

Injunction order against Mandarin s.p.a. - 11 January 2018

Record of measures

n. 4 of 11 January 2018

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, components and of Dr. Giuseppe Busia, general secretary;

NOTING that the Guardia di Finanza, Special Privacy Unit, in execution of the request for information no. 21868/97157 of 27 July 2015 formulated pursuant to art. 157 of d. lgs. June 30, 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code") carried out a formalized control activity with the reports of operations carried out dated 10 and 11 November 2015, against which, upon dissolution of the reservations formulated at that time, with a note received by the aforementioned special unit of the Guardia di Finanza on November 26, 2015, it was ascertained that Mandarin s.p.a. VAT number: 04579020878, company providing internet access services (isp), based in Catania, via Guastavo Vagliasindi n. 9, in the person of the pro-tempore legal representative, as owner pursuant to art. 28 of the Code:

- 1) kept the telematic traffic data of its customers for the purpose of ascertaining and suppressing crimes, for a period exceeding twelve months from the date of connection / disconnection to the internet (May 28, 2009 - November 11, 2015), in violation of what provided for by art. 132, paragraph 1 of the Code;
- 2) has kept the telephone traffic data of its customers for billing purposes, for a period exceeding six months (June 2014 - 11 November 2015), in violation of the provisions of art. 123, paragraph 2 of the Code;
- 3) has carried out a processing of telematic traffic data, keeping them for the purposes of ascertaining and suppressing crimes, without having adopted the biometric recognition measures for the control of the areas with selected access and strong authentication, in violation of the provisions, pursuant to of art. 17 of the Code, by the General Provision of the Guarantor dated 17 January 2008 published in the Official Gazette. n. 30 of 5 February 2008 (in www.garanteprivacy.it, web doc. No. 1482111), containing "Security of telephone and telematic traffic data";

GIVEN the minutes nn.rr. 116, 117 and 118 all dated 10 December 2015 drawn up by the Guardia di Finanza, Special Privacy Unit, with which Mandarin s.p.a. was challenged, as data controller, company providing internet access services (isp),

respectively ; 1) the administrative violation provided for by art. 162-bis, in relation to art. 132, paragraph 1 of the Code; 2) the administrative violation provided for by art. 162, paragraph 2-bis, in relation to art. 123, paragraph 2 of the Code; 3) the administrative violation provided for by art. 162, paragraph 2-bis, in relation to art. 17 of the Code, informing you, for each of the alleged violations, of the right to make a reduced payment pursuant to art. 16 of the law of 24 November 1981, n. 689; DETECTED from the report prepared pursuant to art. 17 of the law of 24 November 1981, n. 689, relating to the aforementioned dispute reports, which did not appear to have been made for any of the three disputes, the reduced payment; GIVEN the separate defensive writings sent pursuant to art. 18 of the law of 24 November 1981, n. 689, with which the company, in relation to the dispute report no. 116 referred to in point 1), has exclusively motivated the request for payment in installments of the amount of any administrative sanction imposed.

With regard to the notice of dispute no. 117 referred to in point 2) the company, citing the jurisprudence of the Court of Cassation regarding the recurrence of the exemption of good faith, highlighted how due to "(...) an external factor, namely the original setting of the software of e-mail used (....), a copy of the messages was automatically stored on the e-mail server, with the consequence that, despite the deletion of data on the e-mail client, carried out periodically, (...) on the latter the messages deleted from the e-mail server were downloaded again every time - we proceeded to check - if new e-mails had been received ". Furthermore, observing how "(...) the same conduct, that is to say the unencrypted storage of the same telephone traffic data, would be subject to a double penalty, both in the complaint report n. 117/2015 (...) and in the different minutes no. 118/2015 (...) "has led to the violation, in the case that concerns us," (...) of the principle of ne bis in idem (...) "also in light of the recent ECHR rulings (Grande Stevens and others against Italy).

Regarding the report of the contestation n. 118 referred to in point 3), the company observed that "(...) the Radius server on which the database of traffic data stored for the exclusive purposes of ascertaining and prosecuting crimes is based, is based on a Linux operating system and does not exist on market biometric devices compatible with the latter. In order to comply with the above provision (point 7.1 of the General Provision of the Guarantor dated 17 January 2008) it was therefore necessary to provide that access to the server could only take place for through a laptop with a Windows operating system. Therefore, access to the data contained in the database was therefore only possible after; a) connecting the laptop to the Radius server; b) reading the operator's fingerprint appointed; c) having entered the authorization password ". Furthermore, he noted that, with reference to the provisions of point 7.9 of the General Provision of the Guarantor dated 17 January 2008, "(...) the MySQL

virtual disk is in fact distributed in an unpredictable manner within the storage, and it is unthinkable to reconstruct the data from a physical disk ". Furthermore, observing how "(...) the same conduct, that is, the unencrypted storage of the same telephone traffic data, would be subject to a double penalty, both in the complaint report no. 118/2015 (...) and in the different minutes no. 117/2015 (...) "has led to the violation, in the case that concerns us," (...) of the principle of ne bis in idem (...) "also in light of the recent ECHR rulings (Grande Stevens and others against Italy).

CONSIDERING that the arguments put forward by Mandarin s.p.a. they are not suitable to exclude liability in relation to the disputed.

Regarding the report of the contestation n. 117/2015 referred to in point 2), the arguments relating to "(...) an external factor, that is to say the original setting of the e-mail software used (...)", Does not allow to qualify, precisely taking into account the jurisprudence of the Court of Cassation mentioned in the defense statement produced in documents, the constitutive elements of the discipline on excusable error referred to in art. 3 of the law n. 689/1981, given that the error on the lawfulness of the fact, commonly referred to as good faith, can be found as a cause for exclusion of liability only when it is innocent. To this end, that is, a positive element is needed to induce such an error, which cannot be remedied by the interested party with ordinary diligence, an element that cannot be found in the present case. The arguments relating to the fact that "(...) the same conduct, (...) would be subject to a double penalty (...)" and those relating to the violation, in the case that concerns us, "(...) of the principle of ne bis in idem (...)", given that, while taking into account the aforementioned jurisprudence of the ECHR and the Court of Cassation, the aforementioned institution of the apparent concurrence of rules cannot be applied since, with specific reference to the violation of art. 123, paragraph 2 of the Code, the retention of the telephone traffic data of the customers of Mandarin s.p.a. for billing purposes, for a period of more than six months (June 2014 - 11 November 2015) it substantiates exclusively an offense of an administrative nature, where such conduct is not envisaged as a constitutive element in any criminally relevant case, even abstractly with reference to the incriminating rules of the Code. Moreover, on this point it should be noted that the conduct object of the contested report no. 117/2015 concerns the retention of telephone traffic data for billing purposes, while that of the complaint report n. 118/2015 pertains to the different conduct of the failure to adopt the measures and precautions to guarantee the interested parties deemed, pursuant to art. 17 of the Code, necessary by the Authority for biometric recognition aimed at controlling the areas with selected access and strong authentication where telematic traffic data is stored for the purpose of ascertaining and suppressing crimes.

With regard to the notice of dispute no. 118 referred to in point 3), in reiterating what has already been counter-argued regarding the alleged violation "(...) of the principle of ne bis in idem (...)", it should be noted that the Guarantor, in the aforementioned general provision of 17 January 2008, established that the processing of telephone and electronic traffic data must be permitted solely on the basis of the prior use of specific IT authentication systems based on strong authentication techniques, consisting in the contextual use of at least two different authentication technologies. In the same provision, the Guarantor also established how, for traffic data stored for the purpose of ascertaining and repressing crimes, 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 the treatment. Given the above, it is noted that, also in the light of what was declared in the defense brief, it is undisputed that, upon the outcome of the control activity formalized in the minutes of operations carried out on 10 and 11 November 2015, the company, as the company providing internet access services (isp) which processes telematic traffic data stored for the purposes of ascertaining and suppressing crimes, does not use specific IT authentication systems based on strong authentication techniques and, specifically, biometric recognition systems for both control of the areas with selected access and for access to the computer system, thereby contravening the provisions of art. 17 of the Code of the aforementioned General Provision of the Guarantor dated 17 January 2008. While taking note of the arguments relating to point 7.1 of the General Provision of the Guarantor dated 17 January 2008, it does not appear that direct access to the Radius server (on which is the database of telematic traffic data stored for the exclusive purposes of ascertaining and repressing crimes) is prevented through the use of the Linux operating system, which by the company's own admission is not compatible with biometric devices but is obviously still used by society. The foregoing in relation to point 7.9 of the General Provision of the Guarantor dated 17 January 2008, does not allow to qualify the one illustrated by the company as a data protection tool with cryptographic technique aimed at making telematic traffic data unintelligible by resorting to forms of encryption or obfuscation.

NOTING, therefore, that Mandarin s.p.a., a company providing internet access services (isp), as data controller, 1) has kept the telematic traffic data of its customers for the purpose of ascertaining and prosecuting crimes, for a period exceeding twelve months from the date of connection / disconnection to the internet (May 28, 2009 - November 11, 2015), in violation of the provisions of art. 132, paragraph 1 of the Code; 2) has kept the telephone traffic data of its customers for billing purposes, for a period exceeding six months (June 2014 - 11 November 2015), in violation of the provisions of art. 123, paragraph 2 of the

Code; 3) has carried out a processing of telematic traffic data, keeping them for the purposes of ascertaining and suppressing crimes, without having adopted the biometric recognition measures for the control of the areas with selected access and strong authentication, in violation of the provisions pursuant to Art. 17 of the Code, by the General Provision of the Guarantor dated 17 January 2008, containing "Security of telephone and electronic traffic data", pursuant to art. 17 of the Code;

GIVEN art. 162-bis of the Code, which punishes the violation of the provisions of art. 132, paragraph 1, for having kept the telematic traffic data of its customers for the purpose of ascertaining and suppressing crimes, for a period exceeding twelve months from the date of connection / disconnection to the internet (May 28, 2009 - November 11, 2015), in violation of the provisions of art. 132, paragraph 1 of the Code, with a penalty of between ten thousand and fifty thousand euros;

GIVEN art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those of art. 123, paragraph 2, for having kept the telephone traffic data of its customers for billing purposes, for a period exceeding six months (2011 - 2013), with the administrative sanction of the payment of a sum from ten thousand euros to one hundred twenty thousand euros;

GIVEN art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those of art. 17 within the terms provided for by the General Provision of the Guarantor dated 17 January 2008, for failing to implement the measures provided for by the General Provision of the Guarantor dated 17 January 2008 adopted pursuant to art. 17 of the Code, 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 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 and that therefore the amount of the three fines: with reference to the violation of art. 162-bis relating to the notice of dispute no. 116 referred to in point 1) must be quantified in the amount of € 10,000.00 (ten thousand); with reference to the violation of art. 162, paragraph 2-bis relating to the notice of dispute no. 117 referred to in point 2) must be quantified in the amount of € 10,000.00 (ten thousand); with reference to the violation of art. 162-bis relating to the notice of dispute no. 118 referred to in point 3) must be quantified in the amount of € 10,000.00 (ten thousand), for a total amount of € 30,000.00 (thirty thousand);

CONSIDERING, also, to accept the request for installments in 10 (ten) monthly installments of € 3,000.00 (three thousand) each, for a total amount of € 30,000.00 (thirty thousand);

HAVING REGARD to the documentation on file;

GIVEN the law of 24 November 1981 n. 689, and subsequent amendments and additions;

GIVEN the observations of the Office, formulated by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

SPEAKER Dr. Augusta Iannini;

ORDER

in Mandarin s.p.a. VAT number: 04579020878, company providing internet access services (isp), based in Catania, via Guastavo Vagliasindi n. 9, in the person of the pro-tempore legal representative, to pay the total sum of € 30,000.00 (thirty thousand) by way of a pecuniary administrative sanction as indicated in the motivation by dividing it, in acceptance of the installment request, into 10 monthly installments of the amount of 3,000.00 (three thousand) euros each, and divided as follows:

- € 10,000.00 (ten thousand) for having kept the telematic traffic data of its customers for the purpose of ascertaining and prosecuting crimes, for a period exceeding twelve months from the date of connection / disconnection to the internet (May 28, 2009 - November 11 2015), in violation of the provisions of art. 132, paragraph 1 of the Code;
- € 10,000.00 (ten thousand) for having kept the telephone traffic data of its customers for billing purposes, for a period exceeding six months (June 2014 - 11 November 2015), in violation of the provisions of art. 123, paragraph 2 of the Code;
- Euro 10,000.00 (ten thousand) for having carried out the processing of telematic traffic data, keeping them for the purpose of ascertaining and suppressing crimes, without having adopted the biometric recognition measures for the control of the areas with selected access and strong authentication, in violation of the provisions of the General Provision of the Guarantor dated 17 January 2008, containing "Security of telephone and electronic traffic data", pursuant to art. 17 of the Code;

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to the same subject to pay the sum of € 30,000.00 (thirty thousand) according to the methods indicated in the annex, whose split payments will be made by the last day of the month following that in which the notification of this ordinance will take place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689,

prescribing that, within the term of 10 (ten) days from the payment, a receipt of the payment is sent to this Authority, in original or authenticated copy.

Pursuant to art. 152 of the Code and 10 of Legislative Decree n. 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, 11 January 2018

PRESIDENT

Soro

THE RAPPORTEUR

Iannini

THE SECRETARY GENERAL

Busia