

[doc. web no. 9157152]

Injunction against AD Sphera Group s.r.l. - April 11, 2019

Register of measures

no. 103 of 11 April 2019

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 Privacy Unit of the Guardia di Finanza, in execution of the request for information no. 7226/123076 of 2 March 2018, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, laying down the Code regarding the protection of personal data (hereinafter the "Code"), carried out the investigations referred to in the report of operations carried out on 20 March 2018 against AD Sphera Group sas di Caneppele De Almeida Michelle & c. , now AD Sphera Group s.r.l., with registered office in Milan, XX, P.I. XX, from which it emerged that the company processed personal data by means of two data collection forms, called "Contacts" and "Candidates", present on its website www.admoda.it, against which it had been having found the absence of the information pursuant to art. 13 of the Code;

CONSIDERING the report n. 23/2018 of 6 April 2018 with which the aforementioned company as data controller was charged with the administrative violation envisaged by art. 161 of the Code, in relation to the omitted information on the website, informing it of the right to make the payment in a reduced amount pursuant to art. 16 of the law of 24 November 1981, n. 689; RECORDED from the report, prepared pursuant to art. 17 of the law of 24 November 1981, n. 689, that the reduced payment does not appear to have been made;

HAVING REGARD TO the written defense dated 11 May 2018, sent pursuant to art. 18 of the law of 24 November 1981, n. 689, as well as the defensive writings of 15 February 2019, sent in accordance with the provisions of art. 18, paragraph 4, of Legislative Decree 101/2018, with which the party observed, in the first place, how, following the investigations carried out by the Privacy Unit of the Guardia di Finanza (during which the absence information at the bottom of the data collection forms), proceeded to send to the same Unit, on 28 March 2018, a communication in which it was highlighted that the lack of

information was due to a technical problem relating to the tabulation system, which he was unaware of, but which was immediately remedied. The party complains that this communication was not taken into account in the preparation of the subsequent dispute report, which took place on 6 April 2018, where this circumstance constitutes a fundamental element for the purpose of excluding liability. In fact, the party specified that, when the website www.admoda.it was created, the text of the disclosure was regularly prepared, containing the methods of processing personal data. However, "following a series of updates, made necessary by site malfunctions starting from the second half of 2017, the table dedicated to the privacy policy and consequently the related link at the bottom of the form, have evidently become corrupted, without ADSphera being aware of it". As soon as the problem was discovered, the technician was contacted who restored the connection in real time. The situation thus described confirms the absolute good faith of the company, which was convinced of the legitimacy of its conduct, having not received any reports relating to the malfunctioning of the site. That said, the party clarified that no personal data processing was carried out through the "Contacts" form, since, as verified during the verification operations, only the data collected through the "Candidates" form reached the mailbox recipient's email. Therefore, with respect to the "Contacts" form, the obligation to provide information cannot be said to be violated. Instead, with regard to the "Candidates" form, the party observed that, since it was a spontaneous submission of applications, the art. 13, paragraph 5-bis, of the Code. In the light of these arguments, the party therefore requested the dismissal of the sanctioning procedure or, alternatively, the application of the sanction to the extent of the statutory minimum with a further reduction to two fifths, pursuant to art. 164-bis, paragraph 1, of the Code;

READ the minutes of the hearing, held on 26 March 2019, pursuant to art. 18 of the law n. 689/1981, during which the party reiterated what had already been declared in the defense briefs, also requesting the dismissal of the sanctioning procedure or, alternatively, the application of the sanction to the extent of the statutory minimum;

WHEREAS the arguments put forward are not suitable for excluding the liability of the party in relation to the disputed matter. In particular, we note the non-existence of the conditions for invoking the excusable error pursuant to art. 3 of the law n. 689/1981 which, as repeatedly reiterated by this Authority on the basis of numerous jurisdictional pronouncements on the point, it is necessary that the error was innocent or not capable of being avoided with ordinary diligence (Cass. Civ. Sez. Iav. 12 July 2010 no. 16320). Therefore, the technical problem described by the party to represent the reasons why the information on the website was missing does not constitute a suitable element to exclude one's liability, since the data controller is always

obliged to guarantee the correctness of the treatments carried out and to prepare all necessary precautions so that the interested parties have full knowledge of their rights, providing them with suitable information. The fact that the connection necessary for entering the information on the website was immediately restored is certainly an element in favor of the party, useful for the purposes of the final evaluation. From an examination of the documentation acquired during the operations carried out, it appears that the "Contacts" form was functional at the time of the assessment, in the sense that it was possible to proceed with entering the requested personal data. Therefore, the fact that, by accessing the info@admoda.it e-mail box, there was no information relating to this form, does not exclude that the data controller must in any case provide information, since the interested party must have all the information necessary for processing at the time you provide your data.

Furthermore, the arguments put forward by the party regarding the applicability, to the case in question, of the provision pursuant to art. 13, paragraph 5-bis, of the Code. Contrary to what was believed, in fact, the preparation of a data collection form, which the interested party uses by entering their data in order to propose their candidacy, does not constitute a "reception of spontaneously transmitted curricula" for which the information does not is due, pursuant to the aforementioned provision; on the contrary, it constitutes a request for personal data made by the data controller, against which the interested party must receive the information "in advance" pursuant to art. 13 of the Code;

NOTING, therefore, that the company has carried out a processing of personal data (art. 4 paragraph 1, letter a) and b) of the Code) without providing the information to the interested parties pursuant to art. 13 of the Code through two data collection forms on the website www.admoda.it;

CONSIDERING the art. 161 of the Code which punishes the violation of the provisions of art. 13 with the administrative sanction of the payment of a sum from six thousand euros to thirty-six thousand euros for each finding;

CONSIDERING that, in the present case, the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that if any of the violations referred to in art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied in an amount equal to two fifths;

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, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERED having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine for the violation of art. 161 of the Code in conjunction with art. 164-bis, paragraph 1, in the amount of Euro 2,400.00 (two thousand four hundred);
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;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to AD Sphera Group s.r.l., with registered office in Milan, Via XX, P.I. XX, in the person of the pro-tempore legal representative,
to pay the sum of 2,400.00 (two thousand four hundred) euros as a pecuniary administrative sanction for the violation envisaged by art. 161 of the Code indicated in the motivation;

ENJOYS

to the same subject to pay the sum of Euro 2,400.00 (two 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, 11 April 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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