

[doc. web no. 9119830]

Closure of the sanctioning procedure - 13 December 2018

Register of measures

no. 509 of 13 December 2018

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 Legislative Decree 196/2003 containing the "Code regarding the protection of personal data" (hereinafter "Code");

CONSIDERING the law n. 689/1981 and subsequent amendments and additions and, in particular, the art. 1, paragraph 2, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

HAVING REGARD to the complaint received by this Authority on 14 February 2018 alleging the unlawful processing of personal data by "XX S.r.l." with registered office in XX, Tax Code and VAT number XX (hereinafter "the Company") for having sent the complainant, by e-mail, some promotional communications in the absence of the latter's consent;

GIVEN the note requesting information signed by the Department of Communications and Telematic Networks prot. no. 9284/124167 of 23 March 2018, addressed to the Company;

HAVING REGARD to the reply note to the Guarantor, sent on 9 April 2018, with which the Company reported that "The complainant's email address was acquired on 29 September 2011 following completion of the form provided for the registration of the event XX held in Milan on 12 and 13 October 2011 (...)" of which event the Company " (...) XX was then XX (...)", also specifying that "(...) subsequently this email was always used by XX respecting privacy to send the invitation to the XX event (...), as well as " (...) for the XX event (...)" ; lastly, that "(...) the subject (complainant) has received a total of n. 3 email communications: a. September 2013 invitation to X; b. 22 November 2017 event invitation XX(...) c. 8 February 2018 invitation to the XX event at the XX (...)" ;

GIVEN the note prot. no. 21108/124167 of 13 July 2018 with which, the Communications and Telematic Networks Department, ascertained an unlawful processing of personal data by the Company for having sent, as data controller "(...) a promotional

communication (precisely on 8 February 2018) (...) in the absence of the necessary prior specific consent (original, i.e. to be acquired at the time of data collection, and subsequent to the opposition made), (...) not resulting in sufficient evidence to be able to document it (...)”, in concluding the investigation, considered that there were no elements to promote the adoption of measures by the Guarantor, since the reported conduct had exhausted its effects (articles 14, paragraph 2, and 11, paragraph 1, letter d), of the Regulation of the Guarantor n. 1/2007), reserving the right, with reference to the conduct of the Company that does not comply with the applicable regulations, to send the documents to the competent Office to verify, with an independent procedure, the occurrence of the conditions to challenge the latter for the administrative violations referred to in articles 23 and 130, paragraphs 1 and 2, of the Code, in relation to art. 162, paragraph 2-bis, of the Code;

GIVEN the note of 12 July 2018, prot. no. 20960/124167, with which the Communications and Telematic Networks Department sent the documents to the Inspection Activities Department so that it could evaluate the occurrence of the conditions for the application of the administrative sanction referred to in article 162, paragraph 2-bis, in relation to the violation administration pursuant to articles 23, 130, paragraphs 1 and 2, and 162, paragraph 2-bis, of the Code;

CONSIDERING the act prot. no. 25153/124167 of 27 August 2018 with which the Guarantor challenged "XX S.r.l." "(...) the violation of the provisions of articles 23 and 130, paragraphs 1 and 2, of the Code, with reference to the absence of consent freely expressed by the interested party for the use of their personal data for marketing purposes, by sending promotional e-mails”;

NOTING that from the administrative report prot. no. 35112/124167 of 30 November 2018, prepared by the Guarantor's Office pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment pursuant to art. 16 of law 689/81;

GIVEN the defense brief sent via PEC on 8 October 2018, pursuant to article 16 of the law of 24 November 1981 n. 689, with which the Company produced further documents, in order to demonstrate the correctness of its conduct.

In particular, with reference to the dispute made, the party, producing new documentation, highlighted that:

- "the consent had been duly acquired on 29/9/2011 through the internet page on the website www.... and in particular the page <http://www....> (...) which is no longer present on the internet" and that "the compilation of said registration FORM generated the record (attached) XX (...) in the DATABASE "XX" at the time".
- "the same name and the same email 2 years later was then included among the guests of the XX event of 2013, in accordance with the consent obtained at the time (...);

- the complainant "(...) has never requested cancellation from said Database in any of the emails sent (...) even if he had been given the option via the button inserted at the foot of XX's invitation email.

In consideration of what was represented, the party finally requested "(...) a hearing in order to definitively clarify the (...) (own) correct operation (and) (...) request the archiving (...) (of the) method";

HAVING REGARD TO the minutes of the hearing of the parties, which took place on 27 November 2018, during which the Company fully recalled the defense briefs already presented and verbally illustrated, in detail, the method for correct reading, from an IT point of view, of the documentation produced;

CONSIDERING, with reference to the documentation produced by the party in order to demonstrate the release of consent by the claimant during the XX event, held in Milan on 12 and 13 October 2011, the following: the registration form reproduced in the "ANNEX A" does not report, in the spaces to be filled in with the personal data, any data of the complainant, but, only, the selection sign only on the first of the two flags, underlying these spaces, relating to the following consent: "Pursuant to the Articles 13 and 23 of Legislative Decree 196 of 2003 declare that I have read the information relating to the processing of my data and I express my consent to the processing of the same by XX or XX for the performance of XX's services or for the 'sending information communications relating to upcoming events by XX or XX S.r.l.'".

Given the absence of the complainant's data in the aforementioned annex, the identification of the author of the flagging is possible, however, by examining the other annex produced by the party together with the defense brief, called "ANNEX B", in which it is present a record indicating, among other things, both the name of the complainant and the expression of consent through the addition of the number "1" in reference to the first of the two flags present in the form, called "XX" and "XX".

Taking this into account, the Company has therefore produced documentation capable of demonstrating the existence, from the outset, of a consent expressed by marking the first of the two flags present in the form on the website www..... This consent was aimed at performance of XX services or the sending of information communications relating to upcoming events by XX or XX S.r.l., an activity lawfully carried out with the email dated 8 February 2018.

CONSIDERING therefore that the arguments put forward by the Company are suitable for determining the closure of the sanctioning procedure initiated with the dispute of administrative violation in consideration of the fact that the Company has demonstrated that the email of 8 February 2018 had been sent on the basis of consent for this purpose made by the interested party;

CONSIDERING, therefore, that it is necessary to file the sanctioning procedure relating to the violation of articles 23 and 130 of the Code, referred to in report no. 25153/124167 of 27 August 2018;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

HAS

the filing of the administrative sanction procedure relating to the contestation of the administrative violation referred to in articles 23 and 130 of the Code, in the terms referred to in the justification;

Rome, 13 December 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia