of the partial indirect, resp. supporting evidence, which in itself will in most cases not be a sufficient basis for determination responsible entity and therefore in the presence of a number of other pieces of evidence which form a complete chain logically linked circumstantial evidence of the dissemination of commercial communications by

accused, it is irrelevant to the proceedings whether these specific identities have been identified.

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As for the identity of the graphics and text, it has not been proven solely in the relationship

to commercial communications sent by companies

, but also between the delivery

and commercial communications from other e-mail addresses.

from the address

Moreover, the interconnectedness between the company

with the accused was also sufficient

proven. Formalistic reference to an obvious writing error

a decision consisting of an diacritical mark in the name of the agent, even if it is also from the date of birth

and the Commercial Register obvious which person it is, cannot stand as an argument.

The appellate body therefore rejected the defendant's arguments. At the same time after a general review

Notes that no reason has been found to render the decision illegal;

and found no errors in the procedure of the administrative body of the first instance. Based

all of the above, the appellate body has ruled as stated in the operative part of this statement

decision.

Lessons learned:

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

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

Prague, December 14, 2018

For correctness of execution:

official stamp imprint

JUDr. Ivana Janů, v. R.

chairwoman

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