[doc. web no. 9101755]

Injunction order - February 2, 2019

Register of measures

no. 40 of 7 February

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;

NOTING that the Special Privacy Unit of the Guardia di Finanza, in execution of the request for information from the Guarantor no. 26779/97157 of 28 September 2015, formulated pursuant to art. 157 of the Code, carried out the checks, pursuant to art. 13 of law 689/1981, at the "XX a.r.l.s.f.l." as an associate - for the use of the "XX Roma" trademark owned by "XX L.L.C. - to "XX S.r.l.", (hereinafter the "Company"), exclusive concessionaire in Rome of the aforementioned brand, with registered office in Rome, Via ... - P.I. .... These investigations, aimed at verifying the legitimacy of the processing of personal data carried out by the Company, were formalized by the soldiers of the Guardia di Finanza in the report of operations carried out on 7 October 2015;

GIVEN the documents of the inspection assessment;

CONSIDERING that, on the basis of the statements made during the investigations and the documentation produced by the Company to the Special Privacy Unit of the Guardia di Finanza, it was found that:

- " (...) the XX a.r.l.s.f.l. (at which the inspection was carried out) uses the XX trademark for its gym located in Rome .... This trademark is owned by XX L.L.C. and was licensed to XX S.r.l. which in turn has (stipulated) a contract with the XX a.r.l.s.f.l. for the use of the aforementioned trademark. (…) The XX a.r.l.s.f.l. it is 60% owned by XX S.r.l., with registered office in Rome in via ..." (see report of operations carried out on 7 October 2015, page 2, point 1);

- the Company owns the website www... and the redirect website www... in which, on the "contact us" page (useful for getting in touch with the center and which includes three options such as "info centre", "search work" and "partnership"), on the "suspensions" page (useful for suspending a subscription), as well as on the "guest" page (useful for receiving an invitation to try the club), personal data collection forms are provided for customers, or any customers, aimed at the performance, by the Company, of the services described above;

- at the bottom of the aforementioned data collection forms, the boxes (so-called check-box) for accessing the text of the "Privacy Policy" and the "Regulations", documents both accessible via the relative links, are already pre-flagged (attachment No. 7 to the report of operations carried out on 7 October 2015) and are marked as mandatory fields by appropriate asterisks. In particular, in point no. 5 of the information, the Company informs that the data collected will be "(...) processed for the entire duration of the contractual relationships established and also subsequently for the fulfillment of legal provisions and for commercial purposes", and, in point n. 26 of the Regulation, it is envisaged that “(…) such data will be used to send commercial offers and/or communications to subscribers by XX and/or the Partners. If the visitor does not intend to receive the aforementioned commercial offers, he is required to give written notice to: XX Roma, via ...”;

- the Company, for carrying out the aforementioned activities, referring to the collection of data through the forms, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is the owner of the processing of personal data;

CONSIDERING the report n. 80 of 8 October 2015 with which the Special Privacy Unit of the Guardia di Finanza challenged the Company for processing in violation of the provisions indicated in art. 167 of the Code for the failure to obtain the consent pursuant to art. 23, paragraph 3, in relation to art. 162, paragraph 2-bis, of the same Code; this, as " (...) to send requests via the data collection forms on the "contact us" "suspensions" and "guest" pages, interested parties find the boxes relating to "privacy information" and "regulation" already pre-flagged and marked as mandatory fields, thus providing mandatory consent for the sending of commercial proposals by XX S.r.l.”, contrary to the provisions of the aforementioned art. 23, paragraph 3, for which "consent is validly given only if it is expressed freely and specifically with reference to a clearly identified treatment (...) and if the information referred to in article 13 has been provided to the interested party";

NOTING that from the administrative report prot. no. 159648/15 of 10 December 2015, prepared by the Special Privacy Unit of the Guardia di Finanza 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 dated November 3, 2015, produced by the Company pursuant to article 16 of law November 24, 1981 n. 689, in order to demonstrate the correctness of one's conduct.

In particular, with reference to the dispute made, the party, in order to obtain the closure of the sanctioning procedure, argued that "for the existence of the violation in question, the user should be put in the position of not being able to access the chosen service without give consent to the processing of data also for commercial purposes". This hypothesis "in the case that concerns us (it is not recognized as) the consent cannot be said to be compulsorily given (since) to access and to be able to use the same services referred to in the areas of the site in dispute, the user had to also available the telephone numbers of the center and could access them without necessarily giving consent to the processing of data for commercial purposes (...) ".

Alternatively, for the purpose of "(...) reducing the alleged harmfulness of the conduct and consequently the sanction (...)" if the disputed liability is ascertained, the Company has highlighted that it is the owner of a single site referred to at www. ..., constituting, instead, a "redirect" the address related to www.....

In the memorandum it was then highlighted both that the offers of a commercial nature to site users were exclusively those sent by the Company and referred to the XX center (with the exclusion, therefore, of data communications by the Company to third parties) both that the majority of users who access the site are members of the gym and therefore give valid written consent, to receive offers, at the time of enrollment in the sports center and that the Company immediately took action to overcome the irregularity detected in the course of inspection;

HAVING REGARD TO the minutes of the hearing of the parties, which took place on 7 November 2016, during which the Company, recalling in full the defense briefs already presented, specified that the pre-flagging of the consent was eliminated on 3 November 2015 and, moreover, reiterated the request for dismissal of the sanctioning procedure as well as, alternatively, the application of the statutory minimum of the sanction, further reduced pursuant to art. 164-bis, paragraph 1, of the Code;

GIVEN the defense brief sent to the Guarantor, on 23 October 2018, pursuant to art. 18, paragraph 4, of Legislative Decree 101 of 10 August 2018, with which the Company renewed what was represented and requested with the first defense brief, as well as during the aforementioned hearing;

CONSIDERING that the arguments put forward by the Company are not suitable to fully accept the requests formulated in the defense briefs.

In fact, in this circumstance, the existence of the violation does not occur, as envisaged, due to the access by the user to the

service, even for commercial purposes, "conditional" to the provision of consent, but due to the activation of the provisions of point no. 5 of the information and in point n. 26 of the Regulation, concerning the sending of promotional offers, through a flawed consent as expressed not by the user freely, but by the Company, by flagging the boxes (so-called check-box) to access the text of the "Informative privacy" and the "Regulation" model. In fact, the requirement of freedom to provide consent is no longer required when these boxes are already pre-selected by the data controller in order to automatically acknowledge the data subject's consent, as highlighted both in the Opinion - WP187 n.15 of 13 July 2011, on the definition of consent, both by the Guarantor, several times, in various provisions, including the one also mentioned in the dispute report n. 80 of 8 October 2015: "Consent to processing on the Internet and use of data for promotional purposes" of 10 May 2006, doc. web no. 1298709, traceable at www.gpdp.it.;

NOTING that, on the basis of the considerations referred to above, the Company, as data controller pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is found to have committed a violation of one of the provisions indicated by art. 167, specifically of the art. 23 of the Code, sanctioned by article 162, paragraph 2-bis, of the same Code, for having processed personal data of customers and any customers, collected through its website, for promotional purposes in the absence of the legitimately given consent of the interested parties ;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violations indicated in art. 167, including the violation relating to art. 23 of the Code, with the administrative sanction of payment of a sum ranging from 10,000.00 (ten thousand) to 120,000.00 (one hundred and twenty thousand) euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that, if any of the violations referred to in articles 161, 162, 162-ter, 163 and 164, is less serious, the minimum and maximum limits are applicable in an amount equal to two fifths. In the present case, the lesser gravity was assessed in the light of the type of personal data being processed and the fact that such data have not been disclosed to third parties;

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, therefore, on the basis of the aforementioned elements evaluated as a whole, considering that the Company took action immediately after the inspection to correct the irregularity ascertained, to have to determine, pursuant to art. 11 of

the law n. 689/1981, the amount of the fine provided for by art. 162, paragraph 2-bis of the Code, for the administrative violation pursuant to art. 23 of the Code, in the minimum amount of 10,000.00 (ten thousand) euros reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of less seriousness, for an amount equal to Euro 4,000.00 (four thousand);

HAVING REGARD to the documentation in the deeds;

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, adopted with resolution of 28 June 2000;

SPEAKER Prof. Licia Califano;

ORDER

to "XX S.r.l.", with registered office in Rome, Via ... - P.I. ...., to pay the sum of 4,000 (four thousand) euros as a pecuniary administrative sanction for the violation indicated in the justification;

ENJOYS

to the same Company to pay the sum of Euro 4,000.00 (four thousand) according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive deeds 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 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, 7 February 2019

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia