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Injunction against Mister Brick S.a.s. - August 5, 2022

Register of measures

no. 296 of 5 August 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components, and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE (General Data Protection Regulation, hereinafter "Regulation");

HAVING REGARD TO the Personal Data Protection Code (Legislative Decree June 30, 2003, No. 196), as amended by Legislative Decree August 10, 2018, No. 101, containing provisions for the adaptation of the national legal system to the aforementioned Regulation (hereinafter the "Code");

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;

SPEAKER the lawyer Guido Scorza;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

1.1. Preliminary investigation

With the complaint of 4 December 2021, presented to this Authority pursuant to art. 77 of Regulation (EU) 2016/679 (hereinafter the "Regulation"), Mr. XX complained of the receipt, on 24 October 2021, of an unsolicited promotional communication originating from the "Mr.Brick" e-mail address <corsocucc @gmail.com> and concerning the leasing of properties in the municipality of Milan offered by the real estate brokerage company, Mister Brick Sas. di Gangi Dino Alessandro & C. (hereinafter «Mister Brick»; «Company»). The complainant declared that he did not consent to the receipt of the aforementioned promotional communication and complained of the failure to respond to the request to exercise the rights

referred to in articles 15, 17 and 21 of the Regulation, sent by email on 24 October 2021 to the email address indicated in the Company's privacy policy, which can be found on the relevant website.

In response to the request for information, formulated by this Office on 9 December 2021 pursuant to art. 157 of Legislative Decree no. 196/2003 (Code regarding the protection of personal data, hereinafter the "Code"), the Company, with communication dated 28 December 2021, declared that it had "never processed personal data [...] of Mr. XX" and attributed the responsibility for the conduct complained of by the complainant to the company XX, with which the same allegedly stipulated a contract in 2017 (of which, however, it did not provide evidence during the proceeding) for the carrying out of advertising campaigns; in confirmation of this, it produced a "release of liability", dated 19 October 2021, with which the XX allegedly relieved the Company of any charge relating to promotional initiatives. Furthermore, he stated that the company XX, attributable to this XX, consulted by the complainant, proceeded to remove his personal data.

1.2. The dispute

In the light of what emerged in the preliminary investigation, on the basis of the overall documentation acquired, on 4 April 2022 Mister Brick was notified of the initiation of the proceeding pursuant to art. 166, paragraph 5, of the Code.

The Office, in particular, has detected a framework of poor control by the Company in the treatments aimed at carrying out the promotional campaign object of the complaint, with consequent inability to comply with the obligation to prove compliance with the rules (accountability of the owner), however, there is no evidence of a formal act of appointment towards XX, or of a contractual documentation that defines the related responsibilities. Consequently, the Company was charged with violating articles 5, par. 2, 24 and 28 of the Regulation, as well as articles 12, 15, 17 and 21 of the Regulation, since the request to exercise the rights formulated by the interested party on 24 October 2021 was not found within the required time limits and also considering the overall inadequate level of transparency of the treatments carried out for promotional purposes.

Furthermore, the Company was charged with violating art. 6, par. 1, lit. a) of the Regulation and of the art. 130 of the Code, due to the sending of a promotional e-mail to XX in the absence of specific consent.

1.3. Mr. Brick's defense

With the defensive writings of May 4, 2022, the Company admitted that it had not "properly ensured that [...] XX operated in a manner compliant with the GDPR, having relied only on the verbal guarantees and professionalism of the person in charge of the marketing campaign" ; moreover, in declaring that he had reprimanded the Company that carried out the promotional

campaign, he specified that he had updated "the configuration of the advertising emails" as well as "the existing contract with […] XX, scheduling half-yearly checks".

2. ASSESSMENTS CARRIED OUT BY THE OFFICE

The arguments produced by the interested party during the procedure, also in relation to other complaints presented by the same relating to the same case and all united by the marketing activity carried out by XX, highlight the difficulty of being able to trace the data controller. Through in-depth checks conducted by the complainant, and the subject of an investigation still underway by the Office, an unclear picture emerged regarding the subjective profile of the conduct: the name "XX", to which the XX is associated, is also connected to other companies against which XX has lodged specific complaints. The same "XX", behind which this XX would be hidden (as per checks carried out by the complainant), consulted by XX, would not have been able to provide information on the origin of the data, nor, much less, document the acquisition of consent. Apart from this circumstance, the documentation relating to the 2017 contract that the Company allegedly signed with the XX was not produced, but only the update of the same deed to 22 April 2022, signed after the conduct complained of in the complaint, not allowing the 'office to verify whether the treatment object of the complaint took place or not in the presence of a formal act of appointment which would have allowed an overall assessment of the treatments and the adequacy of the negotiating division of responsibilities.

However, from the examination of this contract, it emerged that XX undertook to select a certain target of users to whom promotional communications should be addressed on the basis of the requirements identified by Mister Brick (defined as "Customer") and attributable to macro-categories such as: target of interest, type of commercial activity, geographical area, shipping date, type of campaign. The data of the recipients are extracted from the databases of the Suppliers of the XX (also called "web publishers") who would have acquired them through registrations to online services of various kinds (for example: contests, comparison sites, various portals) on the occasion of which users would have given their consent to the communication of data to third parties for marketing purposes.

In the qualification of roles and responsibilities, in relation to the data present in the aforementioned databases (point 7 of the contract), both the Customer (Mister Brick) and the Suppliers are defined as independent data controllers, while the XX would act as data controller as would operate on the basis of the purposes defined by the Customers themselves; however, this qualification of the XX appears to conflict with the attribution to the same of the ownership of the processing of the "personal

data provided by the Customer and necessary for the execution of the [...] contract" (point 8 "Privacy"). Furthermore, the responsibility of XX was agreed in relation to the treatment in question with express indemnification in favor of the Customer for any damage that may derive from the illicit use of personal data.

3. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also on the basis of the statements of the Company for which the declarant is liable pursuant to art. 168 of the Code, the following legal assessments are formulated.

Firstly, it is necessary to recall the definition of "owner" pursuant to art. 4 of the Regulation, or the natural or legal person who, individually or together with others, determines the purposes and means of the processing.

In the present case, Mister Brick has concretely determined the purpose for which the treatment was put in place (the transmission of promotional messages) and has commissioned XX the advertising campaign of its initiatives. In fact, on the basis of the documentation produced by the interested party accompanying the complaint, the complained e-mail concerned the promotion of services attributable to Mister Brick and contained in the content the link to the relevant website http://www.misterbrickimmobiliare.it (cif. "Click here for more information"). Such a configuration of the messages must be considered suitable to generate in the recipients the belief that they have been contacted directly by Mister Brick and, for these reasons, the complainant himself first contacted the Company, at the contact details found in the relative privacy information, on the basis of this legitimate expectation.

In this regard, we must recall what was clarified by the Guarantor with the general provision of 15 June 2011 (in www.garanteprivacy.it, web doc. n. 1821257) with specific regard to the fact that "[...] contacts of a promotional nature are carried out in the name, however on behalf and in the interest of the proposing company; with the effect that a legitimate expectation is generated in the interested parties, since they perceive that they are recipients of advertising initiatives carried out directly by the company on whose behalf the proposal for the sale of products or services is formulated". In these terms, the proposer, being the subject who determines the promotional purpose of the treatment and the means for its execution, as well as being the subject in whose interest the treatment is carried out, is configured as data controller. Instead, the subject who, on behalf of these, actually performs the service, can be, depending on the concrete attitude of the roles between the parties, a co-controller or a data processor, as clarified by the Guarantor in the Guidelines on promotional activity and fight against spam of 4 July 2013 (web doc. n. 2542348) and in the provision of 26 October 2017 (web doc. n. 7320903), as well as

in the provision n. 7 of 15 January 2020 (web doc. n. 9256486).

Therefore, while claiming his own extraneousness to the collection of the complainant's data, it appears that the communication received from Mr. XX was made in the name and in the interest of the Company which, for these reasons, must be considered the owner having, concretely, determined the decisions regarding the purposes and methods of processing (see art. 4 of the Regulation) (see in addition to the aforementioned provisions of 26 October 2017 and provisions of 15 January 2020, also: provisions of 25 November 2021, web doc. no. 9736961 ; provision 25 November 2021, web doc. n. 9737185; provision 2 December 2021, web doc. n. 9731682; provision 2 December 2021, web doc. n. 9731664; provision 16 December 2021, web doc. No. 9742704). In particular, Mister Brick established the reason for the treatment (transmission of promotional messages) and chose the criteria that the XX should have followed to carry out the promotional campaign (target, time periods for mailings, the type of messages: standard or personalized), thereby defining the essential means of the treatment itself.

For these reasons, the reconstruction proposed by the parties according to which, in the processing in question, Mister Brick would be a mere client without any role pursuant to data protection legislation cannot be shared: the Company appears to have exercised the prerogatives of the holder also in the phase of appointment and instruction to XX, the latter subject to an independent preliminary investigation.

Given this, it must be taken into account that, in the response provided to the Authority on 4 May 2022, Mister Brick essentially admitted the lack of adequate technical and organizational measures, governed by art. 24 of the Regulation. In particular, the Company admitted that it had not "properly monitored" the work of the XX which it used to find contact lists and to send promotional communications material for its brand, relying on the alleged professional guarantees offered by the partner and trusting in the positive results of the collaboration established (see cited provision November 25, 2021).

What has been described up to now allows us to outline a picture of inadequate control by the Company in the treatments aimed at carrying out the promotional campaign: it does not appear that Mister Brick has asked the partner for documentation proving the existence of the requisites of lawfulness of the treatment, such as the origin of the data, the information provided and the consents acquired when users register on the websites owned by the Suppliers that XX uses to find contact lists, or that it has verified this in any other way.

The Authority has repeatedly highlighted that the new principles dictated by the Regulation frame the responsibilities of the

data controller in an accountability perspective and impose proactive behaviors consistent with the purpose of proving, in each phase, the legitimacy of the treatments themselves (see above all article 5, paragraph 2, of the Regulation, as well as article 24 responsible for the precise regulation of the said principle).

Given this, in this case, the processing of personal data, carried out with the use of personal data lists from third parties for marketing purposes, was found to lack the requirements of lawfulness, correctness and transparency identified by art. 5 of the Regulation. Therefore, the violation of articles is considered integrated 5, par. 2, and 24 of the Regulation.

Furthermore, the conduct described gave rise to the sending of promotional messages without consent, pursuant to articles 6, par. 1, lit. a) of the Regulation and 130, paragraphs 1 and 2, of the Code, since the Company has not produced any evidence capable of documenting the acquisition.

Finally, the circumstance of failure to respond to the request made by the interested party can be considered confirmed, with consequent violation of articles 12, par. 3, and 15 of the Regulation.

However, in the overall assessment of the facts, account must be taken of the sporadic conduct (only one complained promotional communication appears in the file), the subject of a single complaint, the absence of previous investigations and sanctions, the marginal nature of the promotional activity through e-mail, of the modest extent of the damage since only one e-mail was sent to the complainant without involving the dissemination of personal data and, in a collaborative and proactive perspective, of future improvement interventions on data processing, through checks half-yearly.

In light of the above, pursuant to art. 58, par. 2, lit. f) of the Regulation, it is necessary to impose on Mister Brick the prohibition of the processing of personal data collected without having acquired the aforementioned necessary prior informed consent of the interested party in relation to the marketing activity.

It is also necessary to order Mister Brick, pursuant to art. 58, par. 2, lit. d) of the Regulation, if it intends to make use of third parties for promotional activities in the future, to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the provisions on the matter and, in particular, to obtain prior free, specific consent , unequivocal and documented data subjects for sending commercial communications.

Furthermore, pursuant to art. 58, par. 2, lit. d) of the Regulation to adopt suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights of the interested parties. Furthermore, it is necessary to enjoin the Company to issue suitable prior information to the interested parties with respect to the processing of their data.

Finally, with regard to the treatments already carried out and with dissuasive purposes, it is believed that the conditions exist for the application of a pecuniary administrative sanction pursuant to articles 58, par. 2, lit. i) and 83, par. 5, of the Regulation.

4. INJUNCTION ORDER FOR THE APPLICATION OF THE PECUNIARY ADMINISTRATIVE SANCTION

On the basis of the foregoing, given the violations referred to, the sanction provided for by art. 83, par. 5, of the Regulation.

For the purposes of quantifying the administrative fine, the aforementioned art. 83, par. 5, in setting the statutory maximum in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year where higher, specifies the methods for quantifying the aforementioned fine, which must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), identifying, for this purpose, a series of elements listed in paragraph 2 of the art. 83 in question, to be evaluated when quantifying the relative amount.

As aggravating circumstances, in the present case, it is deemed necessary to take into account:

1. of the subjective dimension of the conduct, to be considered grossly negligent, with particular reference to the lack of feedback provided both to the interested party and to the Authority (letter b).

As mitigating elements, the following must instead be considered:

1. the small number of interested parties involved (only the complainant) as well as the common nature of the data processed (letters a, g);

2. the absence of previous proceedings initiated against the Company (letter e);

3. the lack of further reports or complaints (letter h);

4. the particular socio-economic situation that has affected the country in relation to the pandemic emergency (letter k).

Based on the set of elements indicated above, in application of the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1 of the Regulation, taking into account the necessary balance between the rights of the interested parties and the freedom to do business, also in order to limit the economic impact of the sanction on the organisational, functional and employment needs of the Company, it is believed that it should apply to Mister Brick - also taking into taking into consideration other similar cases (see aforementioned provisions, as well as provision no. 126 of April 7, 2022, web doc. no. 9771529, and provision no. 153 of April 28, 2022, web doc. no. 9779025) - the administrative sanction of the payment of a sum of Euro 1,000 (one thousand/00), equal to 0.005% of the statutory maximum of Euro 20 million.

In the case in question, it is believed that the ancillary sanction of publication on the website of the Guarantor of this provision

should also be applied, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019, taking into account the subject matter of the preliminary investigation, namely the phenomenon of unwanted marketing, with respect to which this Authority has adopted numerous measures both of a general nature and aimed at specific data controllers and on which the attention of the 'user.

Please note that pursuant to art. 170 of the Code, anyone who fails to comply with this provision prohibiting processing is punished with imprisonment from three months to two years and, in the event of non-compliance with the same provision, the sanction referred to in to art. 83, par. 5, letter. e) of the Regulation.

Finally, the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations detected here in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f) of the Regulations, declares the processing carried out by Mister Brick S.a.s. di Gangi Dino Alessandro & C., with registered office in Bergamo, via Fratelli Bronzetti 4/B, VAT number 02635920164, described in the terms set out in the justification, and, therefore, declares the complaint well founded;

a) pursuant to art. 58, par. 2, lit. f) of the Regulation, prohibits any further processing of personal data collected for promotional purposes without the necessary prior informed consent of the interested parties having been acquired;

b) pursuant to art. 58, par. 2, lit. d) of the Regulations, if it intends to carry out promotional activities in the future, directly or through third parties, enjoins the Company to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the provisions on the matter and, in particular, to acquire in advance an informed, free, specific, unequivocal and documented consent of the interested parties for the sending of commercial communications, pursuant to articles 6 and 7 of the Regulation and 130 of the Code;

c) pursuant to art. 58, par. 2, lit. d), of the Regulation, enjoins the Company to adopt suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights as well as to issue suitable preventive information to the interested parties, pursuant to articles 12, 13 and 14 of the Regulation, with respect to the processing of their data;

The Guarantor, pursuant to art. 58, par. 1, of the Regulation, also invites the data controller to communicate within 30 days from the date of receipt of this provision, which initiatives have been undertaken in order to implement the provisions of this

provision and in any case to provide adequately documented feedback. Please note that failure to respond to the request pursuant to art. 58 is punished with the administrative sanction pursuant to art. 83, par. 5, letter. e), of the Regulation.

ORDER

to Mister Brick to pay the sum of Euro 1,000.00 (one thousand/00), as an administrative fine for the violations indicated in the justification, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute, with the fulfillment of the instructions given and the payment, within the term of thirty days, of an amount equal to half of the fine imposed;

ENJOYS

to the aforementioned Company, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of Euro 1,000.00 (one thousand/00), 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 the 'art. 27 of the law n. 689/1981;

HAS

as an accessory sanction, pursuant to art. 166, paragraph 7, of the Code and of the art. 16 of the Regulation of the Guarantor n. 1/2019, the publication on the Guarantor's website of this provision and, pursuant to art. 17 of the Regulation of the Guarantor n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation, of the violations and of the measures adopted.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, 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 owner of the processing of personal data has his residence, or, alternatively, with the court of the place of residence of the interested party. , within the term of thirty days from the date of communication of the provision itself, or sixty days if the appellant resides abroad.

Rome, 5 August 2022

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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