

Injunction against Bill Size s.r.l. - April 4, 2019

Register of measures

no. 91 of 4 April 2019

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;

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, as part of a delegated investigation by the judicial police, the Economic and Financial Police Unit of the Varese Finance Police, after the Milan Public Prosecutor's Office had granted specific authorization on 3 September 2018, ascertained that Bill Size s.r.l. VAT number: 03156890125, with headquarters in Varese, via San Martino n. 5, in the person of the pro-tempore legal representative, has provided, assuming the role of autonomous data controller of the personal data of the interested parties, in the name and on behalf of the telephone operator TIM (Telecom Italia s.p.a.), to the heading, in the year 2017, of telephone cards to third parties, completely unaware of these attributions. In particular, from the aforementioned preliminary investigations it was possible to identify 5 people to whom, without their knowledge, telephone cards were registered for a total number of 7 users, without their consent having been obtained pursuant to art. 23 of the Code.

HAVING REGARD to the minutes no. rr. 17, 18, 19 and 20 all dated 7 November 2018, which are understood to be referred to in full here, with which Bill Size s.r.l. was charged with respectively 4 (four) violations, all envisaged by art. 162, paragraph 2-bis of the Code, for having processed the personal data of 4 (four) natural persons who have declared that they have never signed any request to activate the sim-cards in question and that they are in the dark, consequently, that there were 6 (six) mobile phone cards in their name;

CONSIDERING the report no. 16 dated 7 November 2018, which is understood to be referred to in full here, with which Bill Size s.r.l. was charged with a violation provided for by art. 162, paragraph 2-bis of the Code, for having carried out the processing of personal data of a natural person for whom, in the context of the checks carried out at the aforementioned company, no document certifying the activation of the telephone user was produced (sim-card) in the name of the natural

person in question;

RECORDED from the report prepared by the Economic and Financial Police Unit of the Varese Finance Police, pursuant to art. 17 of the law n. 689/1981, that the reduced payment has not been made for any of the five disputes in question;

CONSIDERING the written defense dated 2 January 2019 pursuant to art. 18 of the law n. 689/1981 in which the company, with reference to all the dispute reports on the subject, after having referred to the regulatory system relating to the GDPR General regulation on the protection of personal data (EU Regulation n. 679/2016) as integrated by the provisions of d. lgs. no. 10 August 2018 no. 101 containing "Provisions for the adaptation of national legislation to the provisions of 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 movement of such data and which repeals Directive 95/46/EC (hereinafter the Regulation), found that "(...) the combined provisions of the aforementioned standards (...) allow only the Guarantor for the protection of personal data to exercise of duties/powers of investigation, verification, assessment, etc., as well as the infliction of any consequent administrative-pecuniary sanctions. If this were the case, the PVCs burdened here, (...), would prove to be flawed at root, and should therefore be considered non-existent or, at the very least, cancelled, if necessary also in self-defense of the proceeding administration itself".

Furthermore, Bill Size s.r.l., always referring to the provisions of Legislative Decree lgs. no. 101/2018, believes that "(...) can make use of the derogatory provision introduced by art. 18 d. lgs. no. 101/2018, with possible remittance in terms, for this purpose, also due to the excusable error induced by the failure to mention, in the PVCs hereby encumbered, the opportunity offered by the same provision".

He also noted how "(...) the activations contested here could only have been the result of errors and approximations, certainly not of a malicious intention";

HAVING REGARD TO the minutes of the hearing of the parties drawn up on 29 January 2019 pursuant to art. 18 of the law n. 689/1981, in which the company, substantially reiterating what was argued in the defense brief and illustrating the initiatives "(...) of internal verification which allowed the non-occurrence of further cases throughout the subsequent period" highlighted how "(...) the percentage of cases with respect to activations that can be documented for the year 2017 is even lower than that indicated in the memory as there were 7 irregular forms against 17,340 activations", producing a document called "Attachment of documents with brief explanatory note" to resolve the reservation formulated " of February 11, 2019;

CONSIDERING that, with specific reference to the notifications of dispute nos.rr. 16, 17, 18 and 19 all dated 7 November 2018, the arguments put forward do not allow the exclusion of liability in relation to the disputed.

What has been observed regarding the fact that, in the present case, "(...) the combined provisions of the aforementioned standards (EU Reg. no. 679/2016 as integrated by the provisions of Legislative Decree no. 101/2018) (...) only allows the Guarantor for the protection of personal data to exercise duties/powers of investigation, verification, assessment, etc., as well as the infliction of any consequent administrative-pecuniary sanctions" is not appreciable, given that, in reality , in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2 of the law n. 689/1981 which, in providing that "The laws that provide for administrative sanctions are applied only in the cases and within the times considered in them", asserts the recurrence of the principle of tempus regit actum. The recurrence of these principles determines the obligation to take into consideration the law in force at the time of the violation committed. In the present case, this moment must be identified in the moment of the registration, in the year 2017, of telephone cards to third parties, completely unaware of such attributions. In particular, 5 people to whom, unbeknownst to them, telephone cards for a total number of 7 users were registered, without their consent having been obtained pursuant to art. 23 of the Code. It is therefore evident that, in the case in question, the provisions of Regulation no. 679/2016, the effects of which are produced from the date of 25 May 2018, cannot be taken into consideration, but the separate rule provided for by the Code in force at the time when the disputed conduct was put in place or in the version prior to the entry into force of Legislative Decree no. 101/2018. It can also be observed how Bill Size s.r.l. erroneously believes that it can avail itself of the faculty of facilitated definition of violations regarding the protection of personal data pursuant to art. 18 of Legislative Decree 10 August 2018 n. 101, given that the aforementioned article, in paragraph 1, provides that only sanctioning procedures initiated, with the adoption of the notification of dispute, on a date prior to 25 May 2018 can be subject to facilitated definition. In the present case, all the 5 violations were ascertained with the same number of notifications of objection raised all on 7 November 2018, therefore after that of application of the Regulation.

Furthermore, with regard to the reasons relating to the fact that "(...) the activations disputed here may have been the result only of errors and approximations, certainly not of a malicious intention", it is noted that, while acknowledging the arguments introduced in the hearing report of the parties of 29 January 2019, no elements have been introduced aimed at qualifying any of the constituent elements of the discipline on excusable errors commonly definable as good faith, pursuant to art. 3 of the law

n. 689/1981, also on the basis of what is asserted by the jurisprudence (Cass. Civ. section I of 15 May 2006 n. 11012; Cass. Civ. section II of 13 March 2006, n. 5426).

WHEREAS, on the other hand, that the violation pertaining to notification of dispute no. 20 of 7 November 2018 was ascertained on 3 September 2018 or the release, by the Public Prosecutor of Milan, of the authorization for the use of elements that emerged in the context of the proc. pen. N. 11213/2018 R.G.N.R., and that the notification of the dispute report appears to have taken place on 4 December 2018, i.e. after the 90-day deadline set by art. 14 of the law n. 689/1981, which is why the aforementioned dispute report must be archived;

NOTING, therefore, that Bill Size s.r.l., assuming the role of independent data controller of the data of the interested parties in question pursuant to art. 4, paragraph 1 lett. f) of the Code, carried out 4 (four) separate treatments of personal data, through the activation of telephone cards without the knowledge of 4 (four) interested parties, failing to obtain their consent, in violation of art. 23 of the Code;

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those pursuant to art. 23 of the same Code, with the administrative sanction of payment of a sum ranging from ten thousand euros to one hundred and twenty thousand euros for each of the four alleged violations;

WHEREAS, for the purpose of determining the amount of the fine, 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, of the seriousness of the violation, of the personality and economic conditions of the offender and that therefore the amount of the pecuniary sanction for the violation referred to in art. 162, paragraph 2-bis must be quantified in the amount of 10,000.00 (ten thousand) euros for each of the four disputes, for a total amount of 40,000.00 (forty 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 general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Prof. Licia Califano;

HAS

the archiving of the administrative sanctioning procedure referred to in the dispute report no. 20 of 7 November 2018 since the

notification of the dispute report appears to have taken place after the 90-day deadline set by art. 14 of the law n. 689/1981;

ORDER

to Bill Size s.r.l. VAT number: 03156890125, with headquarters in Varese, via San Martino n. 5, in the person of the pro-tempore legal representative, to pay the total sum of 40,000.00 (forty thousand) euros as a pecuniary administrative sanction for the violation envisaged by art. 162, paragraph 2-bis of the same Code;

ENJOYS

to the same subject to pay the sum of 40,000.00 (forty thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting 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, April 4th 2019

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia