

Injunction against Dalmesse Italia s.r.l. - June 6, 2018

Register of measures

no. 378 of 6 June 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;

NOTING that the Guardia di Finanza, special privacy unit, with report no. 90 of 7 November 2017 (notified on 16 November 2017), challenged Dalmesse Italia s.r.l., in the person of its pro-tempore legal representative, with registered office in Treviso, viale Luzzatti n. 88, tax code 03653010268, the violations foreseen by the articles 13, 26, 161, 162, paragraph 2-bis and 167 of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196, hereinafter referred to as the "Code");

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- the special privacy unit of the Guardia di Finanza carried out inspections against Dalmesse Italia s.r.l., on 31 August and 1 September 2017, as part of the six-monthly inspection program established by the Guarantor;
- the assessment made it possible to verify that the Company processes the personal data of customers, collected in the various marketing phases of the products offered by means of the sales representatives, in its capacity as data controller;
- the Company is the owner of the website www.dalmesseitalia.it through which it processes the personal data of users in its capacity as data controller;
- on the aforementioned website there are the pages "become a consultant" and "how to buy", with the respective contact forms for data collection, active and functioning;
- in correspondence with each form of contact there is a box bearing the wording "I confirm that I have read and understood the privacy information" which does not refer to any information text;
- none of the pages of the company website contains information pursuant to art. 13 of the Code;
- the Company also carries out sales of durable goods (so-called "technical aids") under the VAT rate regime facilitated in favor

of categories of the handicapped, requesting from the relative customers, in addition to the standard forms (commission proposal and information), the compilation and signing of a self-certification form called "The purchase of technical and IT aids with a reduced VAT rate " to which it is necessary to attach the required health certification;

- the disclosure template attached to the commission proposal makes no mention of the processing of sensitive data with reference to the circumstance of the sale of durable goods under the VAT regime. facilitated;

- for the aforesaid treatment, the acquisition, by the interested parties, of a specific written consent to the treatment of sensitive data is not envisaged;

NOTING that with the aforementioned report no. 90/2017 were contested against Dalmesse Italia s.r.l. violations of the provisions of the Code regarding information (for treatments carried out through the company website and for those carried out in relation to the sale of technical aids), and the acquisition of written consent for the treatment of sensitive data suitable for revealing the status health of the person concerned;

READ the administrative report, drawn up by the Guardia di Finanza, with which it was represented that Dalmesse Italia s.r.l. has failed to pay a reduced amount of the penalties relating to the disputed violations;

READ the defense briefs presented on 15 December 2017 and the minutes of the hearing of the company on 24 May 2018, in which the following are represented:

- As for the lack of information on the site [...]we point out that the disputed lack of information in the forms on the site should be examined in the broader context in which this form was inserted. In fact, even if the information does not appear to be consulted in the form (due to a mere technical error, due to a lack attributable to the collaborator who assisted us at the time of creating the site), it is still present on the site and in all the forms of the site itself and in any case the interested party, providing his/her contact details, receives a confirmation message with references to the information on data processing. This excludes the possibility that data may be collected without the data subject's knowledge and for purposes that go beyond responding to the request formulated by the data subject.";

- As for the unsuitability of the information [relating to the processing of sensitive data suitable for revealing the state of health of the interested parties], the company points out that in fact the company has not practiced with the data collected through the site or the paper forms in use any processing activities with the aim of implementing real structured marketing actions or mass email marketing campaigns; The data collected is in fact always used for accounting, administrative or fiscal purposes and to

provide a response to specific requests made by the interested parties themselves. All this is confirmed, in terms of fact, by the consideration that our company has never received complaints from interested parties following the processing of their data.

We believe that this total lack of objections is the clearest sign of the fact that the data has actually been processed in a limited way and only for purposes connected to the management of the contractual or pre-contractual relationship with the customer.

- As for the failure to obtain consent for the processing of data suitable for revealing the state of health "it is quite evident that Dalmesse Italia processes the sensitive data of the interested parties only in the light of current legislation for fiscal reasons. In particular, the Law of 5 February 1992, n. 104, in general, gives the right to concessions on the purchase of consumer goods, provided that the existence of a functional connection between the impairment/disability of the purchaser and the type of product to be purchased is documented. The functional connection is established by the attending physician who issues the authorization prescription, if he believes that there is that relationship between the product and the type of disability. It is therefore evident that the collection of sensitive data is instrumental to the exercise of a right by the interested party and to the management of a consequent obligation on the part of the owner. Consequently, the treatments carried out by Dalmesse Italia are limited to responding to the requests of the interested parties and actually fall within the scope of the activities envisaged by art. 24 and 26 of Legislative Decree 196/2003 which identify the cases in which the consent of the interested party is not necessary for the legitimate processing of his data.";

CONSIDERING that the arguments put forward, together with the documents acquired during the sanctioning procedure, are not suitable for determining the closure of the sanctioning procedure for the following reasons:

- with reference to the omitted information in the processing carried out through the company's website, it must be highlighted that it constitutes full proof up to a complaint of forgery when reported in the report of operations carried out on 31 August 2017 and in the notification of dispute no. 90/2017, which specifies that "on the pages 'become a consultant' and 'how to buy' there are two data collection forms; in both contact forms there is a check box called 'I confirm that I have read and understood the privacy policy; the wording shown in correspondence with the check box does not refer to any privacy information text; in the pages of the site there is no privacy information pursuant to art. 13 of the Code". From the examination of the documentation acquired during the inspection, there is only one document called "privacy policy" which deals exclusively with navigation data or in any case anonymous data and not with those that can be acquired through the forms on the website. It must therefore be confirmed that the aforementioned treatments were carried out without suitable information being released by the data

controller;

- with reference to the processing of sensitive data suitable for revealing the state of health of the interested parties, it is amply proven by the results of the sanctioning procedure, and confirmed by the company itself, that Dalmesse Italia s.r.l. proceeded with the collection and processing of data suitable for detecting the state of health of the interested parties for the purpose of reducing the rate relating to the value added tax for the purchase of technical aids. This treatment requires the acquisition, by the owner, of the written consent of the interested parties after having provided complete information pursuant to art. 13 of the Code. No trace was found of an information model indicating the processing of sensitive data carried out and of a consent acquisition model among the documentation acquired during the investigation since the documents present refer to standard information and data acquisition models. consent for treatments for promotional purposes. It must therefore be confirmed that the aforementioned treatment, attributable to the areas governed by the "Authorization for the processing of data suitable for revealing the state of health and sexual life", n. 2/2016, adopted by the Guarantor on 15 December 2016, point 1.2, lett. e) (in www.gdpd.it, web doc. n. 5803257), was carried out in the absence of the consent provided for by art. 26 of the Code;

NOTING, therefore, that Dalmesse Italia s.r.l., on the basis of the deeds and considerations referred to above, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code, the violations indicated in dispute no. 90/2017 and, in particular,

a) the violation of the art. 13 of the Code, sanctioned by art. 161, with reference to the omitted information in the processing of personal data carried out through the company's website;

b) the violation of the art. 13 of the Code, sanctioned by art. 161, with reference to the omitted information in the processing of sensitive data suitable for revealing the state of health of the interested parties;

c) the violation of the art. 26 of the Code, sanctioned by art. 162, paragraph 2-bis, with reference to the failure to acquire written consent for the processing of sensitive data suitable for revealing the state of health of the interested parties;

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;

CONSIDERING the art. 161 of the Code, which punishes the violation of art. 13, with the administrative sanction of payment of a sum ranging from 6,000 to 36,000 euros, for each of the two disputed violations; seen the art. 162, paragraph 2-bis, of the Code which punishes violations of the rules indicated in art. 167, among which the art. 26 of the Code, with the administrative

sanction of payment of a sum from 10,000 to 120,000 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;

WHEREAS, in the present case:

- with regard to the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are not particularly serious;
- for the purposes of evaluating the work performed by the agent, the fact that the company has in any case undertaken, following the inspection, a process of adaptation of the procedures, aimed at eliminating the critical issues identified, must be considered in favorable terms;
- regarding the personality of the author of the violation, the company is not burdened by previous sanctioning proceedings defined with a reduced payment or order-injunction;
- with regard to the economic conditions of the agent, the financial statements for the year 2016 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law. no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, to the extent of:

- 6,000 (six thousand) euros for the violation referred to in point a);
- 6,000 (six thousand) euros for the violation referred to in point b);
- 10,000 (ten thousand) euros for the violation referred to in point c);

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, 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, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to Dalmesse Italia s.r.l., in the person of its pro-tempore legal representative, with registered office in Treviso, viale Luzzatti n. 88, tax code 03653010268, to pay the sum of 22,000 (twenty-two thousand) euros as an administrative fine for the violations

indicated in the justification;

ENJOYS

to the aforementioned company to pay the sum of 22,000 (twenty-two 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 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, 6 June 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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