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Injunction against Autoska S.r.l. - October 18, 2018

Register of measures

no. 472 of 18 October 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

NOTING that the Special Privacy Unit of the Guardia di Finanza, in execution of the request for information from the Guarantor no. 7226/123076 of 2 March 2018, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code"), carried out the investigations, pursuant to art. 13 of law 689/1981, at “Autoska S.r.l.” (hereafter the "Company"), operating as a Volvo car dealership, Tax Code 07736420584 and P.I. 01856001001, with registered office in Rome, via Tullio Levi Civita n. 35 and operational headquarters in Frosinone, via A. Fabi n. 133 - formalized in the report of operations carried out on 23 and 24 April 2018 and aimed at verifying the lawfulness of the processing of personal data carried out by the Company;

GIVEN the documents of the inspection assessment;

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

CONSIDERING that, on the basis of the statements made and the documentation produced by the Company to the Special Privacy Unit of the Guardia di Finanza during the inspection, it was found that:

- the Company is a VOLVO brand car dealership and processes customer data for various purposes, such as the formulation of estimates, the sale and purchase of new and used cars, the purchase of cars with subsidized financing, rental, the exchange of cars and technical assistance;

- the Company collects customers' personal data through the website www.autoska.com, of which it is the owner, in particular through the provision of a form to be filled in by the user in the event of a request for one of the aforementioned services, providing information lacking in some of the information to be provided pursuant to art. 13 of the Code (attachment no. 5 of the report of operations carried out on 23 April 2018);

- the Company, for the various purposes indicated in the information posted on the website www.autoska.com, collects a single consent in general form, by affixing a flag at the bottom of the aforementioned form, (see attachment no. 5 of the report of operations carried out on 23 April 2018);

- in order to provide customers with technical assistance on the vehicle and/or for servicing, the Company collects the data through the computer system called "Ecars" and issuing, at the end of the collection, an "order" form - from to be signed by the customer - reporting the incomplete information on the elements referred to in art. 13 of the Code (see attachment no. 8 of the report of operations carried out dated 04/24/2018);

- the ownership of the processing of personal data of customers collected for the performance of the aforementioned activities, pursuant to the combined provisions of articles 4, first paragraph, letter f) and 28 of the Code lies with the Company;

HAVING REGARD TO the Minutes of the Special Privacy Unit of the Guardia di Finanza no. 56 of 29 May 2018 with which “Autoska S.r.l.”, C.F. 07736420584 and P.I. 01856001001, with registered office in Rome, via Tullio Levi Civita n. 35 and operational headquarters in Frosinone, via A. Fabi n. 133:

- the violation of art. 13 of the Code, in relation to art. 161 of the same Code ("Omitted or unsuitable information to the interested party"), for not having "provided suitable information, pursuant to art. 13 of Legislative Decree 196/2003, because there is no information to be provided to the interested parties, nor (…) a (information in) simplified manner in which at least the essential information is listed (e.g. data controller, references of the subjects who to contact to exercise the rights referred to in Article 7 of the Code)";

- the administrative violation of art. 23 of the Code in relation to art. 162, paragraph 2-bis, of the same Code for the failure to acquire specific and informed consent for the processing of customers' personal data carried out through the website www.autoska.com in relation to the various purposes for which the data is collected personal data of the interested parties;

- the violation of art. 13 of the Code, in relation to art. 161 of the same Code ("Omitted or unsuitable information to the interested party"), for not having provided suitable information to customers requesting technical assistance and/or coupons on the car through the computer system called "Ecars" "since the information from return to the interested parties, nor (…) a (information in) simplified manner in which at least the essential information is listed (e.g. Data Controller, references of the subjects to contact to exercise the rights pursuant to Article 7 of the Code, incorrect indication of the location of the offices of the AUTOSKA s.r.l. dealership)”;

NOTING that from the report prepared by the Special Unit for Privacy and Technological Frauds - 2nd Section - of the Guardia di Finanza - prot. no. 0103624/2018 of 3 August 2018 - pursuant to art. 17 of the law of 24 November 1981 n. 689, no reduced payments appear to have been made;

HAVING REGARD TO the written defenses - and related attachments - dated 28 June 2018, formulated pursuant to art. 18 of the law n. 689/1981 with reference to the disputes referred to in the aforementioned report no. 56 of 29 May 2018, with which the Company intended to represent its position by asserting that:

to. the investigations were carried out unlawfully as from the examination of the note of the Guarantor prot. no. 7226/123076 of 2 March 2018, containing the request for information pursuant to art. 157 Legislative Decree no. 196/2003, "the Guardia di Finanza was only responsible for notifying (...) (such) request (...), but not for carrying out inspections, which, however, began on the same day of the notification of the aforementioned request for information". And the "certainty that said Body has not been granted the aforementioned power is provided precisely by the same Body, where on pages 1 and 2 of the Process Report of Operations Completed and on page 1 of the Dispute Report, it founds - increasingly contradicting itself in the first case , the power to execute what is specifically requested and only in the aforementioned request, which instead does not provide for the execution by this body, thereby altering and forcing the content of the aforementioned request and, in the second case, in the powers referred to in 'art.13 Law n. 689/1981, or a generic power which, in the present case, it is not possible to invoke, since there is a specific, clear and direct document, such as the aforementioned Note 7226";

b. with regard to relief no. 1, the content of the information pursuant to art. 13 of the Code " (...) was not drafted by the undersigned Company, but by DriveK Italia S.r.l. (appointed by the Company to create the website www.autoska.com)" which "is responsible for drafting first, and then inserting on the site, the forms and the rest of the Information de quo in compliance with the provisions of the law, adapting the same forms contact details and insert the references provided to the same, ex multis those relating to the Data Controller", which is why the Company "(...) relied on the diligent, competent and conscientious performance of the obligations assumed and, therefore, is not responsible even by way of fault". "On the other hand (…) the reasoning which leads the Guardia di Finanza to contest Finding no. 1 is generic since it does not specify what is the missing information to be given to the interested parties (page 2 contestation verb.) while, unlike what was contested by the Guardia di Finanza, a simplified procedure was envisaged for listing essential information (see see point V of annex 7 of the proc. verb. of completed operations of 23.4.2018), where, even if the name and surname of the Data Controller is missing,

it is however specified that it is the Concessionaire, in the person of the legal representative, both the reference of the subject to contact for the exercise of the rights pursuant to art. 7 of Legislative Decree no. 196/2003, identifying the same in the aforesaid Data Controller";

c. " (...) the same arguments on the subject (DriveK Italia S.r.l.) who (...) drafted and put online the flag to be placed at the bottom of the collection form are valid for Survey no. 2", in relation to which "it is necessary to specify that the consent given is understood in a single and general sense because it concerns a single activity that requires a single data processing, coming into being only for the purpose freely and unequivocally requested by the interested party, by not carrying out the undersigned Company profiling of its customers either for itself or for the parent company Volvo, or market research or marketing";

d. furthermore " (...) the violation of the combined provisions of articles 23 and 167 Legislative Decree no. 196/2003, since the undersigned Company, which has been present in the area for years with a solid and serious reputation, whose activity unfortunately, due to the contingencies of the automotive sector, in spite of itself, must have ceased, has certainly not proceeded with the treatment of the data of its customers to make a profit or to have it made by others or to cause damage to others";

And. with regard to remark no. 3, reference is made to "(...) the reasons given on the generic nature of the dispute report (...) de quo, (e) the paper information referred to in the said finding is suitable and not omitted for the following reasons and considers, in in any case, that said finding should not be considered as autonomous and separately sanctioned but absorbed in Finding no. L";

f. " (...) on the date of notification of the notification of dispute no. 56/2018 or 30.5.2018 the so-called Privacy Code was no longer in force due to the entry into force on 25.5.2018 of the GDPR and, consequently, said report is to be declared null and/or voidable and/or ineffective;

g. the Company "(...) has decided to close the business following the collective dismissal procedure of all employees due to cessation of business activity (...) (due to) the progressive reduction in revenues with very significant losses (...)", for which the payment of the fine relating to the no. 3 reliefs " (…) would considerably alter the balance laboriously found; reason why (...) requests, if the (...) requests (...) (formulated mainly, are not accepted, to declare the complaint report no. 56/2018 null and/or voidable, illegitimate and/or ineffective and issue order for filing of the documents), but evaluating them in the sense of mitigating elements, to consider, for the related findings, the provisions of art. 164 bis, paragraph one of Legislative Decree no.

196/2003 and by the art. 11 of Law No. 681/1981, with particular reference to the economic conditions, the "personality" and the good faith of the undersigned Company, the seriousness of the violation without the intentionality of the damage, restating, in the sense of less rigor, or reducing the amounts of the sanctions";

READ the minutes of the hearing of 11 September 2018 during which the party fully recalled the defense briefs, highlighting in particular the current balance sheet of the Company;

CONSIDERING that the arguments put forward by the Company in the defense writings cited above and aimed at demonstrating the groundlessness of the findings raised with report no. 56 of 29 May 2018 are not suitable for accepting the request to dismiss the sanctioning procedure for the following reasons:

a) with regard to the argument relating to the illegitimacy of the investigations due to the proposed lack of inspection power, it should be noted that the power of collaboration with the Guarantor, in the execution of inspections, of the Special Privacy and Technological Fraud Unit of the Guardia di Finanza finds legitimacy in the 'art. 158, paragraph 2, of the Code, as well as in the Memorandum of Understanding signed on 10 March 2016, still in effect.

In particular, in this matter, it is justified on the basis of an assignment entrusted by the Guarantor not with the aforementioned note protocol no. 7226/123076 of 2 March 2018, but with the assignment letter protocol no. 7229/12376 also dated March 2, 2018. This is also evident in the report of operations carried out on April 23, 2018, in which it is clearly represented that "In the context of the collaboration activity, established with a memorandum of understanding with the Body of the Guardia di Finanza, the Guarantor for the protection of personal data Department of Inspection Activities, Sanctions and register of Treatments, with note no. 7229, dated 03.02.2018, asked the Heading Unit to provide for the:

- notification, to the Company in the specified section, of information request no. 7226/123076, dated 12.03. 2018;
- execution of the request for information and presentation of documents, pursuant to art. 157 of Legislative Decree 30 June 2003 n. 196, in order to allow a complete check on the processing of personal data carried out by the Company";

b) as regards the argument relating to finding no. 1, concerning the unsuitable disclosure pursuant to art. 13 of the Code, the fact that this disclosure was drawn up by the Drivek company does not exonerate the latter's liability, on the basis of the good faith invoked by the Company. In fact, the Company, as data controller - where the Drivek Company, in charge of creating the www.autoska.com site, holds the position of external data processor (point no. 14 protection of the Contract in place among the parties) - should have checked the contents placed on the site, in relation to which, moreover, under other aspects with

respect to the privacy legislation, it was required to guarantee its lawfulness (art. 5 of the "User Responsibility" Agreement); with regard to the invoked good faith, it should then be noted that according to consolidated case law it is necessary that such good faith or, in the terms of art. 3 of law 689/1981, the error, in order to be excusable, is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the legitimacy of his behaviour. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Company, as data controller, was diligently required to know and fulfill the obligations required by the applicable legislation on the subject in question, also due to the fact that, in relation to its professional qualities, it was required to inquire about the applicable rules and their interpretation. It is noted that in the information the data controller is indicated as the concessionaire, in the person of the legal representative, and that the reference to the person to whom to contact for the exercise of the rights appears in the same; however, these elements provided for by art. 13 of the Code are not explained in a sufficiently clear and appropriate manner, as reported in detail in the justification for observation no. 1 by the Guardia di Finanza, where it is represented that, in addition to the express indication of the name of the Data Controller (indicated, in fact, through the generic name of "licensee"), the report also highlights the absence of references to the subjects to contact for the exercise of the rights pursuant to art. 7 of the Code (moreover not mentioned and referred to as "the rights provided for by law"), as well as the erroneous indication of the location of the company's offices;

c) with regard to finding no. 2, since the Drivek company has also prepared the consent collection form, the above is valid in relation to the fact that this does not exempt the Company, in relation to its professional qualities and as data controller, from having to know and carry out the required fulfilments by the applicable legislation on the matter. Furthermore, with reference to the argument according to which "the consent given is understood in a single and general sense because it concerns a single activity that requires a single data processing (...), since the undersigned Company does not carry out profiling activities of its customers (...) ", we highlight what is reported in the text of the information on the website www.autoska.com which states instead that: “the data are processed for commercial purposes, connected or instrumental to the activity of the dealer such as archiving in their databases or for carrying out direct mailing and/or direct marketing activities, also for promotional purposes, on its own behalf as well as for the organization of secondary activities such as for example quizzes, prize games, and competitions, etc.". The same Company, during the assessment, admitted to having carried out marketing activities, declaring that "(...) it has not carried out marketing activities for at least 3 years, also in view of the various economic problems it is

currently facing, also given the imminent closure of the activity" (report of operations carried out of 23 April 2018, page 4, point no. 5);

d) as regards the alleged apodictic attribution of the "(...) violation of the combined provisions of articles 23 and 167 Legislative Decree no. 196/2003 (…)", it should be noted that the violation of art. 23 of the Code, which can be punished administratively, regardless of the commission or otherwise of the crime referred to in art. 167 of the same Code, in the sense that the administrative offense pursuant to art. 162, paragraph 2 bis, occurs in the event of the violation of one of the provisions mentioned in art. 167 of the Code and not in the case of the existence of the criminal offense envisaged by the latter provision;

e) with reference to finding no. 3 and the alleged generic nature of the dispute report, reference is made to what has been highlighted above in relation to finding no. 1; moreover, with regard to the argument for which "(...) said finding should not be considered as autonomous and separately sanctioned but absorbed in the Finding n. I", it should be noted that the information subject of the finding n. 3 is characterized both by a different wording (see report of operations carried out on 24 April 2018, attachment no. 8) and by a different collocation (IT platform called "Ecars") and - this crucial aspect - by a different purpose with respect to that referred to in relief no. 1, as issued to customers in order to provide the technical assistance service and/or relating to the vehicle coupon;

f) the dispute report no. 56/2018, finally, is not "(...) to be declared null and/or voidable and/or ineffective (...)" even if subsequent to the date of application of EU Regulation 2016/679. In this regard, as regards the sanctioning system, the art. 1, paragraph 2, of law 689/1981 provides that "the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them": the violations ascertained prior to the date of 25 May 2018 (date of full application of the Regulation European Union 2016/679) and relating to unlawful conduct whose effects were exhausted by that date, although subject to subsequent dispute, fall within the scope of application of the provisions of the Code in force at the time based on the aforementioned principle of "tempus regit actum ";

NOTING that the Company as data controller pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, on the basis of the considerations referred to above, it appears to have committed:

- the violation of art. 13 of the same Code, in relation to art. 161 of the Code, for the failure to issue suitable information via the website www.autoska.com to interested customers;

- the administrative violation of art. 23 of the Code, in relation to art. 162, paragraph 2-bis, of the same Code, due to the failure

to acquire - in relation to the various purposes of the processing of personal data indicated in the text of the information to be issued to customers - of a specific and informed consent;

- the violation of art. 13 of the Code, in relation to art. 161 of the same Code, for failing to provide suitable information to customers requesting technical assistance and/or the coupon on the car through the computer system called "Ecars";

CONSIDERING the art. 161 of the Code, which punishes the violation of art. 13, with the administrative sanction of payment of a sum from 6,000.00 to 36,000.00 euros;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violation of the provisions indicated in art. 167, which recalls the art. 23, with the administrative sanction of the payment of a sum from Euro 10,000.00 to Euro 120,000.00;

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;

CONSIDERING that, with reference to relief no. 1, due to the slight entity of the violation, consisting of an unsuitable information, the conditions for applying the art. 164-bis, paragraph 1, of the Code according to which “if any of the violations pursuant to art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied to an extent equal to two fifths”;

WHEREAS, in the present case:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the alleged violations are not characterized by specific elements;

a) about the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings must be considered;

b) as regards the economic conditions of the agent, the elements of the ordinary financial statements for the year 2017 were taken into consideration and the Company, in 2017, in view of the termination of the company activity, started the collective dismissal procedure;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 2,400 euros for the violation pursuant to art. 161 in relation to the art. 13 of the Code with reference to finding no. 1; in the minimum amount of Euro 6,000.00 (six

thousand) for the violation referred to in the aforementioned art. 161 of the Code, with reference to observation no. 3; and in the minimum amount of Euro 10,000.00 (ten thousand) for the violation pursuant to art. 23 of the Code, with reference to observation no. 2, for a total amount of Euro 18,400.00 (eighteen thousand four hundred);

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981, n. 689 and subsequent amendments and additions;

GIVEN 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

“Autoska S.r.l.” , tax code 07736420584 and P.I. 01856001001, with registered office in Rome, via Tullio Levi Civita n. 35 and operational headquarters in Frosinone, via A. Fabi n. 133 to pay the sum of 18,400.00 (eighteen thousand four hundred) euros, as an administrative fine for the violations indicated in the justification;

ENJOYS

to pay the sum of Euro 18,400.00 (eighteen thousand four hundred), 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 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, 18 October 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia