

[doc. web no. 9038510]

Injunction against MP Tuscolana s.r.l. - June 6, 2018

Register of measures

no. 379 of 6 June 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;

NOTING that, in the context of the investigations referred to in p.p. 12986/15 mod. 44 incardinated at the Public Prosecutor's Office of Rome and concerning the illegal activation of telephone cards, the Privacy Unit of the Guardia di Finanza carried out investigations aimed at verifying the times, places and methods with which the two subjects completely unaware of two telephone cards from the H3G operator. During the investigations carried out, precise responsibilities were identified for MP Tuscolana s.r.l. which, on the basis of an affiliation contract stipulated on 24 June 2011 with Key 21 Italia Trading Company S.p.a., as sub-agent of the latter, carried out promotional activities for H3G products and services. Therefore, it appeared that MP Tuscolana s.r.l., making use of its own sales representative, had activated two telephone cards without the knowledge of the interested parties, in the absence of their specific consent. Against the granting of specific authorization by the Public Prosecutor of Rome dated 28 October 2015, the aforementioned unit proceeded to contest the administrative violation against MP Tuscolana s.r.l., with registered office in Rome, via Quinto Novio n. 39/41, P.I. 11417011001, as well as Key 21 Italia Trading Company S.p.a., with registered office in Sesto San Giovanni (MI), viale Casiraghi n. 359, P.I. 02982980613, today called My Best Direct s.r.l.;

CONSIDERING the report n. 88/15, dated 23 November 2015, which is understood to be referred to in full here, with which MP Tuscolana s.r.l., in the person of its legal representative pro-tempore, as data controller and offender, and My Best Direct s.r.l. (formerly Key 21 Italia Trading Company S.p.a., hereinafter "MBD"), as data controller and jointly liable pursuant to art. 6 of the law n. 689/1981, the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code regarding the protection of personal data (legislative decree 30 June 2003 n. 196, hereinafter the "Code") for having carried out a processing of personal data of 2 subjects, making unbeknownst to them telephone cards, in the absence of the consent provided for by art. 23 of the same Code;

HAVING EXAMINED the report prepared by the aforementioned Unit pursuant to art. 17 of the law of 24 November 1981, n. 689 and relating to the dispute report drawn up against MP Tuscolana s.r.l., in its capacity as data processor/infringer, and MBD as data controller/jointly liable pursuant to art. 6 of the law n. 689/1981, from which the reduced payments do not appear to have been made;

HAVING REGARD TO the written defence, sent on 29 December 2015 pursuant to art. 18 of the law n. 689/1981, with which MP Tuscolana s.r.l. illustrated the ways in which customers' personal data are collected for the purpose of activating telephone cards and described the relationship on the basis of which the agent agents carry out the promotional activity on his behalf. In particular, in this respect, the company highlighted that these agents, which also included the one who physically activated the telephone cards subject to the investigation in question, "operate autonomously under a VAT number (...)" and that, as evidenced by the contract signed and attached to the deeds, "they operated without representation by MP Tuscolana, carrying out their activity in a free and independent manner, therefore without the constraint of exclusivity and/or subordination (...). For these reasons, the assumption from which the ascertaining body moves according to which MP Tuscolana s.r.l. through his employee he would have activated the utilities in question (...)". The party, therefore, underlined how, "by virtue of its role as sub-agent (of MBD) it sent agents door-to-door with the task of getting potential customers to sign mere purchase orders (...)". Furthermore, the agents, using a tablet on which a specific "App" was installed, which could be accessed using the seller's username and password, sent MBD the customer's identity document and the contract signed by the latter. Therefore, "from a formal point of view, the practice appeared complete in the documentation collected and, apparently, completely legitimate". Finally, the party requested, on the basis of their arguments, the dismissal of the sanctioning procedure or, alternatively, the application of the institution of legal accumulation pursuant to art. 8 of the law n. 689/1981 and the mitigating factor pursuant to art. 164-bis, paragraph 1, of the Code;

GIVEN the note sent on May 2, 2018 with which the party withdrew from the hearing pursuant to art. 18 of the law n. 689/1981; CONSIDERED, also, the written defenses, sent on 11 January 2016 by MBD as jointly liable pursuant to art. 6 of the law n. 689/1981, with which the company clarified that its business consists in the promotion and distribution of products and services (including those of H3G with which an agency contract is in place) and that "the provision of agency services involves makes use of sub-agents, including MP Tuscolana s.r.l., with whom it had established a contractual relationship through a commercial affiliation (franchise) (...) and a sub-agency contract (...)". In particular, according to the party, the commercial affiliation

contract is a fundamental prerequisite for excluding the liability of the franchisor with respect to the work of the franchisee and vice versa. The autonomy profile is further confirmed by the sub-agency contract (attached to the deeds) in which "the sub-agent (MP Tuscolana) will carry out the task covered by the contract, with his own organization of the necessary means and with management at his own risk, both with reference to the result and with reference to the necessary workforce", also specifying that "the sub-agent will not be able to act as a representative of the sub-principal or of the commercial partners". These arguments exclude that there may be a liability of MBD pursuant to art. 6 of the law n. 689/1981, with respect to the conduct implemented by MP Tuscolana and its collaborators, where, among other things, "the offense, if ascertained, would have been committed by a person not linked to MBD by any type of professional relationship (...)", and "only through false material committed in the original information acquisition phase". The party therefore concluded its defense brief by requesting the dismissal of the sanctioning proceedings initiated against it, as jointly and severally obliged;

READ the minutes of the hearing of 11 July 2016, pursuant to art. 18 of the law n. 689/1981, with which MBD reaffirmed what had already been argued in the defense briefs;

CONSIDERING that the arguments put forward by MP Tuscolana s.r.l., in relation to the dispute report referred to above, are not suitable to exclude its liability in relation to the disputed matter. It should be noted that although the sales manager, on the basis of the contract stipulated with the company (called "Authorisation for the distribution of products and services"), carried out his activity "according to his own free organization and at his own care and expense", without powers of representation and "assuming all responsibility for his work", the same was "required to comply with the company's policies regarding the distribution of products and services" (point 3 of the Contract, containing Duties of the person in charge of direct home sales) . The sales manager, in compliance with the sector legislation referred to in law n. 173/2005, in the present case, acted without the bond of subordination and without powers of representation, therefore as a self-employed worker; however, for the aspects that are of interest here, attention must be paid to the methods and purposes with which the personal data of customers are collected and used, given that from the point of view of the protection of personal data, these elements make it possible to correctly identify the roles and responsibility of the parties involved in the aforementioned operations. And so, in the present case, the sales manager operated as an employee of MP Tuscolana s.r.l., collecting the personal data of customers in the exercise of his activity without acquiring the consent required for the activation of the telephone cards; these data then became available to MP Tuscolana which, in turn designated as data controller pursuant to art. 29 of the Code by MBD (of which he

was also sub-agent), provided the sales person with the tools necessary to carry out his business, placing at his disposal the personal identification code necessary to proceed with the activation of the telephone cards , together with a tablet and a specific App through which customer data was recorded and transmitted to MBD, the data controller. Therefore, both MP Tuscolana and MBD must be considered responsible for the illegal activations, by virtue of the positions held by each within the personal data processing operations. As for the determination of the amount of the pecuniary sanction, the inapplicability of the juridical accumulation pursuant to art. 8, paragraph 1, of the law n. 689/1981. As has been repeatedly underlined by the Guarantor in similar cases, the conducts were implemented towards different subjects and, therefore, must be considered distinct and independent of each other and, as such, liable to be punished independently. It should also be noted that the sanctioned case does not fall within the cases for which it is possible to apply the extenuating factor pursuant to art. 164-bis, paragraph 1, of the Code, as the conditions are not met. While, the evaluation elements that were suggested by the party in the defense writings (referring, in particular, to the fact that in the face of around 3,756 contracts only in two circumstances did the problems that led to the ascertainment of the violation arise) are without other indicative for the purpose of determining the amount of the pecuniary sanction, according to the determinations pursuant to art. 11 of the law n. 689/1981;

CONSIDERING, also, that the arguments put forward by MBD pursuant to art. 18 of the law n. 689/1981 are not suitable for excluding liability with respect to the disputed facts. In fact, as already mentioned above, for the purposes of activating the telephone cards, the MBD company acted as data controller and, as such, within the scope of the power to organize the data processing, designated Mp Tuscolana s.r.l. responsible for the treatment, pursuant to art. 29 of the Code. Therefore, MBD is called to answer as a joint liability pursuant to art. 6, paragraph 2, of the law n. 689/1981, having not provided any proof of not having been able to prevent the fact (e.g. by carrying out periodic checks on compliance with the instructions given);

NOTING that MP Tuscolana s.r.l. as responsible for data processing designated pursuant to art. 29 of the Code, has carried out an unlawful processing of personal data, making two telephone cards to two subjects, failing to acquire their consent, and that MBD, for the reasons indicated above, is jointly liable pursuant to art. 6, paragraph 2 of the law n. 689/1981;

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

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those pursuant to art. 23 of the same Code, with the administrative sanction of payment of a sum

ranging from ten thousand euros to one hundred and twenty thousand euros for each of the two violations contested;

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 of 24 November 1981 n. 689, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, of the seriousness of the violation, of the personality and economic conditions of the offender and that therefore the amount of the pecuniary sanction for the violation referred to in art. 162, paragraph 2-bis must be quantified as 10,000.00 (ten thousand) euros for each of the 2 findings, for a total amount of 20,000.00 (twenty thousand) euros;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981 n. 689, 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. Augusta Iannini;

ORDER

to MP Tuscolana s.r.l., with registered office in Rome, via Quinto Novio n. 39/41, P.I. 11417011001, in the person of the pro-tempore legal representative, as offender and to My Best Direct s.r.l., with registered office in Sesto San Giovanni (MI), viale Casiraghi n. 359, P.I. 02982980613, in the person of the pro-tempore legal representative, in his capacity as jointly liable pursuant to art. 6, paragraph 2, of the law n. 689/1981, to pay the sum of 20,000.00 (twenty thousand) euros as a pecuniary administrative sanction for the violation provided for by art. 162, paragraph 2-bis, of the Code, as indicated in the justification;

ENJOYS

to the same subjects to pay the sum of 20,000.00 (twenty thousand) euros, according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts 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 lg. 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, 6 June 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia