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Order injunction against OneDirect S.r.l. - March 25, 2021

Record of measures

n. 113 of 25 March 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, 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");

HAVING REGARD to the documentation on file;

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

They received the Guarantor, pursuant to art. 77 of the Regulations, the complaints of Dr. XX, on 14 November 2018, and of Mr. XX, on 15 January 2019, with whom the receipt of various promotional communications by e-mail from OneDirect S.r.l. was complained of. (hereinafter, "OneDirect" or "the Company") despite the opposition expressed via certified e-mail (also by means of a legal notice in the case of Mr. XX). Furthermore, the complainants complained about the inability to stop sending via the unsubscribe button of the e-mails and the absolute lack of response to requests to exercise the rights provided for in Articles 15 ss of the Regulations.

On the basis of these requests, the Office sent two different requests for information, on February 21, 2019 and May 6, 2019, which remained unanswered despite correct reception. We therefore proceeded to forward these requests again pursuant to art. 157 of the Code, also these correctly received, on 21 May 2019 and 26 June 2019, but not found. It was therefore necessary to proceed by instructing the Special Privacy Unit of the Guardia di Finanza to acquire all the information requested since even the communications of the initiation of the sanctioning procedure for violation of art. 157 of the Code, correctly delivered on June 26 and July 30, 2019, remained unanswered.

As part of the on-site investigations carried out on 5 and 6 November 2019:

- the correct reception of the petitioners' requests and the relative lack of response was verified; similarly, the correct reception of the requests sent by the Guarantor was verified: the Company stated that access to the certified e-mail box is allowed to the legal representative and to four other appointees while, in the period October 2018 / May 2019, the management of the same it was also entrusted to an employee who terminated her employment relationship on 23 May 2019;
- with regard to the specific cases subject to the complaint, the Company stated that the marketing activity is entrusted to the French parent company OneDirect S.A., which acts as the data processor of which OneDirect is the owner; it was verified that, on the date of the assessment, the data of doctor XX were not present in the systems (although the latter complained at least 16 mailings) while, with regard to Mr. XX, the e-mail address with a consent valued at "faux" (negative) but no e-mail was sent by the platform to that address in the last thirteen months (despite having the complainant complained about 3 mailings); the Company therefore reserved the right to carry out further checks.

OneDirect, on November 21, 2019, sent the supplementary documentation subject to reserve to the Special Privacy Unit, from which it emerged that:

on November 20, 2019, the Company requested the complainants to forward the disputed e-mail files to carry out further checks to understand the origin of the data and the methods of sending; to this request, Dr. XX appears to have given an answer the following day but no additions have been received to the Guarantor regarding the checks that the Company should have carried out;

the Company has sent a register of processing activities drawn up by the French parent company OneDirect SA - appointed responsible for the processing of which OneDirect is the owner - but has not sent its processing register, although this was expressly subject to reservation.

Therefore, on October 30, 2020 the communication of the initiation of the procedure was sent to the Company pursuant to art. 166, paragraph 5 of the Code.

Furthermore, with notes dated June 26 and July 30, 2019, the Company had already been accused of the failure to respond to the requests sent by the Guarantor pursuant to art. 157 of the Code.

On 28 November 2020, the Company sent a defense statement stating that:

- no feedback was provided to the requests of the complainants and to those of the Guarantor because the pec box "was not monitored for critical issues within the company"; some employees were therefore removed and the assignment of duties was changed;

- for requests to exercise their rights, interested parties can still use the form in the "contact us" section of the website www.onedirect.it as also indicated in the information;

- with regard to the e-mail address of Mr. XX, it was not possible to understand why this was the subject of promotional communications despite the denial recorded in the systems; the Company therefore assumed that Mr. XX may have granted consent using another e-mail address from which he would then redirect to the e-mail account that actually receives the complained messages; despite having requested confirmation to this effect from the complainant, the latter has not sent a reply, therefore the Company is unable to carry out further investigations;

- with regard to Ms. XX's e-mail address, this would not be attributable to a natural person, since it is a generic contact data of a professional firm, and therefore should not be considered as personal data; in addition, the data of the complainant are not present in the Company's archives and "it is therefore not possible to trace the origin of the data and, even in this case, the recipient email could be a simple redirect";

- while highlighting that these were only two cases, "the company immediately became aware of the fallacy of your personal data management systems and signed the contract ... with the registered office in order to fully adapt to the legislation in force ".

2. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also based on the statements of the Company, for 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.

2.1 On sending promotional communications without consent.

The Company has sent several promotional messages to complainants without being able to document the acquisition of suitable consent. In the case of Mr. XX, the presence of the data in the systems was found but not his consent; in the case of Mrs. XX, however, no data was present, yet she documented the receipt of numerous e-mails. The latter also appears to have responded to the request to send a copy of the e-mails received, which the Company made to order further checks. However, the results of these checks were never disclosed to the Guarantor, nor was there confirmation of the actual implementation of the same, despite the fact that this commitment was subject to reserve during the inspection conducted by the Privacy Unit.

In these terms, the hypothesis of a redirection made by both complainants to the e-mail addresses that received the complained communications seems implausible; moreover, the complainants have repeatedly, in vain, opposed the receipt of promotional messages and certainly, after such opposition, no consent could be considered to exist.

Finally, with regard to the exception raised by the Company in the defense, relating to the non-personal nature of Ms. XX's e-mail address, it is noted that art. 130 of the Code expressly protects the "contractor": such are, pursuant to art. 121, paragraph 1-bis, lett. f) of the Code, also legal persons for which, in Title X, guarantees similar to those addressed to the interested natural persons are envisaged.

Having said that, given the sending of promotional e-mails in the absence of appropriate consent, the violation of Articles 6, par. 1, lett. a) and 7, par. 1 of the Regulations, as well as art. 130, paragraphs 1 and 2 of the Code and it is necessary, pursuant to art. 58, par. 2, lett. b) of the Regulations, to issue a warning to OneDirect about the unlawfulness of such processing, also having to impose, pursuant to art. 58, par. 2, lett. f) the ban on using personal data that the Company has acquired for promotional purposes without being able to document the existence of suitable consent.

Furthermore, given the lack of control over the sending of promotional messages and the consequent lack of adequate corrective measures proposed by the Company, 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.

2.2 Failure to comply with the exercise of the rights referred to in Articles 15 and following.

In addition to receiving promotional e-mails, the complainants also complained about the inability to stop the arrival of unwanted communications. In particular, Mr. XX reported that any attempt to interrupt the mailings was in vain by selecting the unsubscribe button at the bottom of the emails, therefore having to ask his lawyer to send the company two warnings by

certified e-mail.

Ms. XX, on the other hand, represented that she had sent the owner a request by certified e-mail, while continuing to receive promotional messages.

Both declared that they had not received any kind of response to the requests made.

As emerged from the investigations carried out, the owner has correctly received the certified e-mails but has not provided feedback as the mailbox would not have been monitored for several months.

In articulating its defense, the Company objected that the correct channel through which interested parties can exercise their rights is indicated in the privacy policy published on the website www.onedirect.it where it is suggested to use the form at the link " contact us ". If, therefore, the complainants had used this channel instead of the pec, they would have, according to him, received an answer.

In this regard, however, the following observations need to be made:

- some of the attached communications also date back to 2018 and, in the absence of specific information on the part of the Company, it is not known whether the same information and contact methods were in force at the time;
- examining the content of the e-mails received from the complainants, attached to the requests, it is clear that the only contact information present were the company name, VAT number, physical address and telephone and fax number. On the other hand, there was no indication of the address, or even just the existence, of a website; therefore, the only way to identify a communication channel with certainty was by searching for the certified email address, which can be found in public registers starting from the VAT number and the company name;
- even if, at the time of the facts, the channel indicated by the Company had been active, this certainly was not disclosed to the complainants by the same means with which they were contacted; the same, therefore, made use of the ordinary means of contact, to which the publication in special registers confers certainty;
- finally, the unsubscribe button at the bottom of the emails did not work anyway, since Mr. XX continued to receive unwanted messages, and the Company has not declared anything about it.

It follows that the lack of clear indications, within the e-mails themselves, about how to contact the Company, together with the lack of adequate technical and organizational measures, which should have allowed the unsubscribe button to function and correctly monitor. of e-mail, have made it impossible for complainants to exercise their rights, also leading to the sending of

promotional communications even in the presence of an express opposition (to be considered additional to the lack of an origin consent).

For these reasons, the violations of articles 12 and 24 of the Regulations and - taking into account the mandate given to the lawyer to review the business processes and the assurances provided regarding the organizational changes made - it is necessary, pursuant to art. 58, par. 2, lett. b) of the Regulations, to issue a warning to the Company regarding the need to guarantee the interested parties the existence and knowledge of the contact channels and how to exercise their rights.

While taking into account the assurances provided by the data controller regarding the future management and control of correspondence, it is deemed necessary in any case to order the data controller to immediately adopt the organizational measures necessary to provide prompt response to the requests of the interested parties within the terms provided for by art. . 12 of the Regulation.

2.3 On the register of processing activities.

As reconstructed in the introduction, during the inspection delegated to the Guardia di Finanza, the Company has reserved the right to show the register of processing activities. However, when supplementing the documentation, it produced exclusively the register set up by the French parent company OneDirect S.A. who acts as the data processor.

With the communication of the initiation of the procedure of 30 October 2020, the Company was accused of the lack of a register of processing activities. The defense brief received in reply does not contain any mention in this regard, not even clarifying whether such a register exists (which, in any case, has never been exhibited). In addition, a contract is attached which instructs the law firm XX to adapt the treatments to current legislation. Among the items in this contract there is a "revision of the treatment register pursuant to art. 30 EU regulation 2016/679 ".

Therefore, since the existence of the data controller's register of processing activities has not been documented, the violation of art. 30 of the Regulation and it is necessary to inflict an administrative-pecuniary sanction pursuant to art. 58, par. 2, lett. i) and 83 of the Regulation.

2.4 On the degree of cooperation with the Authority and the accountability of the data controller.

As reconstructed in the introduction, the Office has repeatedly tried to contact the Company to ask for information about the complained treatments, without ever obtaining feedback because, as seen, the certified e-mail address had not been checked for months. It was therefore necessary to instruct the special privacy unit of the Guardia di Finanza to acquire, through a

specific inspection, the information requested at the time.

During this assessment, the Company was unable to document all the treatments and reserved the right to integrate the information within 15 days. These additions, however, turned out to be partial as no clarifications were received regarding the checks carried out after Mrs XX's reply and no clarification was provided, as mentioned, regarding the presence of a register of processing activities. This information was not disclosed even with the defense brief of November 28, 2020 where, however, it was stated that the impossibility of ascertaining the treatments carried out should be considered as a mitigating element of any fault.

The violations of art. 31 of the Regulations and art. 157 of the Code (the latter violation has already been the subject of a dispute with the opening notes of the procedure of June 26 and July 30, 2019) and it is believed that the conditions for the application of a pecuniary administrative sanction exist in accordance with Articles 58, par. 2, lett. i) and 83 of the Regulation.

Furthermore, it must be considered that these violations derive from the failure to comply with the accountability principle, as already described in point 2.2, since the owner has not demonstrated that he has implemented adequate technical and organizational measures. For these reasons, taking into account that the owner has acknowledged the insufficiency of the tools provided and that he has appointed a lawyer to review the processing processes, pursuant to art. 58, par. 2, lett. b), it is deemed necessary to issue a warning to the owner regarding the fact that the inadequacy of the measures adopted has resulted in the violation of the obligation to cooperate with the supervisory authority.

The conduct described in this point, integrating the aforementioned violations, cannot be fully assessed by limiting observation only to the cases subject to complaint but must instead be examined in the more general context of the activities carried out by OneDirect and, above all, of the overall ability to the latter to control the treatments carried out in order to guarantee respect for the rights of the interested parties.

Furthermore, the Company has not shown that it has adequately intervened to make corrective measures, on the contrary, in the case of the treatment register, it has not expressed itself at all regarding the findings made by the Office and has not documented in any way the checks that it should have do to justify the repeated sending of promotional communications.

For these reasons, the violations of articles 6, par. 1, lett. a), 7, par. 1, 30 and 31 of the Regulations, as well as art. 130, paragraphs 1 and 2 and 157 of the Code, it is deemed necessary to adopt a specific injunction order for the application of the sanctions provided for by art. 83, para. 4 and 5, of the Regulations and by art. 166, paragraph 2 of the Code.

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

On the basis of the above, various provisions of the Regulation and the Code are violated in relation to related processing carried out by OneDirect, for which art. 83, par. 3, of the Regulation, according to which, if, in relation to the same treatment or related treatments, a data controller violates, with willful misconduct or negligence, various provisions of the Regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation with consequent application of the only sanction provided for by art. 83, par. 5 of the Regulation.

For the purposes of quantifying the administrative sanction, for the violations referred to in point 2, 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 systemic nature of the violations found which therefore makes them potentially extended to a large number of interested parties, taking into account the lack of adequate technical and organizational measures for a long period (Article 83, paragraph 2, letter a) of the Regulation);

2. the degree of responsibility of the data controller, to be qualified as grossly negligent, taking into account that the organizational measures described and the general conduct were not adequate for the diligence expected in carrying out marketing activities, also in light of the countless judgments made over the years by the Guarantor to be considered by now widely known, at least in the principles, to the data controllers (Article 83, paragraph 2, letter b) and d) of the Regulation);

3. the lack of collaboration given to the Authority, considering - also to believe that the lack of responses to the various requests made over time is due to bad organization - the incomplete feedback received on various points under investigation;

4. the absence of corrective measures proposed to avoid the repetition of similar events: the Company, in fact, has not made any declarations regarding any corrective measures concerning the treatment in general, so much so that it was necessary to impose the prohibition of further sending promotional messages to subjects whose acquisition of consent has not been demonstrated, and has not in any way documented the existence of the register of processing activities (Article 83, paragraph 2, letter c) of the Regulation);

5. the existence of similar violations, resulting from the sending of promotional e-mails in the absence of documented consent, for which the Company had already been the recipient of the prohibition of 13 May 2008, approved pursuant to the previous regulations.

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

1. the nature of the data subject to the breach (common data);

2. the low level of damage suffered by the complainants, consisting in the receipt of unwanted promotional messages and the inability to oppose them;

3. of the data of the 2019 financial statements, closed with a significant loss and with a consequent reduction in employees, also recording a significant reduction in the volume of business for the first months of 2020 as a result of the emergency related to the pandemic in progress.

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, based on the set of elements indicated above - taking into account that the maximum legal sanction, identified with reference to the provisions of art. 83, paragraph 5, is equal to 4% of the turnover (which, in the case of OneDirect, is less than 20 million euros) - the administrative sanction of the payment of a sum equal to 30,000.00 euros (thirty thousand / 00) and, due to the aggravating elements found, the ancillary sanction of the full publication of 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.

It is noted 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.

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

WHEREAS, THE GUARANTOR

declares illegal the conduct described in the terms set out in the motivation by OneDirect S.r.l., with registered office in Milan, via Tiziano 32, C.F. 05080100968 and, consequently:

a) pursuant to art. 58, par. 2, lett. f) of the Regulations, prohibits any further processing for promotional purposes of data for which it is unable to document the existence of suitable consent;

b) pursuant to art. 58, par. 2, lett. b) of the Regulations, warns the aforementioned Company regarding the need to acquire free, specific and preventive consent from the interested parties for sending promotional communications using automated methods as well as the need to guarantee the interested parties the existence and knowledge of the contact and how to exercise your rights;

c) pursuant to art. 58, par. 2, lett. b) of the Regulations, warns that the insufficiency of the measures adopted has resulted in the violation of the obligation to cooperate with the Supervisory Authority;

d) pursuant to art. 58, par. 2, lett. d) of the Regulation orders the data controller to immediately adopt the organizational measures necessary to provide prompt response to the requests of the interested parties within the terms provided for by art. 12 of the Regulation.

ORDER

to OneDirect S.r.l., in the person of the pro-tempore legal representative, with registered office in Milan, via Tiziano 32, C.F. 05080100968, to pay the sum of € 30,000.00 (thirty 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.

INJUNCES

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 € 30,000.00 (thirty 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 recipient of the provision, 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 in any case to provide adequately documented feedback. 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 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, March 25, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei

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(1) See also the provision of the Guarantor of 20 September 2012, in www.garanteprivacy.it, doc. web n. 2094932