

SEE NEWSLETTER OF 27 APRIL 2021

[doc. web n. 9577042]

Order injunction against Plurima s.r.l. - March 11, 2021

Record of measures

n. 100 of 11 March 2021

## 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 Guido Scorza, members 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 repeals Directive 95/46 / EC (hereinafter the "Regulation");

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 the national legal system to the aforementioned Regulation (hereinafter the "Code");

CONSIDERING, among the most relevant provisions of the Guarantor with general content, the Guidelines on promotional activities and the fight against spam, 4 July 2013, doc. web n. 254234 as well as the Requirements for the processing of personal data for marketing purposes, through the use of the telephone with operator, following the establishment of the public register of oppositions (provision 19 January 2011, web doc. No. 1784528);

GIVEN the numerous complaints received by the Authority, contained in reports and complaints, regarding the receipt of unwanted promotional calls on behalf of TIM S.p.A. (hereinafter: "Tim");

GIVEN the results of the investigations carried out at Tim S.p.A., recipient of the corrective and sanctioning measure, dated January 15, 2020 (web doc. 9256486), as well as at the call center companies responsible for carrying out promotional campaigns and, in particular , at Plurima srl (hereinafter also referred to as: "Plurima" or "the Company");

GIVEN Plurima's brief of 27 March 2020, the hearing minutes of 29 May 2020 and the supplementary brief sent by the same on 10 June 2020;

GIVEN the overall documentation on file;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

SPEAKER Prof. Ginevra Cerrina Feroni;

WHEREAS

1. The complaints of the interested parties

From 2017 to the first months of 2019 (according to a trend confirmed also in the following months), the Authority received numerous complaints, in the order of several hundreds, contained in reports and complaints, in particular regarding the receipt of promotional calls, on behalf of TIM S.p.a. occurred:

- a) in the absence of consent of the interested parties; or
- b) despite the registration of telephone users in the public register of objections; that is to say
- c) even after the exercise of the right of opposition.

2. The preliminary investigation of the Office and the related results

Because of this situation, the Authority has deemed it appropriate to carry out an articulated preliminary activity in order to acquire more elements of evaluation with respect to the aforementioned complaints, proceeding with inspections at Tim and its partners, including Plurima srl, where the operations were completed on 23 April 2019. Subsequently (on 30 September 2019) the Office sent a request for additional information, in relation to which the Company provided a reply on 11 December 2019. Based on the overall documentation acquired, the Office found that said Company - in the period between August 2018 and 30 September 2019 - had contacted, on behalf of Tim, a total number of 1,253 "referenced" telephone numbers ( i.e. unrelated to the contact lists, but allegedly suggested by the subjects contacted, the latter present in Tim's lists).

With respect to this share of contacts, no consent was acquired from the interested party for the promotional purposes, nor was any other legal basis applicable (see Articles: 6, paragraph 1, Regulation - 130, Code); with respect to this treatment, therefore, a possible violation of the principle of lawfulness has emerged, pursuant to art. 5, par. 1, lett. a, of the Regulation.

The Office, therefore, with a communication dated February 12, 2020, initiated the administrative procedure for the complaint of the violation of the aforementioned provisions, consequently envisaging the applicability of the administrative sanctions provided for by art. 83 of the Regulation, as referred to in art. 166, paragraph 2, of the Code.

With the brief presented on March 27, 2020, due to the extension of the deadline granted by the Office, Plurima represented

that it had:

- acted as a mere data processor;
- observed Tim's mandate in contacting the lists he delivered;
- contacted referenced subjects, with Tim's awareness of these activities;
- made these contacts on the basis of legitimate interest in marketing;
- put in place processes aimed at ensuring the correctness and documentation of data processing.

Furthermore, on the same occasion, the Company argued that "- even if Plurima wishes to consider this treatment as joint owner with TIM - it would not (would) be attributed to the unlawfulness of the treatment ...", highlighting that "for to make up for a lack of specificity in the instructions of the Data Controller, it has implemented a specific internal process aimed at identifying, before contacting the referenced, a suitable legal basis for the processing. But nevertheless, the Company still acted within (broad) legitimate instructions provided by the client-Owner, and always for the purpose of the processing indicated by them (contact with commercial proposition), therefore Plurima's conduct could not be assimilated to a decision on the purposes and means of the processing. "

Furthermore, the Company, with the same memorandum of 27 March 2020 and with the supplementary one of the following 10 June, produced the details relating to these telephone calls, referring, among other things, to: i) the temporal circumstances of the acquisition; ii) at the origin of the 'referenced' number (specifically the lead user who had revealed it); iii) the nature of the relationship (friend, parental), indicating, in some cases, the item "Other Num. Clt"); iv) to the physical operator who had acquired it; as well as to the supervisor of the operation.

Plurima also produced the information provided to interested parties at the time of telephone contact, which was found to be consistent with the regulatory provisions of art. 13 of the Regulation, identifying with sufficient clarity the essential elements of the processing, in accordance with the setting envisaged by the same.

The Company also pointed out various events - connected to its relations with the client Tim, recipient of the aforementioned provision of January 15, 2020 - of significant and negative impact on its economic and financial situation: Tim's failure to renew the contract in existence for about eleven years; the significant reduction in turnover; the drastic downsizing of the organizational and functional structure, resulting in the closure of all operational offices and the total loss of the employed workforce as well as in the voluntary liquidation of the Company: v. Minutes of the hearing 29 May 2020, cit.).

### 3. Evaluation of the overall conduct of the Company

It should be preliminarily highlighted that, in the specific case, Plurima is to be considered the de facto owner, together with Tim, of the promotional treatments related to the "off-list" or "referenced" numbers, with the consequent applicability of principles and obligations regarding data protection. ; in this sense, it is not important to qualify his role as an independent owner or joint with Tim.

In fact, from the documents it emerged that Plurima contributed to establishing both the promotional purposes and the contact methods (see Article 28 of the Regulations), organizing the latter in the absence of operational instructions formalized by the client; de facto procedures then accepted by Tim, who acknowledged the contracts concluded and received the related benefits. Plurima appears to have operated by exceeding, in fact, with respect to the role of mere manager "of the processing formally entrusted for the execution of promotional campaigns addressed to the interested parties on the TIM lists and determining" purposes and means of the processing ", in the scope of a unitary and de facto shared design, at least with regard to the purpose of acquiring new customers and its operational effects, with TIM (see provision February 1, 2018, web doc. 7810723). This also in consideration of the irrefutable circumstance, that the use of "off-list" numbers was functional to the pursuit of a shared interest, both of TIM and of its partners, from which each drew an economic advantage ": v . prov. January 15, 2020, cit., Par. 3).

However, even if Plurima is recognized as responsible (rather than owner or co-owner) of the treatment, the evaluation of its conduct in terms of illegality would not change. In fact, with specific regard to the telephone calls made to "unlisted" users, it was found that "referenced" subjects were contacted, on the basis of a constant operating practice attributable to a conscious corporate choice of the Company and not attributable to exceptional initiatives by the staff.

At the same time, however, it is clear that the role of the call centers which, like Plurima, carried out the promotional campaigns, must be distinguished from that of the client (Tim, in this case), indeed preponderant and much more incisive, with regard to dynamics and practices shared operations as well as the revenue from promotional campaigns.

It is then necessary to re-propose the considerations already formulated by this Authority with the provision. January 15, 2020 (paragraph 3.1., Cit.). In particular, "it cannot be invoked as a legal basis.... that of the 'legitimate interest' in marketing activities, perhaps together with the alleged interest of the 'referring' subject, which involves the friend or relative in the promotion. It should then be highlighted that the legitimate interest, pursuant to art. 6, par. 1, lett. f), of the Regulations -

already provided for by both the abrogated directive 95/46 / EC, as well as by the Code prior to the amendments made by Legislative Decree no. 101/2018 (Legislative Decree no. 196/2003, Article 24, paragraph 1, letter g) - cannot - in general - subrogate the consent of the interested party as the legal basis for marketing. Indeed, the Regulation itself - as already Directive 95/46 / EC in art. 7, paragraph 1, lett. f) - only admits it 'on condition that the interests or fundamental rights and freedoms of the interested party that require the protection of personal data do not prevail'. ... In any case, the existence of legitimate interests requires a careful assessment also of the possibility that the interested party, at the time and in the context of the collection of personal data, can reasonably expect that a processing for this purpose. ".

It should also be reiterated also in the case of Plurima what has already been clarified in the aforementioned provision.

January 15, 2020, namely that: "The application of the legal basis of legitimate interest therefore presupposes the prevalence in practice (based on a balance given to the owner, but always assessable by the Supervisory Authority) of the latter over the rights , freedom and mere interests of the data subjects (specifically, the recipients of promotional communications not assisted by consent). In this comparison, it is necessary to carefully weigh the impact of the processing, which is intended to be carried out on these rights, freedoms and interests (among which, in the case of marketing, first of all the right to data protection and the right to peace of mind are recognizable. individual of the interested party "(1).

Moreover, always recalling the prov. January 15, 2020: "the data controller cannot retroactively resort to the basis of legitimate interest in the event of problems in the validity of the consent. Since he has the obligation to communicate [in the information issued to the interested party] the legitimate basis at the time of the collection of personal data, the data controller must have decided on the legitimate basis before the data collection (see Group Guidelines Art. 29 on consent pursuant to Regulation (EU) 2016/679, 10 April 2018, WP 259 rev.01) ".

Therefore, if the aforementioned conditions are not met for the legitimate interest and with the exception of the hypotheses of the so-called "Soft spam" (Article 130, paragraph 4, Code), as well as the "opt-out" system for data in public lists - it must be considered that the general rule to be followed for processing for promotional purposes is that of prior informed, free, specific and documented consent of the interested parties (2).

Therefore, it should be noted that the Company - in the period between August 2018 and 30 September 2019 - contacted, on behalf of Tim, a total number of 1,253 "referenced" telephone numbers (i.e. unrelated to the contact lists, but as suggested by the contacted subjects, the latter present in Tim's lists), in the absence of the necessary specific consent of the interested

parties for the promotional purposes or other suitable legal prerequisite (see articles 130, Code; 6, paragraph 1 , Regulation).

Based on the overall findings, the Authority therefore believes - in accordance with the assessments already made with the aforementioned communication from the Office of 12 February 2020 - that the following violations by Plurima srl are recognizable in this case:

- art. 5, par. 1, lett. a), of the Regulations;
- art. 6, paragraph 1, of the Regulation (130 of the Code).

Therefore, pursuant to art. 58, par. 2, lett. d) and f), of the Regulation, to have to adopt the definitive limitation of the treatments described above against Plurima, also ordering them to comply with the regulations in force.

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

The violations, as indicated above, also require 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 Plurima of the pecuniary administrative sanction 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).

To determine the amount of the sanction in the specific case, 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:

- the limited duration of the violation (Article 83, paragraph 2, letter a), of the Regulation);
- the limited number of interested parties involved, if related to the considerable amount of promotional telephone calls made by the call center companies, partners of TIM (Article 83, paragraph 2, letter a), cit.);
- the limited number of violations found and their affiliation only to the restricted sector of telemarketing on behalf of third parties (Article 83, paragraph 2, letter a), cit.);
- the subjective dimension of the conduct, which must be considered more appropriately negligent rather than malicious, i.e. aimed at violating the relevant legislation on the subject, considering the measures taken to carry out such processing activity, also due to the lack of explicit operating instructions by the client (Article 83, par. 2, letter b), of the Regulation);
- the declared interruption of the contact activities of the 'referenced' subjects since 9 October 2019, based on the prohibition communicated to it by Tim (Article 83, paragraph 2, letter c), of the Regulation);
- the proactive behavior of the Company which appears to have posed the problem of 'unlisted', trying to govern it, albeit in a

way that did not comply with the law (Article 83, paragraph 2, letter c, cit.);

- the absence of previous violations and provisions of the Authority against the Company (Article 83, paragraph 2, letter e), of the Regulations);

- prompt cooperation with the Authority in the course of the inspections and the procedure (Article 83, paragraph 2, letter f), of the Regulations);

- the categories of personal data affected by the violation, identifiable essentially in mere contact data (Article 83, paragraph 2, letter g), of the Regulation);

- the economic conditions of the offender, taking into account the strong contraction of the activity in question, also due to the termination received by the single-client TIM and, even more so, the closure of all the operating offices, the total loss of the workforce, the status of voluntary liquidation of the Company; as well as, in more general terms, the current very serious economic and financial crisis, also due to the ongoing health emergency (Article 83, paragraph 2, letter k, of the Regulation).

The aforementioned mitigating factors are suitable to prevail over the only aggravating circumstance detectable in the conduct of Plurima, namely the discrepancy of the action carried out with respect to the substantial provisional activity, with which indications and clarifications on the matter were provided (see . general provisions and Guidelines cited in this provision), and the constant dialogue of the Authority with the subjects operating in the telemarketing sector - can reasonably lead to believe that all operators (including Plurima) have reached a sufficient awareness of the provisions which must be unfailingly observed (art. 83, par. 2, letter k, cit.).

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, in the initial application of the administrative pecuniary sanctions provided for by the Regulation, also in order to limit the economic impact of the sanction on the organizational and functional needs and employment of the Company, it is believed that it should apply to Plu-rima s.r.l. the administrative sanction for the payment of a sum of 5,000.00 (five thousand) euros.

This amount takes into account, in comparative terms with similar cases, the relatively small number of referenced users treated without a legal basis and the aforementioned profound employment and operational crisis.

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 subject matter of the investigations, namely the phenomenon of unwanted marketing on behalf of telephone companies, the subject of numerous complaints and consequent investigations by this Authority, despite the repeated measures both of a general nature and aimed at certain businesses.

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 pursuant to art. 170 of the Code, anyone who, being required to do so, fails to observe this prohibition provision is punished with imprisonment from three months to two years and who, in the event of non-compliance with the same provision, is also applied in administrative proceedings. the sanction pursuant to art. 83, par. 5, lett. e), of the Regulations.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. f), of the Regulations, declares the processing described in the terms set out in the motivation unlawful and adopts the following corrective measures against Plurima srl, based in Spoltore (PE), Viale Europa n.126 / 128 (VAT number 1827760685) :

- a) pursuant to art. 58, par. 2, lett. f), of the Regulation, provides for the definitive limitation of the processing of personal data of interested parties, for whom it does not have a free and specific consent for the promotional purpose or another suitable and documented legal basis pursuant to Articles 6 and 7 of the Regulations;
- b) pursuant to art. 58, par. 2, lett. d), of the Regulation, orders the implementation of technical and organizational measures such as to ensure that only personal data for which it has a free and specific consent for this purpose or another suitable one are processed for the promotional purpose. and documented legal basis pursuant to art. 6 and 7 of the Regulations;
- c) pursuant to art. 58, paragraph 1, lett. a), of the Regulations as well as art. 157 of the Code, orders the same Company to provide, within 30 days of receipt of this provision, documented feedback with regard to the initiatives undertaken in order to implement the provisions of points 1 and 2; any non-response may result in the application of the pecuniary administrative sanction provided for by art. 83, par. 5, lett. e), of the Regulations;

ORDER

to Plurima s.r.l., in the person of the pro-tempore legal representative, to pay the sum of € 5,000.00 (five thousand), 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 € 5,000.00 (five thousand), 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. lg. 1 September 2011, n. 150, an objection to the ordinary judicial authority may be proposed against this provision, 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 term of thirty days from the date of communication of the provision itself or of sixty days if the applicant resides abroad.

Rome, March 11, 2021

#### PRESIDENT

Stanzione

#### THE RAPPORTEUR

Cerrina Feroni

#### THE SECRETARY GENERAL

Mattei

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1) See, to this effect: Annual Report 2018, p. 107, the provision. 22 May 2018, doc. web n. 8995274, as well as the Opinion of the Group Art. 29, no. 6/2014, - WP 217, p. 35, according to which the institution of legitimate interest "guarantees greater

protection of the interested party; in particular, it establishes that not only the fundamental rights and freedoms of the interested party are taken into consideration, but also his 'interest' - mere and unqualified. ... all the categories of interests of the interested party must be taken into account and evaluated comparatively with those of the data controller, insofar as they are relevant within the scope of the directive ".

2) In this sense, see: the aforementioned provision. of 15.1.2020, as well as, previously, the Guidelines of the Guarantor on promotional matters, 4 July 2013, and even before that, the prov. gen. January 19, 2011, "Requirements for the processing of personal data for marketing purposes, through the use of the telephone with operator, following the establishment of the public register of oppositions", cit.