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Injunction against Wind Tre S.p.A. - November 29, 2018

Register of measures

no. 493 of 29 November 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

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

NOTING that the Office of the Guarantor, with deed no. 21916/114323 of 20 July 2018 (notified on the same date by certified email), which must be understood as fully reported here, challenged Wind Tre S.p.A, in the person of its pro-tempore legal representative, with registered office in Rho (MI), Largo Metro n. 5, tax code 02517580920, the violations envisaged by articles 23, 130, 162, paragraph 2-bis, 164-bis, paragraph 2, and 167 of the Code regarding the protection of personal data (legislative decree 196/2003, hereinafter referred to as the "Code") in the formulation prior to the amendments introduced by d. lg. 101/2018;

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

- the Guarantor adopted, on 22 May 2018, provision no. 313 (in www.gpdp.it, web doc. n. 8995285), to which reference is made in full, following the outcome of the investigation of an administrative proceeding initiated against H3G S.p.A. and therefore, following the merger of Wind Telecomunicazioni S.p.A. and H3G S.p.A. in Wind Tre S.p.A.;

- the proceeding originated from numerous reports complaining of receiving telephone calls with an operator and unwanted text messages with promotional content in the interest of H3G;

- the investigation carried out by the Office, also through inspections, made it possible to ascertain that "first of all in relation to the whistleblowers, the Company has violated articles 23 and 130 of the Code, having been contacted, directly or through their sales network [...], by telephone or text message, despite having opposed the processing for commercial purposes [...]. And

this unlawfulness, as has already been represented, is primarily caused by the aforementioned absence of suitable preventive measures taken by the Company to exclude unwanted commercial contacts (or at least minimize the risk of their occurrence), by means of appropriate cross-referencing with its own exclusion lists in which all the whistleblowers would have found a place [...]. It must also be noted that even the ex post controls that the Company is in any case required to put in place as stated, at the time of the checks carried out mostly in the form of sending forms to the partners [...] or generalized reminders [...] and even in the individualized communications in which the Company limits itself to recalling the legal obligations in force [...] have not proved to be effective, given that not infrequently more than one of the reporting parties has been able to complain of repeated contacts made by users belonging to a same operator, resulting as a partner of the Company, without the intervention of the latter having had any effect" and that "the Company allows access to its systems and therefore to the large database referring to the users of its services electronic communication, as shown by the declarations made in the documents [...] to a very large number of contractual partners [...] without having absolutely designated the party of the same as we hav seen, 93% [...] as "data processors" , even expressly qualifying them, in the documentation in the deeds, as "data controllers [...] In consideration of the omitted designation of these subjects as "data processors", it must be considered that in the present case the extremes are met for a systematic as well as prolonged over time unlawful communication of data referring to customers to third parties, the contractual partners for which no steps have been taken to designate them as "data processors", which go far beyond the sample cases identified during the checks [...], concerning, as mentioned, 93% of the economic operators who make up the commercial network of the Company. Due to the access granted to this class of subjects to the Company's management system in the absence of any designation of the same as "data processors" and since this processing operation (data communication) is not based on a suitable informed consent of the interested parties (articles 13 and 23 of the Code) also due to the fact that this type of person is not mentioned in the information provided to customers: [...] , nor is there any other equivalent condition proven pursuant to art. 24 of the Code, this treatment serial and systematic, abo all in relation to those who have activated a contract with these operators or have requested assistance must therefore be considered illegal";

NOTING that with the aforementioned deed dated July 20, 2018, Wind Tre S.p.A. was charged with:

a) the violation of the provisions of articles 23 and 130, paragraph 3, and 167 of the Code, sanctioned by art. 162, paragraph 2-bis, with reference to the failure to obtain consent for making promotional calls;

b) the violation of the provisions of articles 23 and 167 of the Code, sanctioned by art. 162, paragraph 2-bis, in relation to the failure to acquire consent for the communication of data to third parties (commercial partners)

c) the violation provided for by art. 164-bis, paragraph 2, of the Code, for having carried out the above conduct in relation to particularly large databases (the database referring to the "Tre" brand consists of approximately 10,000,000 users belonging to approximately 6,600,000 customers in addition to approximately a further 3,000,000 users relating to terminated customers);

GIVEN that, for the violations referred to in points a) and b), a reduced payment was made, pursuant to art. 16 of the law no. 689/1981, carried out on 11 September 2018; having also noted that for the violation referred to in point c) there is no option to extinguish the sanctioning procedure by means of a reduced payment;

GIVEN that Wind Tre S.p.A. sent, on 24 July 2018, a request for review in self-defense of the provision for contesting an administrative violation in which it represented that:

- the company, even before the adoption of provision no. 313 of 22 May 2018, had put in place autonomous initiatives on the "Tre" brand in order to eliminate the critical issues identified during the preliminary investigation;

- these initiatives were strengthened following the adoption of the aforementioned provision and also in order to achieve full harmonization of the procedures in place at the brands subject to merger as well as the necessary adaptation of the treatments to Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter "GDPR");

- due to the proactive behavior of the Company with reference to the overall administrative procedure instituted against it by the Guarantor, it may lead to the dismissal of the sanctions or the substantial reduction of the amount of the same also in relation to the circumstance that the legislative measure adapting the provisions of the GDPR provides for a method for extinguishing sanctioning proceedings through the payment of a reduced sum (equal to two fifths of the statutory minimum), a faculty which appears fair to extend to the case in question as well;

NOTING that the request for annulment in self-defense of the dispute of administrative violation cannot be accepted since the elements of nullity indicated in art. 21-septies of law no. 241/1990, however the arguments contained therein can be considered as defensive writings produced by the party pursuant to art. 18 of the law n. 689/1981. These arguments do not concern the disputed conduct but the subsequent conduct of the Company, which, it should be noted, would have undertaken, even before the adoption of provision no. 313 of 22 May 2018, a process of eliminating the critical issues encountered and adapting to the changes introduced by the GDPR, such as to allow the action carried out by the company to be favorably

assessed, in terms of quantifying the fine. In this regard, all considerations are referred to the section of this order-injunction in which the elements for arriving at the final amount of the fine are examined. The responsibility of Wind Tre S.p.A. must be confirmed here. with regard to the disputed violations, since no new and suitable elements to exclude it were brought to the attention of the Guarantor. Furthermore, as regards the applicability in the case in question of the institution of the facilitated definition introduced by art. 18 of Legislative Decree lg. no. 101/2018, it must be noted that this institute, by express indication of the legislator, only concerns the sanctioning proceedings in place (i.e. initiated with a dispute of administrative violation) and not defined at the date of application of the GDPR (May 25, 2018). Since, in the case in question, the establishment of the sanctioning procedure took place at a later time (with the notification on 20 July 2018 of the deed of contestation of administrative violation), this procedure is excluded from the possibility of a simplified definition.

NOTING, therefore, that Wind Tre S.p.A., on the basis of the above deeds and considerations, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code, the violations indicated in points a) and b) of the notification no. 21916/114323 of 20 July 2018, for which a short term definition and, consequently, the violation provided for by art. 164-bis, paragraph 2, for having committed the violations referred to in points a) and b) in relation to databases of particular relevance and size;

CONSIDERING the art. 164-bis, paragraph 2, of the Code which punishes the violations of a single or more provisions indicated in part III, title III, chapter I of the Code (with the exception of those envisaged by articles 162, paragraph 2, 162-bis and 164), orders in relation to a database of particular importance and size, with the administrative sanction of the payment of a sum from 50,000 to 300,000 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:

to. with regard to the aspect of seriousness, with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are of considerable seriousness taking into account that, in the case in question, different channels of contact that have led to an exponential increase in the level of invasiveness of promotional campaigns;

b. for the purpose of evaluating the work performed by the agent, the fact that Wind Tre S.p.A. has, even before the adoption of provision no. 313 of 22 May 2018, put in place autonomous initiatives on the "Tre" brand in order to eliminate the critical issues identified during the preliminary investigation; these initiatives were strengthened following the adoption of the aforementioned provision and also in order to achieve full harmonization of the procedures in place at the brands involved in the merger as well as the necessary adjustment of the treatments to the GDPR;

c. regarding the personality of the author of the violation, the fact that the Company is burdened by numerous previous sanctioning proceedings defined in brief or following an injunction order must be considered (the last injunction order was adopted on 22 May 2018, in www .gpdp.it, web doc. n. 9018431);

d. with regard to the economic conditions of the agent, the ordinary financial statements for the year 2017 and the consolidated financial statements as at 31 March 2018 and 30 June 2018 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 150,000 (one hundred and fifty thousand) euros for the violation pursuant to art. 164-bis, paragraph 2, of the Code.

also CONSIDERING that, in relation to the economic conditions of the offender, having regard in particular to the circumstance that Wind Tre S.p.A. is the leading mobile telephone operator in Italy (with a customer base of 28,600,000 sim cards) and also holds a significant market share in the fixed telephone sector (2,700,000 lines), the aforementioned fine is ineffective and must therefore be increased by four times, as provided for by art. 164-bis, paragraph 4, of the Code (from €150,000 to €600,000);

HAVING REGARD to the documentation in the deeds;

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

HAVING REGARD TO 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 Wind Tre S.p.A., in the person of its pro-tempore legal representative, with registered office in Rho (MI), Largo Metropolitana n. 5, tax code 02517580920, to pay the sum of 600,000 (six hundred thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the aforementioned Company to pay the sum of Euro 600,000.00 (six hundred 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, November 29, 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia