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Injunction against BUTAL S.P.A. - July 19, 2018

Register of measures

no. 431 of 19 July 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

AT today's meeting, in the presence of Dr. Augusta Iannini, Vice President, Dr. Giovanna Bianchi Clerici and Prof. Licia Califano, members and Dr. Giuseppe Busia, general secretary;

NOTING that on 23 March 2013 this Authority received a report for an alleged illegal processing of data by BUTALI S.P.A.- C.F. 01305510511 - wholesaler of household appliances, radios and televisions, among others, with registered office in Arezzo, San Zeno, Strada n. 6 (hereafter the "Company"), in relation to the activation of a telephone Sim for the reporting party without the latter first receiving the information required by article 13 of Legislative Decree 30 June 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code") and could freely express consent for the three distinct purposes of the processing indicated on the activation request form as required by art. 23 of the Code itself;

HAVING REGARD to the note from the Department of Communications and Telematic Networks prot. no. 15454/85738 of 18 June 2013, with which the Company was asked to provide all information useful for examining the matter, returned to the sender for complete stock;

HAVING REGARD to the note from the Department of Communications and Telematic Networks prot. no. 29301/85738 of 19 November 2013 sent to the Inspections and Sanctions Department in order to notify the Company of a new request for information, pursuant to art. 157 of the Code and the relative acquisition of such information on site, through the Special Privacy Unit of the Guardia di Finanza;

GIVEN the note from the Department of Inspections and Sanctions prot. no. 4317/85738 of 12 February 2014 addressed to the Special Privacy Unit of the Guardia di Finanza;

NOTING that Section II of the Special Privacy Unit of the Guardia di Finanza, in execution of the request for information from the Guarantor no. 4312/85738 of 12 February 2014, formulated pursuant to art. 157 of the Code, carried out the checks, pursuant to art. 13 of law 689/1981, at the Company shop where the reported event took place, located in San Giovanni Valdarno, formalized in the report of operations carried out on 11 March 2014 and aimed at verifying the lawfulness of data

processing personal data carried out by the Company;

GIVEN the documents of the inspection assessment;

CONSIDERING that, on the basis of the statements made during the inspections and the documentation sent by the Company to the Special Privacy Unit of the Guardia di Finanza to resolve the reservations formulated during the inspection, it was found that:

- the Company deals with the wholesale and retail trade of electronic and electrical products, including products of the telephone operator TIM;
- the Company, for the sale of products of the aforementioned telephone operator, was appointed "Data Processing Manager" by "Telecom Italia S.p.A." (report of operations carried out on 11 March 2014, point no. 1, page 3);
- the Company employee, upon requesting activation of a telephone SIM, provided the information to customers only after having entered all the personal data of the latter in the TIM management system;
- once the data has been entered into the system, the employee printed the aforementioned form in which both the consent to the processing of personal data for the purpose of sending advertising material, direct sales, market research, etc. were already pre-filled in the "YES" box. both the one relating to profiling and pre-compiled on the NO consent to the processing of data for the purpose of communication and/or sending of advertising material and commercial information of third parties with automated contact methods;

HAVING EXAMINED the additional documentation sent by the Company, with a note dated March 24, 2014, to the Special Privacy Unit and received by the Guarantor on April 30, 2014 and concerning the Contract between Telecom and the Company, as well as the appointment of the Company as Data Processing Manager personal data and related instructions. In particular, the instruction n. 12, which establishes that the Manager "Performs any other fulfillment and/or operation requested by the Owner and/or necessary to guarantee full compliance with the provisions of the Privacy Code, with particular reference to the obligations relating to the information to be provided to customers and 'acquisition of consent'";

GIVEN the note prot. no. 15188 of 13 May 2014 with which the Department of Inspections and Sanctions sent the file relating to the matter in question to the Department of Communications and Telematic Networks;

GIVEN the note prot. no. 15637/85738 of 19 May 2014 with which the Communications and Telematic Networks Department of the Guarantor communicated to the whistleblower and to the Company the outcome of the investigation for which, in relation

to the reported matter, it found conduct that did not comply with the regulations on the protection of personal data and decided, for this reason, to reserve the right to evaluate the initiation of a sanctioning procedure against the Company in relation to the profiles of the failure to release information on the processing of personal data to customers and the acquisition of consent free and specific to the latter when completing the SIM Tim activation form;

GIVEN the note prot. no. 15639/85738 of 19 May 2014 for the transmission of documents from the Department of Communications and Telematic Networks to the Department of Inspections and Sanctions;

HAVING REGARD TO the dispute report 21722/85738 of 14 July 2014 with which the Guarantor contested the Company:

- the violation of the provisions of articles 13 and 161 of the Code, in relation to the facts mentioned above, for having processed personal data by not previously providing customers with the information as required by the aforementioned art. 13;
- the violation of the provisions of articles 23, 167, 162, paragraph 2-bis, of the Code, in relation to the aforementioned facts, for having activated a telephone sim card in the absence of the customers' free consent for three distinct purposes;

NOTING that from the report prepared by Section II of the Special Privacy Unit of the Guardia di Finanza pursuant to art. 17 of the law of 24 November 1981 n. 689, no reduced payments appear to have been made;

CONSIDERING that the Company, in consideration of the fact that by failing to comply with the instructions given by the Data Controller (in the specific case, no. 12, mentioned above, for which the Data Processor "Performs any other fulfillment and/or operation requested by the Data Controller and/or necessary for guarantee full compliance with the provisions of the Privacy Code, with particular reference to the obligations relating to the information to be provided to customers and the acquisition of consent"), has exercised a completely autonomous decision-making power, such as to assume the legal role of owner of the treatment, as outlined by the aforementioned provision of the Guarantor of 16 February 2006 (web doc. n. 1242592 in www.gpdp.it), according to which "agents and retailers have the capacity of independent data controllers of the data used for the purpose of activation of services when, based on the methods of their activity, they exercise a real and completely autonomous decision-making power on the methods and purposes of the processing action carried out in its own sphere (cf. art. 4, paragraph 1, lett. f) of the Code). In this case, they must autonomously fulfill the obligations established by the Code, with particular reference to those, (...) of information, collection of any necessary consent and the adoption of suitable security measures";

HAVING ACKNOWLEDGED, also, that the company has not submitted defense briefs and has not requested to be heard by

the Authority;

HAVING CONSIDERED having to confirm the company's responsibility for the disputed violation, since it is fully proven in the documents, also on the basis of the company's declarations, that it activated a telephone SIM for the reporting party without the latter receiving the prior information referred to in art. 13 of the Code and could freely express consent for the three distinct purposes of the processing indicated on the activation request form pursuant to art. 23 of the Code;

CONSIDERING the art. 161 of the Code which punishes the violation of the provision pursuant to art. 13 of the Code with the administrative sanction of the payment of a sum from six thousand to thirty-six thousand euros;

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes, among other things, the violation of the provisions indicated in art. 167, with reference, in this case, to art. 23 of the same Code with the administrative sanction of the payment of a sum from ten thousand to one hundred and twenty thousand euros;

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:

a) in terms of 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 alleged violations are not characterized by specific elements;

b) about the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings must be considered;

c) regarding the economic conditions of the agent, the elements of the ordinary financial statements for the year 2017 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction based on the aforementioned elements assessed as a whole, with reference to art. 161 of the code, for the violation of article 13 of the same code, to the extent of Euro 6,000.00 (six thousand) and with reference to art. 162, paragraph 2-bis of the Code, for the violation of article 23 of the same Code, to the extent of Euro 10,000.00 (ten thousand) for a total amount of Euro 16,000.00 (sixteen thousand);

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981, n. 689 and subsequent modifications and additions;

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

GIVEN the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to BUTALI S.P.A. - Fiscal Code 01305510511 - with registered office in Arezzo, San Zeno, Strada n. 6 to pay the sum of 16,000.00 (sixteen thousand) euros, as an administrative fine for the violations indicated in the justification;

ENJOYS

to the same Company to pay the sum of Euro 16,000.00 (sixteen 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, 19 July 2018

PRESIDENT

Iannini

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia