[doc. web no. 9817535]
Injunction order against Colosseo S.r.l. - October 6, 2022
Register of measures
no. 297 of 5 August 2022
THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA
IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components, and the cons. Fabio Mattei, general secretary;
HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE (General Data Protection Regulation, hereinafter "Regulation");
HAVING REGARD TO 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 the national legal system to the aforementioned Regulation (hereinafter the "Code");
HAVING REGARD to the documentation in the deeds;
HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000;
SPEAKER Dr. Agostino Ghiglia;
WHEREAS
1. THE INVESTIGATION ACTIVITY CARRIED OUT
1.1. Preliminary investigation
With the complaint of 10 August 2021, presented to this Authority pursuant to art. 77 of the Regulations, Mr. XX complained of the receipt, on 24 June 2021, of an unsolicited communication from the email address Colosseum of Turin attributable to the company Colosseo S.r.l. (hereinafter «Company»; «Teatro Colosseo»). The complainant declared that he had never given consent to receive the aforementioned promotional communication and complained of the failure to respond to the request to exercise the rights, pursuant to articles 15, 17 and 21 of the Regulation, sent by e-mail on 28 June 2021 to the address indicated in the Company's privacy policy, which can be found on the related website.
In response to the request for information, formulated by the Office on 1 September 2021 pursuant to art. 157 of the Code, the Company, with communication dated 23 September 2021, declared its non-involvement in relation to the conduct complained of in the complaint, specifying that "the newsletter referred to by Mr. XX" would not have started "from [their] addresses email, recognizable with the domain @teatrocolosseo.it." and that "Mr. XX is not in [their] databases."
1.2. The dispute
In the light of what emerged from the preliminary investigation, on the basis of the overall documentation acquired, on 12 November 2021 the Colosseum Theater was notified of the initiation of the proceeding pursuant to art. 166, paragraph 5, of the Code, with which the Office charged the Company with the following violations:
- articles 5, par. 2, and 24 of the Regulation for the lack of adequate technical and organizational measures, with particular regard to the inability to effectively control the supply chain of partners who carry out promotional activities in the interest of Teatro Colosseo;
- articles 12, par. 3, 15, 17 and 21 of the Regulation for failing to respond to the complainant's request regarding the processing of his personal data sent by e-mail on 28 June 2021;
- art. 6, par. 1, lit. a) of the Regulation and art. 130 of the Code for having sent the unwanted communication in the absence of the necessary prior informed consent of the interested party in relation to the promotional activity and in the absence of another suitable legal basis.

1.3. The defense of Colosseo S.r.l.

With the defense briefs, sent on December 12, 2021, the Company asked this Authority to dismiss the proceeding initiated against it "or in any case [...] the exclusion of its position" from what was contested with the communication of November 12, 2021 This is because, in specifying that he never had the material availability of the complainant's personal data, he declared that the unsolicited e-mail, which gave rise to Mr. XX's complaint, would have been sent by the company XX (hereinafter " XX") which the same made use of, in the reference period, to carry out the promotion of an exhibition organized at the Colosseum Theatre. This task would have been conferred orally on the XX against a fee. Trusting in the guarantees offered by the XX in the sector of the promotion of shows and cultural events also on behalf of third parties (as per the chamber of commerce registration), and having previously obtained reassurances "about the professional and habitual performance of this activity [...] in full adherence to the dictates of the GDPR", the Company considered that there was no need to exercise a power of control and to issue instructions regarding the processing of personal data that went beyond the verbal interlocutions functional to the agreement. Teatro Colosseo has, in fact, "legitimately and in good faith" considered that the commissioning company, "in promoting the exhibition [...] would have done so towards subjects who had previously given their consent [...] for the sending of communications promotional". XX allegedly "acted in total autonomy both as regards the method of promotion and as regards the recipients of the same promotional activities", drawing on its own list of contacts to which Teatro Colosseo has never had access. The Company, therefore, reiterated that it has not concretely "determined (or co-determined) any purpose of the processing of data, which have always remained the exclusive property of XX and in any case not known to the Colosseum Theater". It follows that, in the opinion of the Company, "XX [would have] acted in the present case as an independent data controller and not also as data processing manager of Teatro Colosseo. Nor [...] can a situation of co-ownership be found".

Furthermore, the complainant, being an IT forensic consultant, would have been perfectly capable, "given his specific skills, of realizing that the e-mail received from the address from Teatro Colosseo [...] which uses a specific domain owned by it"; this because from the same address Mr. XX would also have received a communication relating to the promotion of a cultural event organized by a different body, the Teatro Sistina.

Finally, the Company represented the possible application of some extenuating circumstances in the event of imposition of the pecuniary administrative sanction, emphasizing, in particular, the uniqueness of the complaint, not having received "other negative feedback" and having been involved for the first time " in forty years of activity [in] this type of problem".

During the hearing, held on 13 January 2022, the Company, in recalling the contents of the brief presented on 12 December 2021, produced further documentation which shows that the XX would have used, for the promotional activity in question, of a further subject, named XX attributable to this XX, who would have confirmed that he had canceled Mr. XX's data.

2. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also on the basis of the Company's statements, for which the declarant is liable pursuant to art. 168 of the Code, the following legal assessments are formulated.

In the absence of contractual documentation, it is first necessary to recall the definition of "owner" pursuant to art. 4 of the Regulation, or the natural or legal person who, individually or together with others, determines the purposes and means of the processing.

In the present case, Teatro Colosseo has concretely determined the purpose for which the treatment was implemented (the transmission of promotional messages) and has commissioned XX to carry out the advertising campaign for its cultural initiatives. In fact, the communication received from Mr. XX, although coming from an e-mail address not recognized by the Company, contained the promotion of

a cultural event organized by the Teatro Colosseo in Turin of which, moreover, in the same message, both the website and telephone numbers. The commercial communication attached to the complaint, therefore, unequivocally associated the receipt of the promotional message to an initiative of the Company. Such a configuration of the message must be considered suitable for generating in the recipients the conviction that they have been contacted directly by the Company which owns the aforementioned Teatro Colosseo in Turin and, for these reasons, the same complainant first contacted Colosseo S.r.l., to the addresses found in the relative privacy information, on the basis of this legitimate expectation.

In this regard, we must recall what was clarified by the Guarantor with the general provision of 15 June 2011 (in www.garanteprivacy.it, web doc. n. 1821257) with specific regard to the fact that "[...] contacts of a promotional nature are carried out in the name, however on behalf and in the interest, of the principal company; with the effect that a legitimate expectation is generated in the interested parties, since they perceive that they are recipients of advertising initiatives carried out directly by the company on whose behalf the proposal for the sale of products or services is formulated". In these terms, the proposer, being the subject who determines the promotional purpose of the treatment and the means for its execution, as well as being the subject in whose interest the treatment is carried out, is configured as data controller. Instead, the subject who, on behalf of these, actually performs the service, can be, depending on the concrete attitude of the roles between the parties, a co-controller or a data processor, as clarified by the Guarantor in the Guidelines on promotional activity and fight against spam of 4 July 2013 (web doc. n. 2542348), in the provision of 26 October 2017 (web doc. n. 7320903), and, more recently, with specific regard to the relationship between the customer and the company call center third parties in charge of promotional campaigns, also in provision no. 7 of 15 January 2020 (web doc. n. 9256486).

Therefore, while claiming his own extraneousness to the collection of the complainant's data, it appears that the communication received from Mr. XX was made in the name and in the interest of the Company which, for these reasons, must be considered the owner having, concretely, determined the decisions regarding the purposes and methods of processing, while not bothering to verify their implementation by the partner in charge of the promotional activity (see Article 4 of the Regulation) (see, in addition to the aforementioned provisions of 26 October 2017 and provision 15 January 2020, also: provision 25 November 2021, web doc. n. 9736961; provision 25 November 2021, web doc. n. 9737185; provision 2 December 2021, web doc. n. 9731682; provision 2 December 2021, web doc. n. 9731664; provision 16 December 2021, web doc. n. 9742704).

What has been described so far allows us to outline a picture of inadequate control by the Company in the treatments aimed at carrying out the promotional campaign: Teatro Colosseo, instead of drawing up a legally binding document, limited itself to a few verbal interlocutions and it does not appear that it requested the commercial partner the documentation proving the existence of the requirements of lawfulness of the processing, such as the origin of the data, the information provided and the consents acquired from the interested recipients of the promotional campaign, or that he has verified this in any other way.

The Authority has repeatedly highlighted that the new principles dictated by the Regulation frame the responsibilities of the data controller in an accountability perspective and impose proactive behaviors consistent with the purpose of proving, in each phase, the legitimacy of the treatments themselves (see above all article 5, paragraph 2, of the Regulation, as well as article 24 responsible for the precise regulation of the said principle).

Furthermore, the conduct implemented by the Company differs from that indicated by the Guarantor on several occasions, for example already in the aforementioned Guidelines on promotional activities, in which it was recognized "the need for the promoters to implement measures and suitable procedures for ascertaining whether the agent, who has been entrusted with data processing using

automated methods for marketing purposes, may in turn contact sub-agents or other third parties for the performance of the same processing, as well as verifying and guaranteeing compliance with the Code by the latter» (point 3 of the aforementioned Guidelines; see also Article 29 Data Protection Working Party, WP 169, Opinion 7/2020 on the concept of "data controller" adopted on 7 July 2021; see, in addition to the aforementioned provisions of 26 October 2017 and the provisions of 15 January 2020, also the provisions of 9 July 2020, web doc. no. 9435753).
In the concrete case, however, Teatro Colosseo became aware of the involvement in the campaign of a third party which the XX (this XX) allegedly made use of only after the notification, confirming that it had not adequately dealt with the operational phases of the processing (destined to bring benefits in terms of increased sales).
Given this, in this case, the processing of personal data, carried out with the use of personal data lists from third parties for marketing purposes, was found to lack the requirements of lawfulness, correctness and transparency identified by art. 5 of the Regulation. Therefore, the violation of articles is considered integrated 5, par. 2, and 24 of the Regulation.
Furthermore, the conduct described gave rise to the sending of promotional messages without consent, pursuant to articles 6, par. 1, lit. a) of the Regulation and 130, paragraphs 1 and 2, of the Code, since the Company has not produced any evidence capable of documenting the acquisition.
In relation, then, to the failure to respond to the request made by the complainant on 28 June 2021, it should be noted that the Company has processed the requests made only after having been requested to do so by the Authority (with a request for information dated 1 September 2021, pursuant to article 157 of the Code). This circumstance, however, was attributed, in the context of the defense brief, to personal events which involved, in the reference period for the violation, the Chief Executive Officer of the Company for which full justification was given before the Authority.
In light of the above, pursuant to art. 58, par. 2, lit. f) of the Regulations, it is necessary to impose on the Colosseum Theater the ban on the processing of personal data collected without having acquired the aforementioned necessary prior informed consent of the interested party in relation to the marketing activity.
It is also necessary to order the Colosseum Theater, pursuant to art. 58, par. 2, lit. d) of the Regulation, if it intends to make use of third parties for promotional activities in the future, to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the provisions on the matter and, in particular, to obtain prior free, specific consent , unequivocal and documented data subjects for sending commercial communications.
Furthermore, pursuant to art. 58, par. 2, lit. d) of the Regulation, to adopt suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights of the interested parties.
Furthermore, it is necessary to enjoin the Company to issue suitable prior information to the interested parties with respect to the processing of their data.
Finally, with regard to the treatments already carried out and with dissuasive purposes, it is believed that the conditions exist for the application of a pecuniary administrative sanction pursuant to articles 58, par. 2, lit. i) and 83, par. 5, of the Regulation.
However, in the overall assessment of the facts, it must be taken into account that the sporadic conduct (only one complained promotional communication appears in the file) and the subject of a single complaint, was immediately interrupted and concerned the promotion of only one cultural event (" Street Art in Blue"). The exceptional nature of this promotional campaign, compared to the ordinary advertising methods of theatrical activity (website, road signs, inserted in newspapers, posters), allows the position of the Colosseum Theater to be significantly reduced, although this circumstance cannot overcome the above disputes highlighted. Moreover, it is possible to hypothesize that the Company, whose corporate purpose lies outside the usual promotional circuit that affects marketers, did not have the perception that the assignment to third parties had involved the processing

of personal data subject to the obligations envisaged by the relevant legislation. In fact, as she clarified during the hearing, the promotional activity of the theater has always been entrusted to the aforementioned instruments and only in this case had the Company decided to make use of another channel to make up for the limitations imposed on economic activities by the regulations relating to the pandemic emergency.
It should be noted that the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.
3. INJUNCTION ORDER FOR THE APPLICATION OF THE PECUNIARY ADMINISTRATIVE SANCTION
On the basis of the foregoing, given the violations referred to, the sanction provided for by art. 83, par. 5, of the Regulation.
For the purpose of quantifying the administrative fine, the aforementioned art. 83, par. 5, in setting the statutory maximum in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year where higher, specifies the methods for quantifying the aforementioned fine, which must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), identifying, for this purpose, a series of elements listed in paragraph 2 of the art. 83 in question, to be evaluated when quantifying the relative amount.
As aggravating circumstances, in this case, it is considered necessary to take into account:
1. of the subjective dimension of the conduct, to be considered grossly negligent, with particular reference to the lack of feedback provided both to the interested party and to the Authority (letter b).
As mitigating elements, the following must instead be considered:
1. the small number of interested parties involved (only the complainant) as well as the common nature of the data processed (letters a, g);
2. the absence of previous proceedings initiated against the Company (letter e);
3. the lack of further reports or complaints (letter h);
4. the particular socio-economic situation that has affected the country in relation to the pandemic emergency (letter k);
5. the financial statements of the Company (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 the freedom to do business, also in order to limit the economic impact of the sanction on the organisational, functional and employment needs of the Company, it is believed that it should be applied to the Colosseum Theater - also taking into taking into consideration other similar cases (see aforementioned provisions, as well as provision n. 126 of April 7, 2022, web doc. n. 9771529, and provision n. 153 of April 28, 2022, web doc. n. 9779025) - the administrative sanction of the payment of a sum of Euro 1,000 (one thousand/00), equal to 0.005% of the statutory maximum of Euro 20 million.
In the case in question, it is believed that the ancillary sanction of publication on the website of the Guarantor of this provision should also be applied, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019, taking into account the subject matter of the preliminary investigation, namely the phenomenon of unwanted marketing, with respect to which this Authority has adopted numerous measures both of a general nature and aimed at specific data controllers and on which the attention of the 'user.
Please note that pursuant to art. 170 of the Code, anyone who fails to comply with this provision prohibiting processing is punished with imprisonment from three months to two years and, in the event of non-compliance with the same provision, the sanction referred to in to art. 83, par. 5, letter. e) of the Regulation.

Finally, the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations detected here in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f) of the Regulations, declares the processing carried out by Colosseo S.r.l., with registered office in Turin, via Madama Cristina 71, VAT number 04092480013, described in the terms referred to in the grounds, to be unlawful and, therefore, declares the complaint well founded;

a) pursuant to art. 58, par. 2, lit. f) of the Regulation, prohibits any further processing of personal data collected for promotional purposes without the necessary prior informed consent of the interested parties having been acquired;

b) pursuant to art. 58, par. 2, lit. d) of the Regulation, if it intends to carry out promotional activities in the future, directly or through third parties, enjoins the Company to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the provisions on the matter and, in particular, to acquire in advance an informed, free, specific, unequivocal and documented consent of the interested parties for the sending of commercial communications, pursuant to articles 6 and 7 of the Regulation and 130 of the Code;

c) pursuant to art. 58, par. 2, lit. d) of the Regulation, enjoins the Company to adopt suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights as well as to issue suitable preventive information to the interested parties, pursuant to articles 12, 13 and 14 of the Regulation, with respect to the processing of their data;

The Guarantor, pursuant to art. 58, par. 1, of the Regulation, also invites the data controller to communicate, within 30 days from the date of receipt of this provision, what 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, letter. e) of the Regulation;

ORDER

a Colosseo S.r.l. to pay the sum of Euro 1,000.00 (one thousand/00), as a pecuniary administrative sanction for the violations indicated in the justification, 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 instructions given and the payment, within the term of thirty days, of an amount equal to half of the fine imposed;

ENJOYS

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 Euro 1,000.00 (one thousand/00), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to the 'art. 27 of the law n. 689/1981;

HAS

as an accessory sanction, pursuant to art. 166, paragraph 7, of the Code and of the art. 16 of the Regulation of the Guarantor n. 1/2019, the publication on the Guarantor's website of this provision and, pursuant to art. 17 of the Regulation of the Guarantor n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation, of the violations and of the measures adopted.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, 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 owner of the processing of personal data has his residence, or, alternatively, with the court of the place of

residence of the interested party. , within the term of thirty days from the date of communication of the provision itself, or sixty days if the appellant resides abroad.
Rome, 5 August 2022
PRESIDENT
Station
THE SPEAKER
guille
THE SECRETARY GENERAL
Matthew