[doc. web n. 9744518]

Order injunction against Tim S.p.A. - 13 January 2022 *

Record of measures

n. 10 of 13 January 2022

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 Gui-do Scorza, components 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 Directive 95/46 / EC (hereinafter "Regulation" or "GDPR");

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 corrective and sanctioning provision of 15 January 2020 (web doc. 9256486), which concerned various data processing by Tim spa, including the management of the rights of the interested parties; as well as corrective and / or sanctioning measures (provisions 14 May 2020, n.85, web doc. 9442587; 27 May 2021 n. 216, web doc. 9689324; 8 July 2021, n. 272, doc. . web n. 9693464; 11 November 2021 n. 401, web document n. "Tim" or "Company");

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;

Rapporteur Prof. Ginevra Cerrina Feroni;

WHEREAS

1. The complaint.

The Authority received a complaint against Tim Spa (hereinafter also: "Tim" or "Company"), dated 28 April 2021, by Mr. XX, in which the complainant, owner of TIM user , represented the following:

- in the period 2018-2019 he worked as a hauler for numerous companies on the national territory;

- on 21.11.2020 received notification of a preliminary hearing notice in relation to a pending criminal proceeding for the XX crimes that would have been committed in Arezzo to the detriment of some coal distributors in the period indicated below;

- the sources of evidence, as evidenced by the request for indictment, were substantiated only in the deed of complaint not corroborated by any evidence, considering that the surveillance cameras of the distributors no longer retained the videos;

- the Judicial Authority, in the course of the investigations, did not request the telephone records relating to the user in use by the same suspect in the period from 28.12.2018 to 31.01.2019 (date of alleged perpetration of the crimes);

- on 30.11. 2020, he gave a mandate to a trusted lawyer, also for the purpose of carrying out defensive investigations in relation to the alleged crimes (doc. 3);

- with PEC of 15.12.2020 the defender of the complainant forwarded to Tim, pursuant to the combined provisions of Articles 132, paragraph 3, of the Code, 327-bis c.p.p. and 391-quater of the Criminal Code, "request for a copy of the incoming and outgoing unencrypted telephone traffic records for the period from 28.12.2018 to 31.01.2019 relating to the user ... referable to itself and in exclusive use based on one's own needs defensive "; in particular, since the crimes of theft of fuel and undue use of credit cards committed in the Arezzo area have been disputed, the request for telephone records of incoming and outgoing calls appeared necessary: 1) in order to ascertain the veracity of what was declared in the complaint by the owner of the company regarding the telephone calls made to the applicant's address on the dates close to the commission of the crimes; 2) "in order to delimit the presence of the accused [...] at the place and / or in the vicinity "of the place where the crimes were committed," through the analysis of the cells hooked up by the telephone in use [to the same] in the reference period ", so as to acquire useful information for to the location of the complainant in the period of time in question.

The complainant further argued that:

- the request in question had to be considered legitimate as it was forwarded exclusively in the context of a criminal proceeding, by reason of the right of defense, by a legitimate person, who is the trusted defender of the accused / suspect, as well as timely as sent by certified email on 15.12.2020 and, therefore, within 24 months from the generation of the data (being the period from 28.12.2018 to 31.12.2018 as well as from 01.01.2019 to 31.01.2019), in accordance with the 'art. 132 of the Code;

- with pec communication of 18.12.2020, Tim declared that "the documentation of the outgoing traffic [would be] provided shortly"; on the other hand, with regard to incoming free-to-air calls, the Company required the completion of a specific

pre-printed form;

- with subsequent PEC of 7.01.2021, the defender, with reference to the telephone traffic data of incoming free-to-air calls, complied with the requirements of the company, filling in the appropriate form and further specifying the reasons underlying the need and urgency of obtain the printouts of telephone traffic both inbound and outbound referable to the user in question;
- pending the sending of the request relating to incoming calls, the Company did not respond to the requests relating to the printouts of outgoing calls, as instead ensured in the initial PEC of response of 18.12.2020;
- despite the subsequent reminders of 27.01.2021; 05.02.2021; 10.02.2021 all sent by certified e-mail, Tim did not transmit the requested data nor did he provide any feedback;
- only with PEC dated 17.02.2021 "and therefore with a good 2 months after the first request", the Company declared that it could not provide what was requested for both outgoing and incoming calls since "the telephone traffic data requested are currently kept for the purpose of ascertaining and repressing crimes and with reference only to the types of crimes provided for in articles 51, paragraph 3 - quater and 407, paragraph 2, letter 9 of the criminal procedure code ", adding that, however, for the outgoing traffic data it was not possible to process the request as: "the failure to forward the outgoing traffic, caused by a mere misunderstanding, is no longer available to date except for the cases indicated above";
- with subsequent PEC of 20.02.2021, through his trusted lawyer, he sent a formal notice to comply, within 7 days of receipt, to the Company without however receiving any feedback;
- with PEC of 21.04.2021 Tim reiterated the denial claiming that the request for incoming calls "had not been timely", having passed 24 months from his generation and therefore there was no possibility of accessing the system; furthermore, the damage that the applicant could suffer as a result of the failure to send was not "correctly demonstrated"; as regards the data of the outgoing telephone traffic, even such sending was no longer possible due to "a mere misunderstanding";
- in his opinion, the infringement of the right of defense was evident, considering that he had made a legitimate and timely request to TIM in the times and in the manner referred to in art. 132 of the Code.

In light of the above, the complainant, through his lawyer, asked the Authority to order Tim to release the incoming and outgoing mobile telephone traffic data generated by its users in the period from 28.12.2018 to 31.01.2019 in due time and in any case no later than the date of 15.12.2021 (date of the criminal hearing).

2. Investigation conducted and its outcomes.

On the basis of the response provided by the Company to the request for information from the Office of May 4, as well as from the subsequent exchange of notes and replies between the said Company and the complainant (to which full reference is made), it emerged that Tim, in substantially, has not denied the factual picture represented above by the complainant, also with regard to the failure to fulfill the requests for printouts. According to Tim, however: "From the internal checks, a series of circumstances emerged that [...] prevent us from being able to qualify the non-fulfillment of the requests of the interested party as a" refusal to access ": the impossibility of following up on them, in fact [...] was the result not of the desire to deny the display of the requested data, but the result, on the one hand, of unpredictable operational accidents (whose exceptional random combination determined, in this limited case, the lack of production to the applicant of the traffic data referred to him); on the other hand, TIM's inevitable compliance with its obligations and incumbent on it by virtue of the current provisions on the retention of traffic data ".

According to Tim, moreover, "starting from 31.01.21, any further event that has occurred degrades in importance ([...] the subsequent exchanges of certified e-mails which are accounted for in the complaint): starting from that date, in fact, the traffic data inbound and outbound requested by Mr. XX, having elapsed 24 months from their generation, were kept in the SAG systems dedicated exclusively to conservation for the specific criminal purposes referred to in art. 132, paragraph 5-bis of the Privacy Code .... In the light of everything just highlighted, the already represented existence of the stringent procedures aimed at the correct management of the requests made by the defenders in the context of defensive investigations (procedures already submitted to the scrutiny of the Authority in the 'scope of other proceedings), and equally firm the need for in-depth analysis and further internal reflection immediately initiated by TIM in order to further implement every suitable solution to promptly identify any accidental event in the internal process of matching the request for traffic data correctly and legitimately formulated, it is important to underline that the case we are dealing with really represents a borderline case […] ”(see reply Tim, cit.).

Moreover, Tim, with the same note, stated that he was "obviously willing to implement all collaborative solutions, in order to extract the data still stored for the specific criminal purposes connected to offenses unrelated to the matter: for to do this however, given the known regulatory constraints, there does not seem to be any other way than that of a specific prescription by the Authority ”(see Tim, cit.).

Subsequently, the Company pointed out that: "in compliance with the commitments already undertaken in the context of

previous proceedings, further improvements are being completed on the management of requests to exercise the rights of interested parties, with particular regard to data traffic".

The Authority with the note of 8 November last, pursuant to art. 166, paragraph 5, of the Code, has challenged the Company for the possible violation of Articles 12 and 15 of the Regulations as well as art. 132 of the Code (in the version - in force at the time of the facts - to which reference must be made, as will be better explained below, also today), starting the procedure for the possible adoption of measures in this regard and for this purpose recalling the right to produce a defense brief and to request a hearing, within 30 days from the date of receipt of the aforementioned complaint (see Article 166, paragraph 6, of the Code and, in a related way, Article 13 of the Internal Regulation of the Guarantor no. 1/2019).

At the end of the term (December 7, 2021), Tim sent a defense statement stating that this investigation is part of a "moment in which the correct exegesis of the reference standards [...] and related problems ([...] and the possibility of accessing the SAG beyond 24 months of storage for "ordinary" criminal purposes), must be considered far from being consolidated. And in fact, as is known: - all the provisions issued by the Authority in this matter, since provision no. 85/20 (in which the thesis of full identity between the request pursuant to art. 15 GDPR [...] and the request of the defender pursuant to art. 391-quater c.p.p was upheld for the first time in the history of the Guarantor). Judice; [...] the only judicial precedent published to date, far from corroborating the position expressed by the Authority, confirms the full hold of [] TIM's theses [...]; […] Provision no. 272/21 was challenged and the hearing for the discussion of the related suspension is set [...] on 16.12.21 ". The Company also referred to "(al) the report of the Guarantor to the Parliament of 02.08.2021, in which the Authority itself recognizes openly the current uncertainty of the then current framework", as well as "(al) the note amendment to art. 132 of the Privacy Code introduced by d.l. 132/2021 […] which […] completely distorts the matter, completely overcoming the question of the relationship between art. 15 GDPR and art. 391-quater of the Criminal Code, since the choice of the Legislator is now absolutely clear (in line with the rulings of the Court of Justice) for the impracticability of a direct request to the Supplier by the defender of the interested party / suspect, being able to address his or her request only and exclusively to the Judge for preliminary investigations. "

According to Tim, "This is a regulatory change that in addition to having a linear impact on the matter for the future, makes the very significant (also in terms of economic investments) procedures implemented by TIM to implement the various provisions of the Guarantor currently subject to completely superfluous of dispute: without prejudice to all the in-depth analyzes that will

be necessary following the examination of the provisions of the conversion law in their final version (especially with regard to the transitional regulation), in fact, what is now certain is that TIM, like the others suppliers, if he had to receive requests such as the one presented by the lawyer of Mr. XX, he will only have to send them back to the sender, inviting the defender to follow 'the discipline of the criminal procedure code' [...] by addressing his requests to the competent investigating judge ".

In the same memo, Tim argued that: "[...] he has always and on all occasions (including through unanswered hearing requests) underlined his will to always and in any case take a proactive attitude, which, however, took into account the regulatory constraints as well as interpreted for decades by the Authority itself), and reiterated the need for a specific order from the Authority that requires the Company to retrieve the data from the SAG database, also highlighting that: “only in provision no. 272/21, and for the first time…. access to the SAG was openly authorized, and TIM immediately, by reason of this, exposed the data dating back more than 24 months by extracting them from the SAG. "

The Company also objected "[...] with regard to the corrective measures, as already highlighted, due to the changes introduced by the Legislative Decree. 132/21, it does not seem that they have the necessary regulatory substrate to be adopted anymore; - with reference to any pecuniary sanctions, […] it is again highlighted that the failure to respond was due to mere human error. Furthermore, the violation, even if deemed to exist, still concerns only one interested party; [...] all the measures implemented by TIM in compliance with the various provisions of the Guarantor, are currently superseded by the new regulatory provisions [...] as already proposed in other proceedings as a mitigating factor, the fact that in 2020 (when the interested parties and their defenders could address their requests directly to the Supplier) TIM had received approximately 1,100,000 requests to exercise the rights of the interested parties, an exponential increase compared to 2018 (approximately 500,000) and 2019 (approximately 800.00). Compared to this enormous amount of requests, the cases that presented critical profiles, even considering what we are dealing with, continue to represent a statistically negligible percentage ".

In light of the above, the Company, with the same aforementioned brief, also asked to be audited. On the same date, the Office sent a notice of call for 13 December; Tim, on 10 December, requested that the hearing be postponed to 20 or 21 December. On the same date, the Office accepted the Company's request, communicating the postponement of the hearing to 20 December.

During the hearing, Tim, through his lawyers - in addition to reiterating several arguments expressed in the aforementioned defense brief - pointed out that the measures implemented (including the freezing of the records in the event of a dispute with

the applicant) to implement the aforementioned provision of 8 July, are currently superseded by the new regulatory provisions, but which have in any case had a significant impact on a technical and economic organizational level, weighing only on Tim, unlike other Telcos, of relevant obligations.

In Tim's opinion, "this radical revision of art. 132, also given the absence of a transitional discipline regarding the management of requests for printouts received before the entry into force of the legislative decree 132/2021, assumes relevance also in relation to the exclusion of the possibility of applying now measures for the implementation of provisions no longer in force, with reference to the case in question. In this regard, he also points out that Tim sent a final reply to Mr. XX, which had also highlighted the need to obtain the traffic reports in good time before the hearing on 15.12 last, while the communication of the initiation of the procedure was sent by this Authority only last November, after more than 4 months (and when the reference standards had already been modified). "

Moreover, according to the Company's lawyers, "the initiatives recently taken by the Authority do not appear to be consistent with the possibility, invoked on several occasions by TIM, of finding shared operational solutions for the management of the 4/5 cases that emerged (out of a of approximately 700/800 cases per year of requests pursuant to Article 391 quater of the Criminal Code regularly managed by the company). " The Company also contested the unambiguous interpretation of the legislation in question, although affirmed by the Authority in its provisions, also in light of the various solutions adopted with the same in the face of Tim's conduct with respect to requests for printouts for the purpose of defensive investigation in criminal context ("prescription adopted with the final provision; immediate prescription for the display of data ascribed to reasons of urgency connected to the existence of a criminal hearing already set; and in case XX, no prescription ....). This gap could not be considered representative of any univocal orientation, and even less of an address that the other operators (as stated in provision no. 272/21) would have already understood, claiming TIM to be the only TELCO not to have learned the teachings ".

In then highlighting "that the news of art. 132 had a significant impact for TELCOs, in relation to the elimination of the interpretative uncertainties related to the delicate matter of managing requests for traffic records kept for criminal justice purposes, with particular reference also to the need to assess, for incoming traffic , the existence of an effective and concrete risk of prejudice for the carrying out of the defensive investigations ", he therefore asked" that no sanctions be adopted ".

3. Evaluation of the overall conduct of the Company.

Preliminarily, it should be noted that the regulatory and jurisprudential panorama on the subject has been modified to date,

especially due to the development of Community legislation (primarily Directive 2002/58 / EC) by the Court of Justice of the EU (among the more recent, the sentence of 2 March 2021 - case C-746/18 - made in the "H.K" case), which constantly highlighted the illegitimacy of a general and indiscriminate storage of traffic and location data for the purposes of fight against crime in general, for which the conservation and access to such data can only be justified by objectives of fighting organized crime or preventing serious threats to public security, provided that these operations - with regard to the quantity of data involved and the relative time periods - are rigorously based on the principle of "proportionality" pursuant to art. 52 of the Charter of Fundamental Rights of the European Union, to which the principles of purpose and minimization of processing are strictly connected (see Article 5 of the Regulation).

It is then necessary to take into account the legislative innovation on a national basis, as also requested by the Supreme Court of Cassation (most recently, with sentence no. , and in particular of the entry into force, from last September 30th, of the d.l. n. 132/2021 ("Urgent measures in matters of justice and defense, as well as' extensions on the subject of referendum, temporary allowance and IRAP"), which amply modified Article 132, paragraph 3, of the Code, eliminating the possibility of the defender of the accused to ask the supplier for access to the printouts directly.

The same decree - the outcome of which, including any transitional regulations, the Authority decided to wait for the correct definition of this case - was converted with amendments by the law. 23 November 2021, n. 178 (in Official Gazette 29.11.2021, no. 284), which took effect on 30 November last. The new text, in confirming the provisions of the aforementioned d.l. (thus providing access to the records only for serious or specific crimes and always requiring the authorization or validation of the judge), it has maintained the elision of the right of access with respect to telephone companies. Furthermore, the same text, in dictating a transitory discipline, has limited itself to providing that the traffic data acquired before the entry into force of the decree-law can be used against the accused only together with other evidence and for the ascertainment of serious or specific crimes, without however providing any indication on how to regulate the requests for printouts prior to the news and remained unfulfilled by the telephone companies.

Considering this, with regard to the present case, which took place before the aforementioned legislative changes, this Authority believes that it must apply the legislative discipline in force at the time of the facts, based on the tempus regit actum principle as well as the principle of favor rei that characterizes our legal system. , first of all at the constitutional level, with specific regard to the right to defense and to a full hearing of the accused person (see articles 24 and 27 of the Constitution).

In particular, as already clarified with the recent measures adopted against the same Company (provisions 14 May 2020, n.85, web doc. 9442587; 27 May 2021 n. 216, web doc. 9689324; 8 July 2021, n.272, web doc. 9693464; 11 November 2021 n. 401, web doc. , the Office has always ensured the full cross-examination, granting all the requested hearings, also taking into account supplementary briefs sent after the time of the hearing, as well as following up, promptly and punctually, requests for access to the documents pursuant to l. n. 241/1990 presented by Tim - on the basis of the legal framework for the conservation of telephone traffic data (in the formulation in force at the time, before the entry into force of the aforementioned Legislative Decree no. 132/2021), the telephone records are "Kept by the supplier for twenty-four months from the date of the communication, for the purpose of ascertaining and prosecuting crimes" (see Article 132, paragraph 1, of the Code) and, within the same term, "[...] the defendant or of the person under investigation (could) request, directly from the supplier, the data relating to the users in the name of the client in the manner indicated in article 391-quater of the criminal procedure code "(132, paragraph 3, cit.). This provision appears to have been violated by Tim.

Furthermore, the provisions of art. 12, para. 2 and 3, of the Regulation, according to which "The data controller facilitates the exercise of the rights of the interested party pursuant to articles 15 to 22" and must provide "feedback to the request to exercise the rights referred to to articles 15-22 without undue delay and, in any case, at the latest within one month of receipt of the request ". In fact, there is no doubt that the technical problem represented by the owner in its management procedure of such requests is not compensated, in the concrete factual dynamics, by the necessary attention to repeated and clear requests of the lawyer of the complainant aimed at the actual satisfaction of the same. It is also indubitable how, however, this problem cannot negatively reflect on the complainant's fundamental right of access to the printouts of the complainant nor be exempt from a critical assessment by the Authority, even if limited to a few cases compared to the considerable mass of requests received by Tim. , which, moreover, limits itself to asserting, without however proving, this statistical circumstance (see provision 11 November 2021, cit.).

The elements acquired as a whole - also on the basis of the declarations made by the parties, pursuant to art. 168 of the Code - confirm the legitimacy of the complainant's requests, by reason of the indictment in the context of criminal proceedings and the related need to carry out defensive investigations (as clearly represented also to the Company), and also the timeliness of the same with respect to the criterion ex law of 24 months (in particular those of 15.12.2020 and 7.1.2021).

There is no actual response from Tim to these requests, as far as records are concerned. In fact, with particular regard to the

outgoing printouts, the Company, despite having ensured their delivery with a note dated 18.12.20, did not do so, and then, in the face of the various reminders received over time, communicated - only with PEC of 17.02.2021 - which was no longer possible to do so due to the expiry of the terms referred to in art. 132 of the Code. Even later, with the pec of 21.4.21, the same Company specified that the delivery in question had not occurred "due to a mistake".

With particular regard to incoming telephone calls, in recalling the provision of the Guarantor of 3 November 2005, "Access to telephone data: guarantees for incoming calls" (web doc. No. 1189488), this Office must reiterate that "the indications, principles , measures and guarantees indicated therein can be considered valid even after the full operation of the Regulation, which, as is known, has reserved the discipline of electronic communications to a distinct next regulatory source, still referable therefore to Directive 2002/58 / EC, as implemented by title X of the Code and therefore from the aforementioned art. 132, not abrogated by the said Regulation "(see, in these same terms, the provision of 14 May 2020, cit.).

On the basis of what is indicated in the aforementioned general provision, "By way of exception [...] requests for the exercise of rights can be presented, and successfully processed, when they prove that the response to them by the supplier is necessary to avoid an actual prejudice and concrete for carrying out defensive investigations ", despite having as object the incoming telephone traffic.

Well, in the case in point, a clear close connection emerges between the requests for incoming printouts and the defensive needs of the complainant, above all for the purpose of identifying and verifying the geographical positions assumed by the accused at the time of the disputed facts, by reason of the cells hooked up by the telephone user when it generates traffic.

Although filed, Tim appears to have also neglected the management of the request for incoming printouts, as he first objected (despite the original timely and motivated request of the lawyer of the complainant) the failure to fill in the form in charge; subsequently, the Company, despite having received the said form duly completed, did not proceed with the delivery nor did it provide any feedback. Only with pec of 17.02.2021, Tim declared that he could not provide such tabs because, on that date, they were kept only for the specific crimes provided for by art. 132 of the Code, adding even later (pec 21.4.21) a further new motivation, or rather that the damage that the applicant could have suffered due to failure to send would not have been "correctly demonstrated".

As mentioned above, the case underlying this complaint is characterized by profiles of close analogy with the case subject to the provision of May 14, 2020, which was challenged before the judicial authority by Tim, also on the basis of the alleged need

to receive an order. - promptly by the Authority to extract the printouts from the database reserved for the judicial authorities for the purposes of counter-terrorism, not having any other possible copy, in order to satisfy the complainant's request. Well, it should be remembered that the Court of Milan, with sentence no. 2939 of 9 April 2021, rejected the appeal proposed by Tim, in particular confirming the legitimacy of the legal approach provided by the Authority with regard to the need to protect the requests of those interested in the printouts, regardless of the specific formal title used to support the same.

Moreover, as is known, the provision referred to in art. 150, paragraph 5, of the Code which provided for the possibility, in case of "difficulties or disputes regarding the execution of the measure", to contact the Guarantor to have "the methods of implementation", was not confirmed by the new regulatory framework , probably in accordance with the different approach based on the accountability of the owner. Nonetheless, when defining this complaint, the Authority must first take into account that, in the case in question (as in the others mentioned above), Tim - who did not give effective feedback to the requests for exercising the right of access to the taboos promptly formulated by the lawyer of the complainant for defensive investigations in the context of a criminal proceeding - he stated that he did not keep the records, having elapsed 24 months (provided for by paragraph 1, of art. .), if not exclusively for the needs of ascertaining and preventing the particular crimes referred to in law no. 167/2017, according to the longer duration (72 months) provided therein.

It is therefore indisputable - contrary to what emerges from Tim's defense as a whole - the violation of the obligation to deliver such data in the face of a legitimate and timely request. In this sense, the availability shown by Tim cannot be relevant, only on terms that are now out of date.

As already clearly stated in the aforementioned provision. July 8, 2021, the correctness and timeliness of the request submitted by the complainant, indeed, is a legal fact constituting the obligation of the Company to release the data. Indeed, as an exemption from this obligation, it cannot detect the course - in the delay - of the time period of 24 months pursuant to the law envisaged for data retention, since it is in fact: - attributable solely to the culpable inaction of the Company and, therefore, - of, to his illicit conduct that can not reverberate to the detriment of the complainant: - not attributable in any way to the complainant himself, who acted on the other hand in a diligent and timely manner in order to acquire the data. Therefore, the circumstance - also attached by the Company - for which the data in question would not have been "stored" or "frozen" in the "ordinary" database pursuant to art. 132 of the Regulations, being currently held only within the functional data bases exclusively to ensure the investigation and prosecution of the particular and serious crimes referred to in art. 24 of Law

167/2017:

a) cannot assume any excuse value with respect to the non-fulfillment of the obligation to release data, on the other hand the substantially omissive behavior of the Company which, although the recipient of a timely request, has uselessly allowed the period of 24 months contemplated therein, never failing - as well as a prudential logic and attention towards the interested party would have required - to "freeze" or "continue to keep in the appropriate system" the data in question from the moment of the request;

b) cannot frustrate the legitimate aspirations of the complainant to obtain, in "specific form", the coveted good of life, with the acquisition of data functional to the full and conscious explanation of their own defensive guarantees in the criminal proceedings of which it is a part. And this - as established in the aforementioned provision. July 8, 2021 - in compliance with the general principles for which:

- the fulfillment of the obligation in question, in function of the protection of the indefectible defensive prerogatives of the suspect as well as the public interest in due process (articles 24 and 111 of the Constitution; articles 6 and 13 of the ECHR; art. 47 Charter of Nice), cannot in any way be left to the “free choice” of the subject (supplier) who is unfailingly called upon to fulfill that obligation, in an effective, diligent and timely manner;

- the "time" taken for the definition of the affair - first against the supplier, and then in the "judicial" proceedings carried out before this Authority - cannot be detrimental to the subject "who is right".

Moreover, it should be considered that Tim, also on the basis of the recent aforementioned provisions on the matter (aimed at balancing the right to data protection with the right to defense of the accused through the order to satisfy the request for access of the complainant: v. provision 14 May 2020, cit .; also, where necessary, by retrieving the printouts from the SAG and their transmission to the applicant's defender: see provision 8 July 2021, cit.), could / should have taken action from the moment - May 4 u.s. - of the request for information regarding the complaint in question, as formulated by the Authority's Office (or at the latest from the moment - 8 November 2019 - of receipt of the complaint), without having to wait for the new further possible provision of the Board (or, alternatively, the filing of the investigation started) above all taking into account the persistent interest of the accused in receiving the printouts (despite the expiry of the term of 24 months provided for by law), due to the ongoing criminal proceedings (of which a hearing was in fact held on December 15 u.s.). From what has been specified, it emerges - unlike what Tim complained - a constant and consistent orientation by the Authority in this regard, albeit

declined in different times (in the present case, awaiting the outcomes of the defense brief and of the hearing), in reason for the specific nature of the grievances and the reference context (such as any 'recidivities'; particular socio-economic situation of the Company; pandemic emergency) and also taking into account not only the legislation in progress but also the appeal by by Tim of the Prov. May 27, 2021, cit., For an alleged infringement of the cross-examination, as well as of the other aforementioned similar measures.

All this considered, since it cannot be admitted that the fundamental right of defense in criminal matters can remain substantially compromised - due to a culpable act attributable solely to the omission and defaulting behavior of the supplier (see provision of 8 July u.s., cit.) - it is considered, to pursuant to art. 57 par. 1, lett. f), of the Regulations, of having to adopt a measure against Tim that first of all declares the conduct of the Company unlawful as it violates the complainant's right of access to the printouts. Furthermore, pursuant to art. 58, par. 2, lett. c), of the Regulations, Tim must be ordered to satisfy the complainant's request, providing him without further delay the data in question, as promptly requested, on a date falling within the period of 24 months provided for by law for conservation pursuant to art . 132 of the Regulation, "also through the verification of suitable technical solutions for the recovery of the printouts in question" (see, in these terms, already the provision of 8 July 2021, cit.).

In this case, it is deemed necessary to postpone the adoption of specific organizational and technical measures, taking into account that this requirement was already contained in the aforementioned provision of 14 May 2020 and that in the meantime (between the end of November 2020 and beginning of last February) Tim communicated to the Authority that it has prepared wider and more detailed measures to manage the requests for exercising the rights referred to in Articles 15-22 of the Regulation, in implementation of the aforementioned provision of 15 January 2020.

On the other hand, it is believed not to be able to postpone - unlike the aforementioned provision adopted on May 14, 2020 - the application of a pecuniary administrative sanction, considering that today's case (together with further similar complaints received by the Authority) "requires reading the behavior adopted by TIM not as an incorrect outcome of the management of a single instance "(see provision in these terms, July 8, cit.), but rather as a company practice lacking in adequate compliance with the regulatory obligation, with reference to events in which fundamental rights of the person linked to the right of defense in criminal law are at stake. In this sense, the behavior is aggravated by not even having provided for a specific precautionary method for the conservation of the records in question for the time linked to the dispute in progress.

4. Ordinance-injunction for the application of the pecuniary administrative sanction.

Violation of the aforementioned rules therefore requires the adoption of an injunction order, pursuant to Articles 166, paragraph 7, of the Code and 18 of law no. 689/1981, for the application to TIM of the administrative pecuniary sanctions provided for by art. 83, par. 5, of the Regulations (payment of a sum of up to € 20,000,000 or, for companies, up to 4% of the annual worldwide turnover of the previous year, if higher).

For the determination of the amount of the penalty, it is necessary to take into account the elements indicated in art. 83, par. 2, of the Regulation, which, in this case, can be considered in the following terms.

In particular, in an aggravating function:

1. the seriousness of the violation (Article 83, paragraph 2, letter a), with reference to the particular nature of the treatments connected to the exercise of rights in court and to the circumstance that the Company's conduct hindered the easy exercise of one's right of defense within the terms granted by law, since - even if eventually ensured by the intervention of the judge - an aggravation of the procedural procedures may be noted, which is also an element capable of affecting the subjective sphere of 'interested party;

2. the subjective dimension of the conduct, which must be considered grossly negligent, having neglected the response to clear and justified requests, in fact and in law, as well as repeated, with particular regard to those presented by the defender (Article 83, par. 2, letter b);

3. the injunctive, corrective and sanctioning measures adopted by the Authority against the Company, also with regard to the incorrect management of the rights of the interested parties, including the provision 15 January 2020, n. 7, doc. web n. 9256486; the order injunction 18 January 2018, n. 16, web doc n. 7665804, connected to the prov. 22 June 2016 n. 275, doc. web n.5255159; the order injunction n. 433 of 3 October 2013, doc. web n. 2726332 (Article 83, paragraph 2, letter e));

4. the aforementioned corrective measure (provision 14 May 2020, cit.), With which it was ascertained the incorrect management of the requests relating to the printouts in the context of defensive investigations, without imposing sanctions, having considered the violation to be placed. lation found in the context of the treatments covered by the aforementioned provision. January 15, 2020, as well as two previously mentioned specific sanctions: prov. July 8, 2021 and prov. 11 November 2021 (Article 83, paragraph 2, letter k);

5. the particular economic importance of the Company (Article 83, paragraph 2, letter k), taking into account the 2020 financial

statements, with specific reference to overall revenues and net profit.

Noted, as extenuating circumstances:

1. the alleged significant number of requests to exercise the rights of the interested parties, and in particular of requests for printouts, received by the Company during the reference period (Article 83, paragraph 2, letter a);

2. the notified adoption of measures, with specific regard to the requests concerning telephone records for defensive investigations, which should reasonably prevent or otherwise limit similar problems (Article 83, paragraph 2, letter c);

3. the serious socio-economic crisis linked to the pandemic in progress, together with the investments allegedly supported by Tim to implement some of the aforementioned specific corrective measures of the Guarantor (Article 83, paragraph 2, letter k).

Based on the set of elements indicated above, in application of the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1, of the Regulation, taking into account the necessary balance between the rights of the interested parties and freedom of enterprise, also in order to limit the economic impact of the sanction on the organizational, functional and employment needs of the Company, it is believed that the administrative sanction should be applied to Tim spa of Euro 200,000.00 (two hundred thousand / 00).

In the case in question, it is believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Guarantor Regulation n. 1/2019, taking into account the macroscopic nature of the violations detected with regard to legal principles now consolidated in the provisional activity of the Guarantor and in the jurisprudence (see to this effect also provision 11 November 2021, cit.).

Finally, 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, in the event of non-compliance with the same provision, the sanction referred to in art. 83, par. 5, lett. e), of the Regulation.

WHEREAS, THE GUARANTOR

a) pursuant to art. 57 par. 1, lett. f), of the Regulation, declares the conduct of Tim S.p.A. unlawful. - with registered office in Via Gaetano Negri, 1, Milan; p. VAT 00488410010 - and therefore declares the complaint founded in the terms set out in the motivation;

b) pursuant to art. 58, par. 2, lett. c), of the Regulations, orders Tim Spa to provide the complainant with the requested data,

also through the verification of suitable technical solutions for the recovery of the printouts in question, without further delay, and in any case within the term of 7 days. from the date of receipt of this provision, being data promptly requested by the complainant, before the expiry of the term of 24 months contemplated by art. 132 of the Regulation, culpably left to run by TIM;

c) asks Tim S.p.A. to provide adequately documented feedback pursuant to art. 157 of the Code within 15 days from the date of receipt of this provision. It is recalled that failure to respond to the above requests integrates the details of the administrative offense referred to in art. 166, paragraph 2, of the Code;

ORDER

to Tim S.p.A., in the person of the pro-tempore legal representative, to pay the sum of € 200,000.00 (two hundred thousand / 00) as a pecuniary administrative sanction for the violation indicated in the motivation, representing that the offender, pursuant to art . 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within thirty days, 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 € 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

as an ancillary sanction, pursuant to art. 166, paragraph 7, of the Code and art. 16 of the Guarantor Regulation n. 1/2019, the publication on the website of the Guarantor of this provision, and, 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.

Pursuant to art. 78 of the Regulation, as well as art. 152 of the Code and 10 of the d. lgs. 1 September 2011, n. 150, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed, alternatively, at the court of the place where the data controller resides or is based or at that of the place of residence of the interested party within the deadline of thirty days from the date of communication of the provision itself or sixty days if the applicant resides abroad.

Rome, January 13, 2022

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei

* The provision was challenged