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Injunction against Vincall s.r.l.s - 11 April 2019

Register of measures

no. 95 of 11 April 2019

#### THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

NOTING that the Guardia di Finanza, special privacy unit, with report no. 27/2018 of 15 May 2018 (notified on the same date), which must be understood as fully reported here, challenged Vincall s.r.l.s (hereinafter "Vincall" or "the Company"), in the person of its pro-tempore legal representative, with registered office legal in Vibo Valentia, via S. Aloe snc, C.F. 03429570793, the violations envisaged by articles 13, 23, 161, 162, paragraph 2-bis, and 167 of the Code regarding the protection of personal data (legislative decree no. 196 of 30 June 2003, hereinafter the "Code") in the formulation prior to the changes introduced by d. lg. no. 101/2018;

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- as part of an inspection, initiated in relation to the reports of two interested parties, the Guardia di Finanza examined the processing of personal data carried out by Vincall, a company that carries out telemarketing and teleselling activities through "call centres" on behalf of more clients;
- with reference to the alleged agreements reached in July 2017 between Vincall and Green Power s.r.l., sales agent of the company Edison Energia S.p.A., the Company instructed the Albanian company Tele It, based in Valona, to contact potential customers by telephone in order to have them sign contracts for the supply of electricity and gas with the aforementioned Edison Energia S.p.A.;
- Tele It contacted potential customers using telephone numbers collected by the same company and without the contact list

having been previously provided or validated by the three companies (Edison, Green Power and Vincall) involved in the promotional activity;

- having obtained from the subjects contacted the willingness to sign a contract, Tele It proceeded to transmit the data of the new customers to Vincall, for registration on Edison's management platforms;
  - Vincall then proceeded to fill out the paper contracts. These contracts were not signed by the customers so that Vincall's back-office employees recontacted the customers themselves asking for confirmation of their intention to purchase the services offered and, where obtained, affixed their own initials at the bottom of the relevant contract;
  - the contracts had to be sent to Green Power for subsequent forwarding to Edison;
  - the Guardia di Finanza, following the inspection, proceeded to obtain summary testimonial information from all those who appeared to have been contacted in the context of the commercial operation described above, noting that Vincall had not provided the necessary information to the interested parties pursuant to art. 13 of the Code (with reference to 78 contracts for energy supplies) and had not asked the interested parties for the consent pursuant to art. 23 of the Code for the collection of personal data for marketing purposes (with reference to 111 contracts) and for processing for the same purposes (with reference to 155 contracts);
  - on the basis of the acquired deeds, the Guardia di Finanza challenged Vincall for the violations referred to in the epigraph;
- NOTING that with the aforementioned deed of May 15, 2018 Vincall was charged with the following violations:
- pursuant to articles 13 and 161 of the Code, in relation to n. 78 energy supply contracts, for failing to provide the interested parties with appropriate information following telephone contacts at their call center;
  - pursuant to articles 23 and 162, paragraph 2-bis, and 167 of the Code, in relation to no. 111 energy supply contracts, for not having acquired the consent of the interested parties for the collection of their data for marketing purposes;
  - pursuant to articles 23 and 162, paragraph 2-bis, and 167 of the Code, in relation to no. 155 energy supply contracts, for not having acquired the consent of the interested parties for the processing of their data for marketing purposes;
- HAVING ACKNOWLEDGED that the Company has not made the reduced payment, as evidenced by the report drawn up pursuant to art. 17 of the law n. 689/1981;

READ the minutes of the hearing of 9 July 2018 and the written defenses of 17 July 2018 and 16 February 2019, the latter sent on the basis of the provisions of art. 18, paragraph 4, of Legislative Decree lg. no. 101/2018, in which it is stated that:

- following the agreements with Green Power, for the procurement of new customers on behalf of Edison, Vincall assigned this task to the Albanian company Tele IT;
- Tele It "not only contacted potential customers by telephone (for Edison spa), but also filled in all of its parts" the membership proposals of individuals who had expressed an interest in becoming Edison customers;
- these membership proposals were sent to Vincall which, before forwarding them to Edison S.p.A. through the portal made available by Green Power "carried out a series of both formal and substantial checks through telephone calls to confirm the will expressed in the application forms";
- Vincall "analysed the individual proposals and, once the initial formal and substantial requirements had been met, contacted each potential customer individually through its employees in order to ascertain the existence and relevance of the will to sign the contract";
- only after having verified the aforesaid will, the Vincall operator proceeded to note the customer's name and surname on the membership proposal;
- therefore, no form was signed in place of the potential customer, "but the operator himself indicated" the customer's name and surname at the bottom of the membership proposal, almost as an initials and internal traceability of the operations performed;
- this last procedure was to highlight that "that single contractual procedure was ready to be forwarded" to Edison "for verification of the final conclusion of the contractual process";
- in all cases, the signatures of adhesion did not produce any legal effect and, in any case, "according to jurisprudence and consolidated doctrine, the apocryphal signature should be classified as a "harmless forgery" or "useless forgery"" since it is an expression of the will of the customer to conclude a contract;
- the contractual proposal was compiled solely by the Albanian company Tele It, which "was in charge of informing potential customers" regarding the processing of personal data and acquiring consent pursuant to art. 23 of the Code;
- furthermore, in the matter subject to the report "the case referred to in art. 24" of the Code and, if Vincall's liability were in any case recognised, "the single pecuniary sanction should be applied (pursuant to article 81 of the criminal code) also in compliance with the principle of favor rei which derogates from that of the material accumulation of the pecuniary penalty, thus applying the functional accumulation";

- in the present case there would be the uniqueness of the "criminal design", as there would be a "preventive representation by the operators of a unitary program suitable for carrying out violations of the same articles 13 and 23 with multiple actions. This can be deduced both from the identity of the violated rule and from the brevity of the time elapsed between one violation and another";

HAVING ACKNOWLEDGED that the arguments put forward by the company Vincall are not suitable for determining the acceptance of the request for dismissal of the overall sanctioning procedure or for the application of the juridical accumulation, for the following reasons:

- first of all, it should be noted that there are differences between the reconstruction of the overall customer acquisition process on behalf of Edison that emerged from the inspection and that represented in the defense briefs. On the basis of what was found by the Guardia di Finanza, in fact, the Albanian company Tele It, on behalf of Vincall, contacted potential customers drawing from its own lists and, once obtained a willingness to sign a contract with Edison, sent the data, in electronic format, to Vincall, who first filled in the paper acceptance proposal and then contacted the potential customer for confirmation of his intention to proceed with the proposal. In the defense briefs, however, it was repeatedly underlined that Tele It, after having contacted the customers, compiled the paper acceptance proposal itself and then sent it, it is not clear by what means and according to what timing, to Vincall who proceeded to carry out the phase verification;

- while emphasizing that what emerged from the inspections was crystallized in a report of transactions carried out which is valid up to the point of a false lawsuit, it must be considered that, in any case, the personal data of Edison's potential customers have "arrived" in the context of guarantees required by Italian legislation through Vincall, a company which had the duty to ensure that: a) all interested parties had received information containing all the elements of art. 13 of the Code; b) the same interested parties had given their consent to the processing of their data or had formally consented to proceed with the execution of a contract for the supply of electricity with Edison;

- well, the transmission of potential customers' data in electronic format by Tele It to Vincall, or the transmission of the paper membership proposal models without the customer's signature, constitutes clear proof that the potential customers have not had the opportunity to take vision of any information model pursuant to art. 13 of the Code. The absence of a script containing the aforementioned information, to be read to the interested parties during telephone contacts, confirms that the information was not provided even through this tool. Furthermore, since the potential customers have not signed any membership proposal

and since there are no records of the telephone contacts made by Tele It, the personal data processing carried out by Vincall cannot be included among those for which it is not necessary acquire consent on the basis of art. 24, paragraph 1, lett. b), of the Code (execution of contractual obligations or fulfillment of specific pre-contractual requests);

- for such treatments (such as, for example, those aimed at further contacting potential customers, operated by the company),

Vincall, which operated in the absence of specific designations as data processor and must therefore be considered independent data controller, had the obligation to acquire consent from the interested parties and, in this regard, it must be remembered that consent, pursuant to art. 23, paragraph 3, of the Code, must be "documented in writing": the written form ad probationem is therefore required, in the absence of which consent cannot be considered given;

- with reference to the defensive observation regarding the applicability, in the disputed violations, of the formal competition envisaged by art. 8, paragraph 2, of the law n. 689/1981, based on the uniqueness of the so-called "criminal design" underlying the multiple conducts (similarly to the provisions of Article 81 of the Criminal Code on the subject of continued offences), it must be noted that this hypothesis of juridical accumulation of administrative sanctions is expressly provided for, precisely on the basis of the aforementioned Article 2, paragraph 8, of the law n. 689/1981, only in cases of violations of "mandatory social security and assistance laws";

- in the case in question, an administrative sanction must be applied for each disputed violation and in this regard it is noted that the disputed violations "in relation to n. 111 energy supply contracts, for not having acquired the consent of the interested parties for the collection of their data for marketing purposes" are absorbed by the disputed violations "in relation to n. 155 energy supply contracts, for not having acquired the consent of the interested parties for the processing of their data for marketing purposes" since the overall processing also includes collection operations;

- on the basis of the above considerations, Vincall's responsibility must be confirmed in relation to the violations referred to in "survey no. 1" and to the "relief no. 3", of the dispute report of 15 May 2018, while the filing of the disputes referred to in "survey no. 2", of the same deed;

NOTING, therefore, that Vincall, on the basis of the above deeds and considerations, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code, the violations indicated in report no. 27/2018 of 15 May 2018, in findings nos. 1 and 3;

CONSIDERING the art. 161 of the Code which punishes violations of art. 13, with the administrative sanction of the payment of

a sum from Euro 6,000 to Euro 36,000;

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes violations of the provisions indicated in art. 167, among which the art. 23, with the administrative sanction of the payment of a sum from Euro 10,000 to Euro 120,000;

CONSIDERING that, in the case in question, the decrease referred to in art. 164-bis, paragraph 1, of the Code, since the violations do not appear to be particularly tenuous, nor are the treatments carried out in relation to activities of an economic or social nature indicated in the regulation;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

WHEREAS, in the present case:

to. with regard to the aspect of gravity, with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the conducts appear to have been implemented in a framework of marked lack of interest in the overall legislation on protection of personal data and superficial underestimation of the serious implications deriving from the use of forms of customer acquisition based on informality and the unilateral simplification of the framework of formal obligations prescribed by the legislation;

b. for the purpose of evaluating the work carried out by the agent, the fact that Vincall, in agreement with Green Power, cancelled, even before the completion of the inspections by the Finance Police (which took place on 10 and 11 October 2017), the sending to Green Power itself, of the membership proposal forms, circumscribing the effects of the unlawful conduct;

c. regarding the personality of the author of the violation, the fact that Vincall is not burdened by previous sanctioning proceedings defined in brief or following an injunction order must be considered;

d. with regard to the economic conditions of the agent, the financial statements for the year 2016 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements evaluated as a whole, to the minimum extent of:

- 6,000 (six thousand) euros for each of the 78 violations pursuant to articles 13 and 161 of the Code, for a total of 468,000 (four hundred and sixty-eight thousand) euros;

- 10,000 (ten thousand) euros for each of the 155 violations pursuant to articles 23 and 162, paragraph 2-bis, of the Code, for a total of 1,550,000 euros (one million five hundred and fifty thousand);

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, and subsequent modifications and additions;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Augusta Iannini;

HAS

the filing of the administrative sanctioning procedure referred to in finding no. 2 of the dispute report n. 27/2018 of 15 May 2018, for the reasons indicated in the introduction;

ORDER

to Vincall s.r.l.s, in the person of its pro-tempore legal representative, with registered office in Vibo Valentia, via S. Aloe snc, C.F. 03429570793, to pay the sum of 2,018,000 euros (two million eighteen thousand) as an administrative fine for the violation indicated in the justification;

ENJOYS

to the aforementioned Company to pay the sum of Euro 2,018,000 (two million eighteen thousand), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive deeds pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 11 April 2019

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia