[doc. web n. 8438789]

Injunction order against ATAM S.p.A. - Territorial company Arezzo Mobilità S.p.A. - January 25, 2018

Record of measures

n. 35 of 25 January 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

NOTING that the Privacy Unit of the Guardia di Finanza, in execution of the request for information no. 6303/102969 of 3 March 2016, formulated pursuant to art. 157 of the legislative decree 30 June 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code"), carried out investigations at ATAM S.p.A. - Territorial company Arezzo Mobilità S.p.A. (hereinafter the "Company"), a publicly held company that manages mobility services for the Municipality of Arezzo, with headquarters in Arezzo, Località case nuova di Ceciliano n. 49/5 - VAT number 00368260519, formalized in the minutes of operations carried out on 8 and 9 March 2016, in order to verify the lawfulness of the processing of personal data carried out by the company by means of a geolocation system aimed at detecting the geographical position of own vehicles through an electronic communication network, with particular reference to the methods with which the notification obligation pursuant to art. 37 and 38 of the Code;

CONSIDERING that, on the basis of the declarations made during the inspections and the documentation acquired, it was found that:

- the Company, among other services for the mobility of the Municipality of Arezzo (paid parking, bike sharing), manages the car sharing service, included in the "Consorzio Gestori Circuito Nazionale Car Sharing" circuit;

- with reference to this service, which began in July 2015, the Company makes use of the technological support provided by the company TRS Tecnologie in the networks and systems S.p.A., using "(...) the management system www.icsprenoto.it - TRS from which it is possible to detect the position of the individual cars and possibly associate it with the booking number of the customer who picked up the car "(page 2 of the complaint report);

- there are only sixteen subscribers to the service "(...) and all employees and / or technical collaborators of the Company, registered for the sole purpose of verifying the functionality of the booking and billing system, as (...) to date no user "as

claimed by the party during the investigations (page 2 of the report of operations carried out on March 9, 2016);

- the Company, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is the owner of the processing of personal data carried out for the execution of the activity relating to the aforementioned service;

- the Company, in the face of the processing of personal data carried out through the geolocation system, has failed to notify the Guarantor, pursuant to art. 37 and 38 of the Code, before the beginning of the treatment started in July 2015;

GIVEN the minutes n. 30 of 16 March 2016 with which the Company, in the person of the pro-tempore legal representative, was charged with the administrative violation envisaged by art. 163 of the Code, for having carried out the processing of personal data pursuant to art. 37, paragraph 1, lett. a), (processing of data indicating the geographical position of people or objects through an electronic communication network), failing to notify the Guarantor according to the methods indicated in art. 38 of the Code;

NOTING that the Report prepared by the aforementioned Unit pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment was not made;

GIVEN the defense brief dated 26 April 2016, sent pursuant to art. 18 of the law n. 689/1981, with which the Company asserted that for the car sharing service offered to the public, from 1 July 2015, "(...) ATAM uses a TRS management system that allows the detection of the position of individual cars and, therefore, also of the relative subscribers. (...) Consequently, in the present case it is indisputable the effectiveness of the dictation of the two aforementioned rules (articles 37 and 38 of Legislative Decree 196/2003). It is equally undoubted that ATAM has not made the notification pursuant to articles 37 and 38 of Legislative Decree 196/2003 (...) "but that, however, there is no obligation to notify the Guarantor in consideration of the fact that" at the time of access by the Finance On 8 and 9 March 2016, no natural person was registered in the car sharing service. As a result, no personal data had been processed by the TRS management system ". The party, as already stated during the inspection, reiterates, in fact, that the entries resulting from the system referred to "(...) employees and / or collaborators of ATAM that this used for mere" test "purposes only purpose of testing the functionality of the service (...) All of the above (...) determines that, at the time of the first access performed by the Guardia di Finanza on 8 March 2016, ATAM was not under any obligation to make the preliminary notification of pursuant to the combined provisions of articles 37 and 38 of Legislative Decree no. 196/2003 ". Furthermore, for the above reasons, the party has cited its good faith, to be taken into consideration, for the purposes of applying art. 164-bis, paragraph 1, of the Code (lesser seriousness of the violation referred to in Article

163) in the event that the Company is deemed to have failed to comply with the notification obligation pursuant to Articles 37 and 38 of the aforementioned Code;

READ the minutes of the hearing of 10 October 2016, held pursuant to art. 18 of the law n. 689/1981, with which the party reiterated what had already been declared in the defense statement, as well as represented the new fact of having notified the Guarantor on 22 March 2016 following the inspection. produced additional deductions in which, in addition to reiterating that "at the time of the dispute (...) no processing operation had been carried out (...)", he highlighted that "ATAM S.p.A. is not able to exercise a decision-making power that is completely autonomous with respect to the complex of the activities carried out regarding the protection of data collected through the car sharing system: the methods relating to the processing carried out with electronic tools significantly involve the TRS (...) In this case, the data controller assumes the characteristics of joint ownership and therefore the notification should also have different content ";

TAKING INTO ACCOUNT that the Company, for the reasons set out above, has requested, in the main, the cancellation of the notification of administrative violation no. 30/2016 and, consequently, the archiving order of the documents; in the alternative, the application of art. 164-bis, first paragraph, and, therefore, of the sanction to the extent of two fifths of the legal minimum;

CONSIDERING that the arguments put forward are not suitable for determining the cancellation of the report of the contestation and the filing of the sanctioning procedure.

First of all, the fact that through the "(...) management system www.icsprenoto.it - TRS (...) it is possible to detect the position of individual cars and possibly associate it with the reservation number of the customer who picked up the car" (page 2 of the notice of dispute), constitutes a hypothesis that falls within the scope of application of Articles 37, paragraph 1, lett. a), and 38 of the Code. In fact, as specified by the Guarantor in the provision "Clarifications on the treatments to be notified to the Guarantor" of 23 April 2004 [doc. web n. 993385] "The location must be notified when it allows to continuously identify - even with possible intervals - the location in the territory or in certain geographical areas, on the basis of equipment or electronic devices held by the owner or person or placed on objects".

In relation, then, to what is highlighted in the defense statement in order to demonstrate the non-existence of the obligation of notification by the Company, it is irrelevant that the registration in the system by employees and collaborators took place for mere purposes of "proof "to test the functionality of the service: in fact, the liability of the Company in relation to the administrative violation for failure to notify is not excluded since, contrary to what has been asserted, also the experimentation

substantiates, pursuant to art. 4, paragraph 1, lett. a) of the Code, a processing of personal data.

As regards, then, the above argument relating to the fact that the Company "is not able to exercise a completely independent decision-making power with respect to the set of activities carried out in the field of data protection collected through the car sharing system (... ) "And that, in this case" (...) the ownership of the treatment assumes the characteristics of joint ownership (...) "is also irrelevant since - assuming it is a case of joint ownership - in this case, each joint owner is required to make an autonomous notification in which the other joint controllers must be indicated, without specifying the relative treatments. With regard to the good faith invoked, the Company, holding in all respects the title of data controller, was required to fulfill the obligations required by the applicable legislation in the matter in question, also due to the fact that, in relation to its quality professional as an agent, was required to inquire about the applicable rules and their interpretation, including the obligation to notify the Guarantor according to the procedures indicated in art. 38 of the Code. Therefore, the argument relating to the existence of good faith cannot be accepted, in view of the obligation of the data controller to comply with the legislation on the protection of personal data;

NOTING, therefore, that the Company on the basis of the above considerations, appears to have committed, as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, the violation pursuant to art. 37, paragraph 1, lett. a), and 38 of the Code, for having processed data indicating the geographical position of people or objects through an electronic communication network without having previously submitted the notification to the Guarantor;

VERIFIED that the Company submitted the notification to the Guarantor on 22 March 2016, following the inspection and the complaint made by the Special Privacy Unit of the Guardia di Finanza, as shown by the query in the General Register of treatments;

GIVEN art. 163 of the Code which punishes the violation of the provisions of art. 37 and 38 with a fine of between twenty thousand and one hundred twenty thousand euros;

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, in the case in question:

a) with regard to the aspect of severity with reference to the elements of the extent of the injury or danger and the intensity of

the psychological element, the violation is not characterized by specific elements, also having regard to the concrete methods of use by the geolocation system company;

b) for the purposes of evaluating the work carried out by the agent, it must be noted that the Company, by querying the general register of treatments, appears to have submitted the notification to the Guarantor on 22 March 2016, after the start of the treatment;

c) regarding the personality of the author of the violation, the circumstance that the company is not burdened by previous sanctioning procedures must be considered;

d) with regard to the economic conditions of the agent, the elements of the ordinary financial statements for the year 2016 were taken into consideration;

CONSIDERING, therefore, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, on the basis of the aforementioned elements assessed as a whole, in the amount of 20,000.00 (twenty thousand) euros for the violation referred to in art. 163 of the Code;

GIVEN the documentation in the deeds;

GIVEN the law n. 689/1981 and subsequent amendments and additions;

GIVEN the observations of the Office made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000, adopted by resolution of June 28, 2000;

Rapporteur Dr. Giovanna Bianchi Clerici;

ORDER

to ATAM S.p.A. - Territorial company Arezzo Mobilità S.p.A. based in Arezzo, Location of Ceciliano's new houses n. 49/5 - VAT number 00368260519, to pay the sum of € 20,000.00 (twenty thousand) as a pecuniary administrative sanction for the violation indicated in the motivation;

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to the same company to pay the sum of € 20,000.00 (twenty thousand), according to the methods indicated in the annex, within 30 days from the 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 art. 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, opposition may be

proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller resides, within thirty days from the date of communication of the provision itself. , or sixty days if the applicant resides abroad.

Rome, 25 January 2018

PRESIDENT

Soro

THE RAPPORTEUR

Bianchi Clerici

THE SECRETARY GENERAL

Busia