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Injunction order against Aimon S.r.l. - November 25, 2021

Record of measures

n. 412 of 25 November 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Professor Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members, and the cons. Fabio Mattei, general secretary;

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / EC (General Data Protection Regulation, hereinafter the "Regulation");

GIVEN the Code regarding the protection of personal data (Legislative Decree 30 June 2003, n.196), as amended by Legislative Decree 10 August 2018, n. 101, containing provisions for the adaptation of national law to the aforementioned Regulation (hereinafter the "Code");

GIVEN the documentation in the deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

SPEAKER Attorney Guido Scorza;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

With a complaint of 22 February 2019, submitted to this Authority pursuant to art. 77 of the Regulation, the lawyer XX, representing having received numerous unwanted text messages with the sender "Dorelan", complained about the inability to fully exercise their data access and opposition rights.

In particular, the lawyer XX reconstructed, attaching relevant documentation, the exchanges that took place with B&T S.p.A. (hereinafter, B&T), owner of the Dorelan brand and subject identified by the link at the bottom of the text messages. From these interlocutions it emerged that B&T had declared itself unrelated to the material for sending text messages, which a third

party (not mentioned) would have provided on its behalf, and had invited the complainant to enter his telephone number at the link <https://www.smsspot.it/privacy-cancellation/> or to write to support@smsspot.it. Precisely from this last address, inserted for information in the exchanges, a further reply was received to the complainant in the name of the Company Aimon S.r.l. which qualified as an "external manager, as... it is aimed at database suppliers". Aimon also did not provide information on the owner of the database, which she qualified as the data controller, but limited herself to informing the complainant that her requests would be forwarded to privacy@runwhip.com. From the documentation on file, it does not appear that the latter address has ever received a reply to the complainant.

The Office, with a note dated 7 November 2019, forwarded the complaint to all parties involved (B&T, Aimon and Runwhip S.r.l.) asking for comments on what was represented.

Runwhip never provided feedback, not even on the occasion of subsequent reminders and notification of the notice of initiation of the procedure by the Guardia di Finanza (this conduct will be assessed in a separate provision).

From the feedback provided by B&T and Aimon to the request for information, the following emerged:

- B&T stated that it did not have the material availability of the data but that it contacted Aimon who would send promotional messages through the "SMS Spot" platform using databases acquired in the market; in the case complained of by XX a database provided by Runwhip S.r.l was used;
- Aimon, confirming the reconstruction of B&T, added that he had acquired the data of the complainant from Runwhip which would have collected it from company XX and that he had used it for sending the text message; has not, however, provided documentation proving the data acquired and the checks made on the alleged lawfulness of the same;
- both assured that, despite not having the material availability of the complainant's data, they had nevertheless taken note of his opposition to receiving further contacts aimed at promoting the Dorelan brand.

Subsequently - with pec of 20 January 2020 directed both to the Guarantor and to Aimon, Runwhip and B&T - the lawyer XX complained that he had received a further text message containing Dorelan-branded promotional offers, despite the alleged acceptance of the opposition. To this request, Aimon replied on 6 February 2020, with pec addressed to XX and the Guarantor, that the complainant's number "was made available for the sole purpose of using it for sending the message in favor of B&T S.p.A. to the undersigned company by company XX [which] markets the data collected in turn by XX ". He also added that the latter company would have collected the data of the XX on May 23, 2016, following a completed registration on

the website www.ricercaperte.com and, to substantiate this statement, attached a string extracted from a database in which such information is found together with the fields called "1 ° Privacy" and "2 ° Privacy" valued at "Yes". With regard to the dispatch made after the opposition and despite the assurances provided regarding the implementation of the same, Aimon stated that it was a technical problem.

Finally, on 3 December 2020, in response to a specific request for clarification from the Office also sent to XX, B&T reiterated that it had not acted as data controller, but that it had entrusted the promotional service to Aimon, trusting in the guarantees contractual offers from the latter regarding the lawfulness of the personal data used for the promotional campaign. The company also added that it had terminated the contract with Aimon as a result of the facts that emerged with the complaint. The one presented with the complaint in question, however, does not represent an isolated case since, on January 20, 2020, a complaint from Mr. XX with almost similar complaints was received: the receipt of a text message with the sender "Dorelan" containing promotional offers relating to the Dorelan brand , following which the interested party turned to B&T who invited him to contact Aimon. Also in this case, Aimon replied to the interested party that the data controller is the person who holds the database (in particular, XX).

2. CONTESTATION OF VIOLATIONS AND EXERCISE OF THE RIGHT OF DEFENSE

2.1 The dispute

In light of the findings of the preliminary investigation, on March 9, 2021, B&T and Aimon were notified of the initiation of the procedure pursuant to art. 166, paragraph 5 of the Code. The Office, in particular, noted that both B&T and Aimon had carried out processing of personal data, while not recognizing any role in this regard and without consequently regulating their respective roles and responsibilities. Consequently, the violation of art. 5, par. 1, lett. a) and art. 12, 13 and 14 of the Regulations, since adequate information was not even provided to the interested parties and that the latter had not been able to properly exercise their rights.

Furthermore, the violation of art. 21 of the Regulations, as it was not possible to exercise the right to object, as well as the violation of art. 6, par. 1, lett. a) of the Regulations and art. 130 of the Code, due to the sending of the second text message to XX, despite the opposition already expressed by the interested party and allegedly acknowledged by the Companies.

The defensive briefs subsequently forwarded, with which the contractual documentation that had regulated the relations between the parties was produced for the first time, made it possible to reconstruct the concrete attitude of the roles and

responsibilities regarding the processing of personal data, beyond of the qualification that the parties themselves had attributed and with results in part different from what was proposed in the replies provided to the interested parties and to the Guarantor.

2.2 The defense of B&T

B&T, who was also heard at the hearing, stated that it had never managed the data collection material but that it had instructed Aimon, which presented itself as a market leader, to find the contact lists, selecting them exclusively from those that guaranteed greater reliability, and to physically provide for the sending of text messages. This assignment had been remunerated with a large consideration precisely by virtue of the greater guarantees required in terms of the lawfulness of the contacts used. Relying on these contractual guarantees and counting on the positive results of the collaboration established, there was no need to exercise a power of control that went beyond the usual verbal interlocutions. After all, according to B&T, Aimon had full autonomy in the choice of database suppliers and for these reasons it was also responsible for dealing with any requests for cancellation received (which B&T could not in any way verify by not having access to the lists).

In any case, B&T, in order to facilitate the protection of the interested parties as much as possible, has implemented some corrective measures such as, for example, the modification of the information published on the landing page accessible from the link at the bottom of the sms, with indication of the channels to send requests for the exercise of rights. The company also promptly checked every request received by the customer service, forwarding it at the same time to Aimon (as for example in the case complained of by Mr. XX). In this context, the choice to use the Dorelan brand within the messages was inserted with the aim, on the one hand, of guaranteeing greater seriousness in communication and, on the other hand, of being able to indirectly control the work of the supplier. , through feedback from interested parties.

Finally, precisely as a result of XX's complaint, B&T considered that the trust requirements towards Aimon were no longer valid and terminated the contract despite being aware of the losses caused by the interruption of the promotional campaign in full sales period.

2.3 The defense of Aimon

In the memorandum of 8 April 2021, Aimon described the activity carried out on behalf of B&T, representing that, where the latter had in fact the role of a mere client, Aimon had acted as data processor on behalf of the subjects who create the databases and who are to be considered the only data controllers. In particular, in the reconstruction made by Aimon it was represented that some third parties, using web platforms, have provided for the material collection of the data of the interested

parties (for example by participating in competitions or registering for online services) acquiring, after providing information, a specific consent for sending promotional messages and for transmission to third parties. These subjects would then make use of the Aimon platform for the forwarding material of messages whose promotional content concerned third party products such as B&T. Therefore, having defined the purposes of the processing (the exploitation of the collected data for promotional purposes), these list providers have been qualified as owners.

With regard, however, to the specific cases subject to the complaint, Aimon stated that:

- "on 11/29/2018 the XX used the data of the lawyer XX to send, as data controller using our sms sending platform, the message containing information relating to B&T ";
- "on 17/01/2020 the XX used the data of the lawyer XX to send, as data controller using our sms sending platform, the message, also in this case containing information relating to B&T ";
- "the data of Mr. XX, have also been used on 16/01/2020 always from the XX".

The Company, therefore, "by hosting such data on its platform", would have acted as data processor on behalf of these subjects (hereinafter, XX and XX) also dealing with the management of the cancellation requests received from the interested parties.

Aimon also added that "the relationships with the aforementioned data controllers are the result of the intermediation activity carried out by two different companies through which it was possible to identify these subjects as suppliers". In particular, Runwhip S.r.l. it had taken care of acting as a commercial intermediary with XXe while the XX. had promoted the commercial agreement with XX. Both Runwhip and XX, according to what was declared in Aimon's memory, would not have carried out any activity regarding the processing of data, limiting themselves to intermediating the commercial relations between Aimon and the list providers (foreign subjects who want to operate in the Italian market).

Aimon also represented that it had carried out preventive checks on the lawfulness of the lists formed by the subjects qualified as data controllers, and in particular:

- "with the active collaboration of intermediaries" (Runwhip and XX), verified the characteristics of the information used at the time of data collection and the existence of suitable consents (verified by sample); however, no documentation proving such sample checks was attached;
- with regard to the first text message sent to XX, he verified that the data subject's data had been collected on the website

www.bedrive.it; the party has produced (att. 9 to the memory) a copy of the information published at the time on the said site (from which XX appears as the data controller) and an exchange of emails between XX, Aimon and XX from which it appears that this Ultima replied to XX on January 21, 2019, after having "received the report from ... the Runwhip contact person", indicating the personal data in its possession, the acquisition website, the date (January 3, 2017) and the IP with which registration would have been made; it should be noted that XX's response is sent to the email address XX, an address never used by XX in his discussions with the Guarantor and with all those involved and resulting solely from the extraction allegedly carried out from the database of XX itself. In fact, the attachment shows that Runwhip forwarded XX's request to XX, asking her to provide feedback, and that this request came from the complainant's pec address and not from the aforementioned gmail address. It is therefore likely that XX has never received such feedback since the complaint was integrated in March 2019 complaining of the lack of information, as it did in subsequent interlocutions until further reporting on January 20, 2020.

- with regard to the second text message sent to XX and the one sent to XX in January 2020, he verified that the data of the interested parties had been collected on the website www.ricercaperte.com, of which they attach the information and two strings indicating the registration, which would have taken place on 23 May 2016 for XX and 18 December 2016 for XX. For both, the fields indicated as "1st privacy" and "2nd privacy" are set to "yes". Aimon declares that, on the basis of what was confirmed by the supplier XX, the two fields reported respectively indicated the acceptance of "general terms and conditions and I wish to receive information from research open and associated websites" and the consent to treatment "for sending information and commercial offers also from third parties to whom it will be possible for the owner to communicate the personal data provided by me "(see attachment 10 to the memorandum);
- for XX, an exchange of conversations between the interested party, B&T and Aimon (in part already produced with the complaint) is attached, from which it emerges that XX, on January 20, 2020, received the same from the address privacy@ricercaperte.com string proving the registration to the site and the consents given; the communication is signed by "the staff of Ricercaaperte" with no other information regarding the identity of the sender. It is noted that, with the reply sent on January 20, 2020 to Aimon, B&T and XX, XX denied the registration and reported that the residence data reported were partly incorrect;
- to assess the adequacy of the measures adopted by the database suppliers, Aimon would have deemed sufficient the indication of the date of acquisition of the consent by selecting the appropriate boxes on the websites and would have verified

that "the owners envisaged suitable procedures to guarantee that the will of the interested party to revoke his consent is effectively respected "; no documentation was produced of these checks;

- the Company, having taken note of what emerged in the investigation, has changed some operating procedures, for example by indicating in the text of the messages a reference of the owner, so as to make him contactable directly by the interested parties; moreover, he stated that he had taken steps to have the data of the complainants deleted.

3. THE ASSESSMENTS MADE BY THE OFFICE

Aimon attached to his defense brief the information that would have been published, at the time of the alleged registration by the interested parties, on the websites of XX and XX. From the examination of these information it appears that:

- XX, owner of the www.bedrive.it site, is based in Lugano, Switzerland, and indicates as contact details a physical address in Switzerland and the email XX; an establishment in the territory of the European Union is not indicated and the representative in the Union is not indicated (as required by art. 27 of the Regulation); in addition, the storage times indicated in the information are not defined by referring only to "the time strictly necessary to carry out the purposes illustrated";

- XX, owner of the website www.ricercaperte.com, is based in Florida and indicates as contact details a physical address in Florida and emails XX and XX; an establishment in the territory of the European Union is not indicated and the representative in the Union is not indicated; here too, with regard to storage times, reference is made only to the "time necessary to perform the service requested by the user or required by the purposes described";

- with regard to the website www.ricercaperte.com, the Office on 6 October 2021 verified that it contains only a form to be filled in to participate in the competition called "win an iPhone XS". It is required to enter the following data: name, surname, date and place of birth, residential address, email, telephone number; there are four boxes, with optional selection, for the expression of the following consents: acceptance of the contractual terms and receipt of information from the site and from partners; receiving promotional messages from third parties to whom the data may be communicated; transfer of data to third parties; profiling by promoemail.org and related companies. This site www.promoemail.org contains a very similar form and promises the winning of an iPad but indicates as the data controller the Company XX, based in London and with an email address XX. In both sites, the link "regulation ", The terms and conditions of the competition which, as indicated, takes place in the territory of the Italian Republic; in no case is the tax representative in the territory of the State indicated, who, being foreign subjects, should instead be appointed as required by art. 5, paragraph 2, of the Presidential Decree of 26 October 2001, n.

Aimon has attached to its defense brief two deeds called "data processing agreement" signed, one with XX on 5 October 2018, and the other with TXX on 6 December 2019. In these documents, Aimon is qualified as the data processor, while XX and XX as holders.

Furthermore, Aimon has attached the contract signed with Runwhip on 5 October 2018 and the one signed with XX on 6 December 2019. From the examination of the two contracts, from the same approach, it emerges that Runwhip and XX are qualified as "intermediary" with the role of facilitate access to the Italian market for subjects, such as XX and XX, holders of databases. It is also specified that these intermediaries operate, in turn, as data processors with respect to the owner of the database, qualified as the owner. The latter "making use of the assistance of the intermediary" uploads its database to the platform managed by Aimon for the material sent to end users. Furthermore, in both contracts it is specified that the intermediary, as data processor, declares under his responsibility that the databases have been formed in compliance with the rules for the protection of personal data. It was not possible to concretely verify the role of these "intermediaries" since Runwhip escaped any interlocution and XX, mentioned only at the end of the investigation, was not asked.

Both Aimon and B&T have attached the three contracts signed for the 2018/2019/2020 campaigns.

In particular, from the examination of the contract signed on 4 October 2018 it emerges that Aimon undertook to select a specific target, differentiating the mailings by point of sale / geographical area and would have managed the cancellation requests through the email address supporto @ smsspot .it. There is no qualification of the roles and responsibilities regarding data processing: B&T, as a customer, is defined as an "advertiser" and determines the requirements of the campaign and the texts of the messages; Aimon, on the other hand, "undertakes to send on profiled contacts according to the campaign requirements indicated by the customer". The information is given that the recipients' data come from registrations to online services and that the owners are the "publishers" of the websites. It is also provided that "at the beginning or at the bottom of the text of the text message or e-mail, the identifier of the publisher and / or the data processing manager is inserted, for which up to a maximum of nine characters are used. The identifier ... is a hyperlink type and leads to a web space within which the recipient can obtain detailed information about the signed privacy policy and the references of the data controller ". However, as already described, in the text of the text messages received from the complainants the sender was indicated as "Dorelan" and the link referred to the Dorelan brand site.

The contract concluded on January 3, 2019, similar in content, also provides that Aimon manages on behalf of B&T, in the case of interactive campaigns, a database with the data of the subjects who, by replying to the messages, have expressed their willingness to be contacted.

Finally, from the examination of the contract signed on 17 December 2019, we note the addition of some passages.

In particular, Aimon's responsibility is agreed to "verify the legitimacy of the databases to be used and to make the identification data of the suppliers from which it receives the databases known to the customer The customer has the right to oppose the use of certain suppliers" with express indemnification in favor of B&T for any damage that may arise from the use of personal data contained in these databases. The list of database suppliers "of contacts provided under license" to Aimon is attached to this contract.

4. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also based on the statements of the Company to which the declarant responds pursuant to art. 168 of the Code, the following assessments are formulated in relation to the profiles concerning the regulations on the subject of personal data protection.

4.1. On the qualification of roles regarding the processing of personal data

Recalling what has been reconstructed in point 3 above, it is first of all observed that, by comparing the prospectuses reported in the briefs, the attached contracts and the documentation produced by the complainants, the parties' intent to securitize does not correspond to the actual execution of the conduct by Aimon and B&T. In fact, if in the contracts the parties have not given themselves any qualifications in the treatment, they have instead carried out a treatment, albeit with different roles and responsibilities, which has partly deviated in fact from what has been agreed. For example, it is noted that, despite having foreseen the insertion of the name of the owner of the database in the text of the SMS, the message actually sent only contained a link to the Dorelan brand landing page (in this case, with reference to point sale of Siena).

Therefore, in order to determine the concrete attitude of the roles and, consequently, the degree of responsibility of B&T and Aimon, it is necessary to jointly examine the declarations of the parties with the documentary elements produced by these in the defense phase.

It is then necessary to recall the definitions of owner and manager pursuant to art. 4 of the Regulation, where the "owner" is the natural or legal person who, individually or together with others, determines the purposes and means of the processing,

while the "data processor" is the person who processes personal data on behalf of the owner.

As better clarified in the EDPB Guidelines 7/2020 (1), regardless of the contractual qualification of the roles, the owner is the person who determines the purposes (why) and the means, ie the methods (how), of the processing; on the other hand, the person who works on behalf of the owner is to be considered responsible, carrying out the instructions even with a certain degree of autonomy without being able to exercise any faculty with regard to the choice of the purposes of the processing. As already stated by the Guarantor in a similar case (provision of 26 October 2017 web doc no.7320903), the client of a promotional campaign, regardless of the material apprehension of the data, must be considered the data controller having concretely determined the decisions in order the purposes and methods of the processing itself.

In the present case it can be considered that the role of B&T is certainly to be qualified as the data controller while that of Aimon, who acted in a delegated way on behalf of B&T, can be classified as responsible. This is because B&T: has concretely determined the reason for which the treatment was put in place (the transmission of promotional messages); has chosen the criteria that Aimon should have followed to carry out the processing (choice of target, frequency of sending, content of messages) thereby defining the essential means of processing; selected the data controller from the market and provided him with instructions on the expected level of quality in choosing the lists, also asking to verify that the data had been collected in compliance with the regulations.

The clarification, made during the hearing, regarding the choice to indicate "Dorelan" as the sender in order to have a useful feedback to check the supplier's work, expresses a legitimate prerogative of control by the principal who, at the same time, realizes one of the main responsibilities of the data controller.

Furthermore, consideration must be given to the effects produced on the interested parties. In the specific case, on the basis of what is represented in XX's complaint but also in XX's subsequent complaint, promotional text messages were sent with the sender "Dorelan" and containing promotional offers under the Dorelan brand. Such a configuration of the messages was evidently capable of generating in the recipients the conviction that they had been contacted directly by the company belonging to the Dorelan brand. In fact, they first turned to B&T, on the basis of this legitimate expectation, and hardly understood the subsequent liability charges to other subjects.

In this regard, it is necessary to recall what was clarified by the Guarantor with the general provision of 15 June 2011 (in www.garantepivacy.it, web doc. 1821257) with specific regard to the fact that "... promotional contacts are made in the name,

however on behalf and in the interest of the principal company; with the effect that legitimate expectations are created in the interested parties, since they perceive that they are recipients of advertising initiatives conducted directly by the company on behalf of which the proposal for the sale of products or services is formulated ".

In this context, the owners of the databases (XX and XX) acted as autonomous owners since the treatment they put in place (collection, storage and transmission of data to third parties) is previous and completely independent from the treatment put in place. be from B&T.

For these reasons, the reconstruction proposed by the parties according to which, in the treatment in question, B&T would have been a mere client without a role, the suppliers of databases XX and XX would have been holders of the specific treatment that led to the sending text messages to XX and XX and, finally, Aimon would have acted as data controller on behalf of the database owners.

4.2. About Aimon's responsibility

In the framework reconstructed so far and on the basis of the elements acquired, it appears that Aimon, despite having acted as the person responsible for the treatment of B&T, is not exempt from fault in the conduct examined as a whole. In fact, if any control burden on the activity of the manager falls on the owner, it is true that the person in charge of the processing still has his own specific obligation to correctly execute the instructions received.

As represented up to now, B&T, while not recognizing the role of owner, has in any case contractually agreed with Aimon the realization of three promotional campaigns with certain quality requirements, requesting to carry out checks on the correct realization of the lists and on the acquisition of the required consents to the processing. .

As reported in point 3 above, the information held by Aimon regarding publishers and data collection methods already revealed elements of dubious compliance with the level of quality expected by the owner.

From reading the information of XX (indicated for the 2020 campaign) and from a simple consultation of the website www.ricercaperte.com it was easy to verify the fact that the data had been collected from non-EU residents without any indication of the representative of the holder in the Union. This requirement is instead mandatory pursuant to art. 27 of the Regulation, according to which (see Article 27, paragraph 3) this representative must not only be established in the Union but must be based in one of the Member States where the data subjects are located and whose data are processed in " scope of the offer of goods or services. In addition, as already noted above with regard to the prize competition on the site

ricercaaperte.com, there was also no indication of the tax representative in Italy, required by the rules governing prize competitions.

The choice of a person not resident in the Italian territory, or at least in the EU territory, does not guarantee the interested parties the right to assert their rights and, at the same time, hinders the investigation activities of the Guarantor making it extremely difficult to verify the lawfulness of such treatments and impose corrective measures. These problems, which have already emerged during other investigations still in progress, have also been confirmed in the cases subject to complaint.

Also with regard to the lawfulness of the consents allegedly expressed by the interested parties, it is noted that the documentation produced by the list providers is not suitable for demonstrating the real expression of consent to the receipt of promotional messages and the transfer to third parties. In fact, with regard to the first text message sent to XX, XX's response only indicates a date and an IP address without any other reference and, for these reasons, it could at most indicate the date of registration on the site but not also document the performance. of one or more specific consents. Instead, with regard to the strings produced by XX to document the consents expressed by XX and XX, it is noted that the first consent includes, in a single formula, the acceptance of the contractual terms and the consent to receive information to be researched and opened. associated websites. Furthermore, it was not possible to carry out any type of verification on the veracity of this documentation since XX is based in Florida and, as mentioned, it does not appear to have appointed a representative in Italy either for the processing of data or for the related tax aspects. in the prize draw.

Moreover, the documentation of consent through the indication of the IP address alone is a method that the Guarantor has already considered insufficient to document the unequivocal will of the interested parties (see the aforementioned provision of 26 October 2017), while there are alternatives more suitable to guarantee a greater degree of certainty about the genuineness of the manifestation of consent (such as the practice of sending a confirmation message to the address indicated during registration).

It must be remembered that the orderly performance of marketing activities, with the use of lawfully collected and updated data, in addition to avoiding dangerous drifts (such as phishing and scams), benefits the market itself by protecting virtuous operators and strengthening the trust of those concerned. . It is therefore necessary to adopt the utmost diligence in the selection of databases and it is the task of this Authority to supervise the correct implementation of the treatments and to stem the circulation in the market of data whose origin cannot be concretely verified.

While it is true that B&T has failed to correctly qualify the roles and carry out the necessary checks on Aimon's work, it is also true that the latter, acting as data processor in violation of the instructions received (given the insufficient verification of the data quality), has contributed to depriving the processing of the requirements of lawfulness, correctness and transparency in violation of art. 5, par. 1, lett. a) of the Regulations.

In addition, the instructions provided to Aimon by B&T also included the task of acknowledging the requests for exercise of rights by the interested parties and providing prompt feedback. In the cases described by the complainants, Aimon appears to have responded evasively, without providing the requested information regarding the origin of the data and without indicating the list provider from which they were provided but rather indicating Runwhip and XX which, according to what was subsequently declared to the Guarantor, they would have had the role of mere commercial intermediaries. Furthermore, as already noted, the response sent to XX by XX was directed to an email address that did not correspond to that of the complainant: an element that Aimon could easily have verified when it was called to examine the complaint with which the same XX he complained that he never got a response.

Also in this case, Aimon's conduct, expressly commissioned by B&T to respond to requests from interested parties, made it impossible for applicants to obtain the information requested regarding the processing, in violation of art. 12 of the Regulation. These behaviors lead to a significant limit to the exercise of that information self-determination which is expressed precisely through the control that the interested party can carry out on their data with respect to the risks of dispersion or use that does not comply with the purposes of the related collection. In fact, it cannot be considered that an expression of will initially expressed in a conscious way with respect to certain treatments can have a chain effect, through successive passages of personal data from one owner to the other in a completely imponderable manner for the interested party.

In addition to not being able to obtain information about who held the data and the documentation of consent, the interested parties were not even able to properly exercise the right to object, in violation of art. 21 of the Regulation. This is because, in contravention of what was agreed with the owner, Aimon, despite having taken note of XX's desire not to receive other communications from B&T, has given greater importance to the fact that the data had been extracted from two different databases, belonging to two different owners and therefore made the second sending in violation of art. 21 of the Regulations and, given the absence of valid consent, in violation of art. 6, par. 1, lett. a) of the Regulations and art. 130 of the Code.

4.3. Conclusions

Having said all this, it must be considered that the arguments set out in Aimon's defense brief are not sufficient to overcome the disputes raised with the act of initiating the proceedings of March 9, 2021.

On the basis of what has been observed so far, having found Aimon's liability in the unlawfulness that has emerged, the violation of Articles 5, par. 1, lett. a), 6, par. 1, lett. a), 12 and 21 of the Regulations and art. 130 of the Code.

Consequently, it is necessary to impose on the same, in the execution of activities similar to those subject to investigation, the prohibition of using personal data without having concretely verified the lawfulness of the original acquisition, pursuant to art. 58, par. 2, lett. f).

Furthermore, with regard to the treatments already carried out, and with dissuasive intent, taking into account that the Company is still operating in the SMS advertising market, it is believed that the conditions exist for the application of a pecuniary administrative sanction pursuant to Articles 58, par. 2, lett. i) and 83 of the Regulation.

5. INJUNCTION ORDER FOR THE APPLICATION OF THE ADMINISTRATIVE PECUNIARY SANCTION

On the basis of the above, given the violations referred to, the sanction provided for by art. 83, par. 5 of the Regulation.

For the purposes of quantifying the administrative sanction, the aforementioned art. 83, par. 5, in setting the maximum legal limit in the sum of 20 million euros, or, for companies, in 4% of the annual worldwide turnover of the previous year, whichever is higher, specifies the methods of quantifying the aforementioned sanction, which must "in any case [be] effective, proportionate and dissuasive "(art. 83, par. 1 of the Regulation), identifying, for this purpose, a series of elements, listed in par. 2, to be assessed when quantifying the relative amount.

In compliance with this provision, in the present case, the following aggravating circumstances must be considered:

1. the severity and duration of the violation, since the processing, although not supported by the necessary guarantees, continued from 2018 to 2020, with the sending of text messages to numerous mobile users (respectively: 2,490,000, 1,800 .000, 3.220.000);
2. the degree of responsibility of Aimon which, on the basis of its professional competence, should know the rules to be followed in the execution of marketing activities and which, consequently, could have realized that the use of some lists did not guarantee their respect; nevertheless, he still chose to use these lists for a long period, configuring the intensity of his responsibility as conscious fault.

As mitigating elements, it is believed that we must take into account:

1. of the fact that the Company has demonstrated that it has responded promptly to the requests of the interested parties, albeit insufficiently, and that it has requested the deletion of data from its partners;
2. the degree of cooperation shown in the discussions with the Authority with regard to the timeliness of the feedback and the attachment of all the contractual documentation necessary to correctly qualify the roles of the parties.

In an overall perspective of the necessary balancing between the rights of the interested parties and freedom of enterprise, and in the first application of the administrative pecuniary sanctions provided for by the Regulation, it is necessary to prudently evaluate the aforementioned criteria, also in order to limit the economic impact of the sanction on the needs. organizational, functional and occupational of the Company.

Therefore, it is believed that, on the basis of the set of elements indicated above, in the comparison between the level of seriousness of the conduct of the parties and the respective turnover, giving particular value to the latter in the present case in relation to the above-mentioned needs, apply to Aimon the administrative sanction of the payment of a sum equal to € 200,000.00 (two hundred thousand / 00), equal to 1% of the maximum edict, and, also due to the aggravating elements found, the accessory sanction of the publication in full of the this provision on the website of the Guarantor as required by art. 166, paragraph 7 of the Code and by art. 16 of the regulation of the Guarantor n. 1/2019.

Please note that pursuant to art. 170 of the Code, anyone who, being required to do so, does not comply with this provision of prohibition of processing is punished with imprisonment from three months to two years and who, in the event of non-compliance with the same provision, the sanction referred to in administrative office is also applied. to art. 83, par. 5, lett. e), of the Regulation.

Finally, it is believed that the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations found here in the internal register of the Authority, provided for by art. 57, par. 1, lett. u) of the Regulations.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. f), of the Regulations, declares unlawful the processing described in the terms set out in the motivation by Aimon S.r.l., based in Mirano (VE), Via Ca 'Rezzonico 18, VAT no. 03814240275, and consequently:

a) pursuant to art. 58, par. 2, lett. lett. f), prohibits the Company, in carrying out activities similar to those under investigation, from using personal data without actually verifying the lawfulness of the original acquisition.

ORDER

to Aimon S.r.l., with registered office in Mirano (VE), Via Ca 'Rezzonico 18, VAT no. 03814240275, to pay the sum of € 200,000.00 (two hundred thousand / 00) as a fine for the violations indicated in the motivation, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute, with the fulfillment of the prescribed requirements and the payment, within thirty days, of an amount equal to half of the sanction imposed.

to the aforementioned Company, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 200,000.00 (two hundred thousand / 00), according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to 'art. 27 of the law n. 689/1981.

HAS

a) pursuant to art. 17 of the Guarantor Regulation n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lett. u) of the Regulations, violations and measures adopted;

b) pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the website of the Guarantor.

The Guarantor, pursuant to art. 58, par. 1, of Regulation (EU) 2016/679, also invites the data controller to communicate within 30 days from the date of receipt of this provision, which initiatives have been undertaken in order to implement the provisions of this provision and to provide however, adequately documented confirmation. Please note that failure to respond to the request pursuant to art. 58 is punished with the administrative sanction pursuant to art. 83, par. 5, lett. e), of Regulation (EU) 2016/679.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as art. 152 of the Code and 10 of the legislative decree 1 September 2011, n. 150, opposition to this provision may be filed with the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller is resident, or, alternatively, to the court of the place of residence of the person concerned. , within thirty days from the date of communication of the provision itself, or sixty days if the applicant resides abroad.

Rome, November 25, 2021

THE VICE-PRESIDENT

Cerrina Feroni

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Stanzione

1) Guidelines 7/2020 on the concepts of controller and processor in the GDPR, adopted on 7 July 2021