

Injunction against Active Network S.p.a. - July 19, 2018

Register of measures

no. 429 of 19 July 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

AT today's meeting, in the presence of Dr. Augusta Iannini, Vice President, Dr. Giovanna Bianchi Clerici and Prof. Licia Califano, members and Dr. 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. 6153/91026 of 28 February 2014, formulated pursuant to art. 157 of Legislative Decree 30 June 2003, n. 196, bearing the Code regarding the protection of personal data (hereinafter the "Code"), carried out the checks at Active Network S.p.a., which carries out the activity of "provision of internet access services", already based in Viterbo, Chemical Street no. 18, and currently based in Milan, Via Santa Maria Valle n. 3, P.I.01599530563, formalized in the report of operations carried out on 18 June 2014, aimed at verifying compliance with the legislation on the protection of personal data and with the provisions of the Guarantor, pursuant to art. 17 of the Code, in the provision containing "Security of telephone and telematic traffic data" dated 01.17.2008 (in www.garanteprivacy.it, web doc. n. 1482111), integrated by the provision of 07.24.2008, containing "Regulatory implementation in subject of telephone and telematic traffic data" (in www.garanteprivacy.it, web doc. n. 1538237). During the investigations carried out and on the basis of the note sent on 2 July 2014 dissolving the reservations formulated, it emerged that the Company, as data controller pursuant to articles 4 and 28 of the Code:

- kept the electronic traffic data for the purposes of ascertaining and prosecuting crimes beyond the term of 12 months (from 18 April 2011), in violation of the provisions of art. 132 of the Code;
- did not observe the measures and precautions prescribed by the Guarantor pursuant to art. 17 of the Code, having carried out a processing of electronic traffic data for the purpose of ascertaining and repressing crimes without having adopted the strong authentication procedure with particular reference to the use of technology based on the processing of biometric characteristics of the interested party;

CONSIDERING the report n. 58 of 21 July 2014, which is understood to be referred to in full here, with which Active Network S.p.a., in its capacity as data controller, in the person of its pro-tempore legal representative, was charged with the administrative violation envisaged by art. 162-bis of the Code, in relation to art. 132, paragraph 1, for having stored electronic traffic data, for the purpose of ascertaining and prosecuting crimes, for a period exceeding 12 months, informing you of the right to make a reduced payment pursuant to art. 16 of the law of 24 November 1981 n. 689;

NOTING that from the report prepared pursuant to art. 17 of the law of 24 November 1981 n. 689 from the aforesaid Nucleus it does not appear that the Company has made the payment in a reduced amount;

CONSIDERING the report n. 59 of 21 July 2014, which is understood to be referred to in full here, with which Active Network S.p.a., in the person of its pro-tempore legal representative, was charged with the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code, for having failed to adopt, in violation of the provisions of the Guarantor, pursuant to art. 17 of the Code, with the aforementioned provisions of 17 January 2008 and 24 July 2008, authentication systems based on strong authentication techniques, with particular reference to the non-use of technologies based on the processing of biometric characteristics of the interested party for access to the traffic data stored for the purpose of ascertaining and prosecuting crimes, informing you of the right to make a reduced payment pursuant to art. 16 of the law of 24 November 1981 n. 689;

NOTING that from the report prepared pursuant to art. 17 of the law of 24 November 1981 n. 689 from the aforesaid Nucleus it does not appear that the Company has made the payment in a reduced amount;

HAVING REGARD TO the written defense dated 24 September 2014, sent pursuant to art. 18 of the law of 24 November 1981 n. 689, with which the party has objected that the sanctions imposed are objectively excessive and unjustified, having adopted more than adequate measures to guarantee the security and protection of the personal data of its customers. With reference to the security measures applied, in fact, the party found that the inspectors had verified the presence of authentication systems based on the entry of user IDs and passwords, assigned to each person in charge of the company. Furthermore, "because of the size of the company, it would be very burdensome for Active Network to equip itself with tools for authenticating the appointees - such as recognition of the retina and papillary - which among other things in the specific case, as well as being less sophisticated, appear to all excessive effects especially considering the tools already in place";

READ the minutes of the hearing, held on 9 March 2015, pursuant to art. 18 of the law n. 689/1981, with which the party observed that the failure to adopt a biometric authentication system was determined by the scarcity of personnel responsible

for accessing the telematic traffic data. On the other hand, as regards the violation relating to data retention times, the party observed that it was an error in the interpretation of the reference legislation and that, in any case, already at the time of the inspection, he had to make the appropriate changes. Therefore, he requested the filing of the disputes and, alternatively, the application of sanctions to the extent of the statutory minimum with a reduction to two fifths, based on the provision of art. 164-bis, paragraph 1, of the Code;

CONSIDERING that the arguments put forward are not suitable for excluding the party's liability for the disputed matter. In the aforementioned provisions, the Guarantor has expressly prescribed the measures that the providers of electronic communication services must adopt, in order to guarantee the protection of telephone and telematic traffic data. With particular reference to the retention of data for the purposes of ascertaining and repressing crimes, in the provision dated 24 July 2008, the Guarantor specified that, in the context of strong authentication techniques, "one of these technologies must be based on the processing of biometric characteristics of the person in charge, in such a way as to ensure the physical presence of the latter at the workstation used for processing" (letter a), point 1, of the aforementioned provision). These provisions are aimed at all operators in the sector, regardless of their organizational and economic capabilities or the amount of data processed, taking into account only the particularly delicate nature of the data being processed and the purposes pursued. Therefore, the measures that the company has adopted, consisting in the assignment of user ids and passwords and in the use of an SSL cryptographic key (as shown by the report of operations carried out on June 18, pages 4-5), are certainly not responding to those required by the Guarantor and, therefore, cannot be considered adequate to guarantee the protection of the rights and freedoms of the interested parties. Similarly, the dispute charged against the party for the violation of art. 132 of the Code, with reference to the retention times of electronic traffic data, since the checks carried out revealed that the oldest data present in the database dated back to 18 April 2011, or to a period of time longer than the 12 months required by the legislation. Instead, as regards the defensive argument that leads the violations in question to an error in the interpretation of the reference legislation, it should be noted that the error on the lawfulness of the conduct (indicated as "good faith"), can be relevant in terms of exclusion of liability only when it is inevitable and innocent: therefore, a positive element is needed, extraneous to the author of the violation, such as to generate the conviction of the legitimacy of his action, in addition to the condition for which everything possible has been done by the author to observe the law and that no reproach can be brought against him (Cass. Civ. Sez. lav. 12 July 2010 n. 16320). In addition to the consideration that these requisites are not found in the present case

(given that all the problems identified were easily found with the ordinary diligence required), the position of the Company must also be considered, professionally inserted in a specific field of activity, and , as such, bound to a more specific information and knowledge obligation regarding the rules governing its sector of activity. Precisely in consideration of this, the applicability to the case in question of the extenuating circumstance pursuant to art. 164-bis, paragraph 1, of the Code, since the violations in question do not fall within the hypotheses of less seriousness;

NOTING, therefore, that Active Network S.p.a., on the basis of the considerations referred to above, as data controller, pursuant to articles 4 and 28 of the Code, it appears to have processed traffic data:

a) in violation of art. 162-bis, of the Code, in relation to art. 132 for having stored data on electronic traffic for purposes of ascertaining and prosecuting crimes for a period exceeding 12 months;

b) in violation of art. 162, paragraph 2-bis of the Code, in relation to art. 17, for having processed computer traffic data for the purpose of ascertaining and repressing crimes without having adopted the measures prescribed by the Guarantor with the provision of 17 January 2008 (in the Official Gazette of 5 February 2008 n. 30, and on the website www.garanteprivacy.it in web doc. n. 1482111), modified and integrated by the subsequent provision of 24 July 2008 on the conservation of telephone and telematic traffic data (in the Official Gazette of 13 August 2008 n. 189, and on the website www.garanteprivacy.it in web document n. 1538224);

CONSIDERING the art. 162-bis, of the Code which punishes the violation of the provisions indicated in art. 132 of the Code with the administrative sanction of the payment of a sum from ten thousand euros to fifty thousand euros;

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes the violation of the provisions of art. 167 of the Code which refers, among others, to art. 17, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and 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;

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 10,000.00 (ten thousand) euros for the violations pursuant to art. 162-bis of the Code, in relation to art. 132 of the Code and in the amount of 10,000.00 (ten

thousand) euros for the violations pursuant to art. 162, paragraph 2-bis, in relation to art. 17 of the Code, for a total amount of 20,000.00 (twenty thousand) euros;

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. Augusta Iannini;

ORDER

to Active Network S.p.a., with registered office in Milan, Via Santa Maria Valle n. 3, VAT number 01599530563, in the person of the pro-tempore legal representative, to pay the sum of 20,000.00 (twenty thousand) euros as an administrative fine, for the violations indicated in the justification;

ENJOYS

to the same subject to pay the sum of Euro 20,000.00 (twenty thousand), according to the methods indicated in the attachment, 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 lg. 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, 19 July 2018

PRESIDENT

Iannini

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia