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Order injunction against La Prima S.r.l. - September 16, 2021 *

Record of measures

n. 316 of 16 September 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 (General Data Protection Regulation, 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 national law to the aforementioned Regulation (hereinafter the "Code");

HAVING REGARD to the 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;

RAPPORTEUR prof. Pasquale Stanzione;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

With a complaint of 17 September 2019, submitted to this Authority pursuant to art. 77 of the Regulations, Ms XX complained about the receipt of a contact on LinkedIn by a collaborator of La Prima S.r.l. (hereinafter "La Prima" or "the Company"), aimed at offering real estate services in reference to a specific property owned by the complainant.

The request for information of 20 April 2020 by the Office remained unanswered therefore it was necessary to repeat it pursuant to art. 157 of the Code with a note of 14 October 2020. On the following 3 November, with the deadlines now largely expired, an e-mail from the XX was received informing that it had been instructed by La Prima to respond as soon as possible.

As the Company remained silent, the notice of the initiation of the procedure was notified by the Guardia di Finanza on 1 December 2020 with regard to the violation of art. 157 of the Code.

With an e-mail dated December 22, 2020, the Company did not provide any justification regarding the failure to respond to the repeated requests of the Guarantor but, on the merits, stated that "the creation of a LinkedIn profile involves an indiscriminate erga omnes authorization to be contacted by other LinkedIn users. And this is what he did [...], contacting the complainant in order to offer her his professional service. And this he did, having the certainty, deduced from the public land registers, that it was the owner of the property in question".

During the hearing held by the lawyer XX on behalf of the Company, on January 25, 2021, it was specified that the complainant's profile on LinkedIn is set up to receive messages from any LinkedIn user. However, the conversation was only visible to XX and to the employee of the Company, since it was a confidential message between LinkedIn users.

With a note dated 20 April 2021, the Company was notified of the initiation of the procedure for the adoption of corrective measures, as required by art. 166, paragraph 5, of the Code, contesting the violation of art. 5, 6, 24 and 25 of the Regulation.

With the defense brief of May 18, 2021, the Company fully contested the validity of the findings raised by the Authority, arguing that:

- the LinkedIn profile of the complainant is set up in such a way as to be contactable by any other user of the social network, without any limitation; therefore contact by a real estate agent is to be considered admissible as it is "free expression of my job opportunity", especially since the conversation was only visible to the sender and the complainant;
- access to the public real estate register was made to verify ownership of the property, therefore, since this is precisely the purpose of this public register, no violation is found in the acquisition of the data;
- the violation of articles 24 and 25, contested by the Office on the assumption that the Company justified the collaborator's conduct by considering it admissible, does not exist since it is based only on a mere unsubstantiated deduction.

2. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also based on the statements of the Company to which the declarant responds pursuant to art. 168 of the Code, the following assessments are formulated in relation to the profiles concerning the regulations on the subject of personal data protection.

Preliminarily, it should be noted that registering with a social network entails adherence to the terms of service established by

the same and on the basis of these contractual conditions the expectations of the interested parties are based on the use that this tool will be made by others as well. users. Therefore, the communications made and received within these platforms are aimed solely at what is established in the conditions of use of the service itself. LinkedIn, in particular, is a platform whose purpose is to connect individuals who share the same professional interests to facilitate the exchange of knowledge or job opportunities. On the other hand, it is not envisaged that LinkedIn users can use the platform to send messages to other users with the aim of selling products or services, even if this obviously involves their work. In this context, it does not matter whether a user's profile is open or not to receive contacts from other network users because what matters is the purpose - in this case promotional - for which the message is sent. , a purpose that is in contrast with that, envisaged in the contractual conditions for joining the social network, that the interested party can expect. Similarly, the fact that the message remained visible only to the sender and the recipient is only important from the point of view of containing the prejudice, which otherwise would have given rise to an illegal dissemination of the data, but it is not a sufficient condition. to remove the unlawfulness of the conduct.

Similarly, access to real estate registers is certainly allowed for the verification of ownership of a property. In fact, the Office, contrary to what is argued in the defense brief, did not contest the acquisition of the data but the subsequent use of that data for a purpose - promotion of services - which is not among those for which the public register was established and that concerned a person who had not even expressed the will to put their property up for sale.

In this case, therefore, the collaborator of the Company used the real estate register and the social network - set up for specific purposes - to propose a sale service, a different and incompatible purpose with the original ones and therefore not falling within the legitimate expectations of the interested; all this, based on the assumption that the person he was contacting on LinkedIn was the same person found as the owner in the public registers. The violation of art. 5 of the Regulation.

The described conduct therefore entailed that the processing of data - concretized in the collection of the data and in the sending of a message for promotional purposes - took place in the absence of a suitable legal basis, not being attributable to any of the conditions of lawfulness referred to. to art. 6, par. 1 of the Regulation. The processing, in fact, cannot be framed, for the aforementioned reasons, in the execution of the service contract signed by LinkedIn users and the interested party had not expressed a specific consent to be contacted for promotional purposes in these ways, nor could she have done so. since, as mentioned, this purpose is not foreseen. For these reasons, the violation of art. 6, par. 1 of the Regulation.

With regard more generally to the operating methods of the data controller, it must be considered that the arguments set out in

the defense brief are not sufficient to overcome the disputes raised with the act of initiating the procedure of 20 April 2021 where, taking into account that the data controller considered the conduct put in place by the collaborator lawful, it was considered possible to deduce that such practices fall within the usual operating methods or, at least, are not considered to be in conflict with them. As already described above, even after the initiation of the procedure, the Company reiterated its conviction regarding the lawfulness of the use of public registers and social networks for promotional purposes, without censoring the collaborator's conduct and, consequently, deeming it admissible as an operating mode. It follows that the technical and organizational measures of the owner are not adequate to guarantee that the processing of data takes place in compliance with the Regulations. For these reasons, the violation of articles 24 and 25 of the Regulation and it is necessary, pursuant to art. 58, par. 2, lett. d), to order La Prima to conform its processing to the provisions of the Regulations, by adopting suitable measures to avoid carrying out promotional activities in the absence of an appropriate legal basis by all the persons in charge of processing.

Considering the aforementioned violations integrated, it must, however, be taken into account that:

- the conduct that is the subject of the complaint represents an isolated case since, at the moment, there are no further proceedings initiated against the Company;
- the extent of the injury resulting from the fact is not relevant since only one direct contact was made to the complainant without involving the disclosure of personal data;
- the owner is a micro-enterprise and its business is affected by the current economic situation in the sector, strongly conditioned by the emergency related to the pandemic in progress.

For these reasons, it is believed to be able to postpone - for the violations indicated above - the application of a pecuniary sanction and to be able to issue, as a proportionate and dissuasive measure, a warning to La Prima, pursuant to art. 58, par. 2, lett. b) of the Regulations, regarding the aforementioned violations, contested with the act of initiation of the procedure of 20 April 2021.

However, with regard to the violation of art. 157 of the Code, challenged with a separate act of initiation of the procedure of 1 December 2020, it is believed that the conditions for the application of a pecuniary administrative sanction under Articles 58, par. 2, lett. i) and 83 of the Regulation. This is because, as described in point 1, the Company did not respond to the repeated requests for information from the Guarantor, making it necessary to notify via the special privacy unit of the Guardia di

Finanza. During the subsequent interlocutions (two defense briefs and a hearing), the Company, through the XX, made its defense on the merits without ever justifying its silence, although this was expressly contested by the Guarantor with the aforementioned act of initiation of the procedure.

3. INJUNCTION ORDER FOR THE APPLICATION OF THE ADMINISTRATIVE PECUNIARY SANCTION

Based on the above, art. 157 of the Code for which, pursuant to art. 166, paragraph 2 of the Code, the sanction provided for by art. 83, par. 5 of the Regulation.

For the purposes of quantifying the administrative sanction, for the violations referred to in point 2, the aforementioned art. 83, par. 5, in setting the maximum legal limit in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year, whichever is higher, specifies the methods of quantifying the aforementioned sanction, which must "in any case [be] effective, proportionate and dissuasive "(art. 83, par. 1 of the Regulations), identifying, for this purpose, a series of elements, listed in par. 2, to be assessed when quantifying the relative amount.

In compliance with this provision, in the present case, the following aggravating circumstances must be considered:

1. the seriousness of the violation, since the repeated failure to respond has led to a burdening of the preliminary investigation with the consequent extension of the time for defining the procedure and with an increase in costs related to the need to send the soldiers of the Guardia di Finanza for the notification of the deed;
2. the degree of responsibility of the data controller who has not justified his silence in any way, limiting himself to apologizing for the delay only after having received the notification of the deed by the Guardia di Finanza and without giving any reasons regarding the lack of answers.

As mitigating elements, it is believed that we must take into account:

1. the absence of previous proceedings initiated against the Company;
2. the nature of La Prima as a micro-enterprise as well as the data of the 2020 financial statements.

In an overall perspective of the necessary balancing between the rights of the interested parties and freedom of enterprise, and in the first application of the administrative pecuniary sanctions provided for by the Regulation, it is necessary to prudently evaluate the aforementioned criteria, also in order to limit the economic impact of the sanction on the needs. organizational, functional and occupational of the Company.

Therefore, it is believed that, based on the set of elements indicated above, the administrative sanction of the payment of a

sum of € 5,000.00 (five thousand / 00) should be applied to the Company and, due to the aggravating elements noted, the ancillary sanction of publication in full of this provision on the website of the Guarantor as required by art. 166, paragraph 7 of the Code and by art. 16 of the regulation of the Guarantor n. 1/2019.

Finally, it is believed that 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, for the annotation of the violations found here in the internal register of the Authority, provided for by art. 57, par. 1, lett. u) 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 by La Prima S.r.l., with registered office in Milan, viale Gran Sasso 25, VAT no. 10180050964, consequently:

- a) pursuant to art. 58, par. 2, lett. b) of the Regulations, warns said Company to comply with its processing of personal data with the provisions of the Regulations;
- b) pursuant to art. 58, par. 2, lett. d), orders the Company to take appropriate measures to avoid carrying out promotional activities by all persons in charge of the processing in the absence of an appropriate legal basis.

ORDER

to La Prima S.r.l., with registered office in Milan, viale Gran Sasso 25, VAT no. 10180050964, to pay the sum of € 5,000.00 (five thousand / 00) as a fine for the violations indicated in the motivation, 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 prescribed requirements and the payment, within thirty days, of 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 / 00), 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

- a) 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;
- b) pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the website of the Guarantor.

The Guarantor, pursuant to art. 58, par. 1, of Regulation (EU) 2016/679, also invites the data controller to communicate within 30 days from the date of receipt of this provision, which initiatives have been taken in order to implement the provisions of this provision and to provide however, adequately documented confirmation. 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, lett. e), of Regulation (EU) 2016/679. Pursuant to art. 78 of Regulation (EU) 2016/679, as well as art. 152 of the Code and 10 of the legislative decree 1 September 2011, n. 150, an opposition to this provision may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller is resident, or, alternatively, to the court of the place of residence of the person concerned. , within thirty days from the date of communication of the provision itself, or sixty days if the applicant resides abroad.

Rome, September 16, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei

* The provision was challenged