[doc. web n. 9693464]

Order injunction against Tim S.p.A. - July 8, 2021

Record of measures

n. 272 of 8 July 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repealed the directive 95/46 / EC (hereinafter "Regulation" or "GDPR");

GIVEN the Code regarding the protection of personal data (Legislative Decree 30 June 2003, n.196), as amended by Legislative Decree 10 August 2018, n. 101, containing provisions for the adaptation of national law to the aforementioned Regulation (hereinafter the "Code");

GIVEN the corrective and sanctioning provision of 15 January 2020 (web doc. no. 9442587), concerning in particular the management of requests for access to telephone records, both adopted against Tim Spa (hereinafter, also “Tim” or “Company”);

HAVING REGARD to the documentation on file;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

RAPPORTEUR prof. Pasquale Stanzione;

WHEREAS

1.The complaint.

On 5 June 2020, Mr. XX filed a complaint with the Guarantor against Tim, with which he was asked to ascertain the violation of the right of access to telephone traffic data and to order the same Company to satisfy the request to exercise this right, within a period consistent with the defensive needs invoked.

In particular, the person's lawyer represented, producing related documentation:

- to have asked the Company, by registered letter dated 4.7.2019, to acquire the telephone records of the mobile users in the name of the interested party, for the limited period between 00.00 of 13.12.17 and 24.00 , 00 of 15.12.17, as the same had been reported by a patient because he was absent at the scheduled shift (between 8.00 pm of 14.12.17 and 8.00 am of 15.12.17) at the outpatient medical service, with consequent activation of criminal proceedings against him XX;
- that the person concerned had been prevented from providing service, following a sudden health problem, promptly reported to the Operations Center in the immediacy of the fact;
- that the acquisition of both incoming and outgoing telephone traffic would have been indispensable, since, by also reporting the cells connected to the contested period, it made it possible to verify and demonstrate in particular: if the interested party was actually at moment in which he was about to take up service; the care with which he had immediately alerted the operations center; contacts with his wife to ascertain her health conditions; the time when this happened; the route taken to the workplace (later not reached);
- that, in response to this request, TIM by e-mail dated 14.08.2019 had pointed out the need to use a special form, ensuring that, following receipt of the same, it would have processed the request;
- that, on 6.9.2019, the same lawyer had sent a registered letter with which the form duly completed and signed by the applicant had been forwarded to TIM;
- that, resulting from the numerous telephone reminders, on 17.10.2019, had sent the Company a registered letter with return receipt, renewing the request and attaching the duly completed form again;
- that, having received no reply, on 9.4.2020, TIM was requested by certified e-mail to send the requested traffic data;
- that the Company replied on 16.4.2020, noting that the request could not be processed because the traffic data requested concerned periods exceeding the 24 months provided for by art. 132, paragraph 1, of the Code;
- considering that this response had been the consequence of a misunderstanding (since the data of the telephone traffic requested referred to the period from 13.12.2017 to 15.12.2017 and the related requests had been advanced before the expiry of the 24 months provided for by the aforementioned regulations), on 24.04.2020 the request was reiterated, reiterating its timeliness;
- however, with a letter dated 19.05.2020, by certified e-mail, the Company replied confirming the previous negative communication.

Based on the foregoing, the complaint highlighted the violation of art. 15 of the Regulations as well as the urgency of acquiring the documents required before the 20th, date of the hearing of the criminal proceedings against the complainant.

2. The preliminary investigation

The Office, on 10 June 2020, made a request to the Company for elements also aimed at knowing whether or not it had the intention of adhering to the complainant's request.

Tim, in a note dated 25 June 2020, in providing feedback, decided not to satisfy the request in question, without substantially denying the factual circumstances represented by the complainant and without providing exhaustive explanations regarding the previous delaying responses and the denial finally opposite. In particular, the Company objected to the inadmissibility of the complaint in question, noting that: the requests would have been made with reference to the rule referred to in art. 391-quater of the criminal code (and not art.15 of the Regulation), with the consequent need to apply the remedy provided by the procedural-criminal law legislator (and in particular by the articles 367 and 368 c.p.p.), in the event that the request made by the defender did not received positive feedback. With this in mind, the Company asserted the decisive relevance of the formal title of the aforementioned instances also for the purposes of the competent Authority (the judicial authority rather than the Guarantor). Furthermore, Tim - arguing the groundlessness of the complaint - noted that the arguments put forward by the complainant would be "generic and unclear", as well as unsuitable for demonstrating an effective and concrete prejudice to defensive investigations.

Tim on the occasion pointed out that he had not 'frozen' the requested telephone traffic data relating to the complainant's user, based on constant company practice: with the expiry of 24 months, therefore, the data were no longer available to outside the databases dedicated to their conservation exclusively for the prosecution of the particular and serious crimes referred to in art. 24 of the law n. 167/2017, which did not apply in the present case. Furthermore, he represented that, should the Guarantor order sic et simpliciter to provide the complainant with the data subject of the proceeding, TIM would find itself in a critical situation, "not being able to provide the data if not extrapolating them from dedicated systems or databases, manned by high measures of security and abstracted from precise constraints of purposes incompatible with a treatment carried out for the purpose of simple production for different purposes ". According to the Company, therefore, this investigation could prove to be a suitable opportunity to clarify these operational profiles, "also supplementing the measures required up to now by the Guarantor for the safety of traffic data stored for criminal justice purposes and for the methods of their acquisition in

compliance with the aforementioned purpose constraints, in order to allow TIM to align the related internal procedures with clear and unambiguous provisions, prescriptions and interpretative indications ".

On March 5, 2021, the Office sent Tim the communication of the initiation of the procedure, in relation to the possible violation of the following provisions: art. 15 of the Regulation and art. 132 of the Code, for the purposes of the possible adoption of the measures referred to in Article 58, par. 2, of the Regulations and the possible application of the sanction referred to in art. 83, par. 5, of the Regulation.

With the interlocutory note of 17 March u.s. (with regard to the hearing set by the Authority, as requested in advance by Tim already in the reply of 25 June 2020), the Company - "confirmed all the formalized deductions on the merits of the complaint" - expressed its willingness "to show the interested party traffic data stored for 72 months in compliance with the provisions of Law 167/17, after their extraction from the system dedicated to this, only in the presence of a precise indication to this effect by this Authority: in fact, it remains in all its criticality, the topic already raised ... of the impossibility for the undersigned to independently overcome the constraints of purpose provided for by the law, if not on unequivocal provision by the Authority. "

The Company, with the memorandum of 2 April 2021, in reiterating its position, also pointed out that, since the complainant would not "have issued to his lawyer a power of attorney for the exercise of the rights under art. 15 GDPR, it was therefore not possible for TIM to overcome this unavoidable formal tare ".

On the same occasion, Tim, recalling the "decidedly critical interpretative profiles ... on the burdensome issues of the possibility of freezing data upon receipt of a request for ostension (pursuant to art. 15 or 391-quater), and the possibility or not to extract them from the SAG ", represented that" the application of a pecuniary sanction ex se, whatever the extent (was), would appear frankly incomprehensible ", invoking" the possibility of closing the proceeding with the possible adoption of corrective measures. ".

In view of the possible application of a pecuniary sanction, the Company "with reference to the criteria applicable to the present case pursuant to art. 83, par. 2, GDPR ", asserted: the absence of willful misconduct or negligence, since" TIM's position is the result of an interpretation of the delicate and complex framework of rules on data retention ... and having ... no interest in limiting the rights of interested parties who request access to traffic data stored for criminal purposes "; - "The violation ... still concerns (would) only one interested party, and there are no conditions to consider any recidivism, given the absence, at the time, of previous univocal interpretations".

TIM also - in highlighting that it has provided "in all forms, in all phases, and to the maximum extent, its willingness to provide data to the complainant, within the limits in which the Guarantor enables the company to extract the data from the SAG (an operation that the company cannot carry out independently, except by violating specific provisions of the law) - highlighted that “the alleged violation can be placed in a period prior to the well-known corrective and sanctioning provision no. 7/2020…. as well as the corrective provision no. 85/2020, as a result of which TIM implemented a series of organizational and technical measures regarding the management and response of requests to exercise the rights of the interested parties, also with specific regard to telephone traffic data ". The Company then referred to further "ongoing improvement interventions" and to the growing number of requests from interested parties managed by Tim with respect to which "cases with critical profiles represent a statistically irrelevant percentage".

3. Assessment of the overall conduct of the Company

Preliminarily - resuming below what has already been established by the Guarantor with the recent provision of 14 May 2020, n. 85 (web doc. No. 9442587) adopted against Tim regarding a similar complaint - the complaint presented by the interested party on the basis of art. 132 of the Code, included in the broader and more general bed of art. 15 of the Regulation (also referred to by art. 132, paragraph 3). In fact, it appears in documents that there has not been an actual response to repeated requests for access to traffic data, which are specific and limited. Moreover, remaining on a formal level, the aforementioned provision, in ensuring the right of access directly to the supplier, expressly refers to "the methods indicated in article 391-quater of the criminal code", thus manifesting a non-dichotomous and necessarily alternative legislative vision (as theorized by Tim), but, on the contrary, suitably integrated and coherent with the procedural-criminal law system and the current one regarding data protection.

This Authority, however, deems it necessary to reiterate how - with a view to effectively protecting the rights of the data subjects - it is not the formal name of the request that is relevant, but the substantial content of the same, which must be correctly identified and applied by the data controller who is the recipient. . In the same vein, pursuant to art. 12 of the Regulation, it is not possible to complicate the exercise of the rights of the interested parties, by imposing formalities or other obligations outside the cases strictly provided for (see, for example, Article 12, par 5, Reg., Cit., to manifestly unfounded or excessive requests), such as specific forms or special delegations of the interested party for the exercise of these rights. Delegations (and related powers) which must instead be considered reasonably absorbed in the broader object of the power of

attorney issued to the legal defender, if the fundamental right to defense is not to be violated and which must be safeguarded with even more vigor in the very delicate criminal law sphere.

As already clarified with the aforementioned provision of May 14, 2020, based on the current legal framework of reference on the retention of telephone traffic data, these data "are kept by the supplier for twenty-four months from the date of the communication, for purposes of verification. and prosecution of crimes "(see Article 132, paragraph 1, of the Code) and, within the same term," ... the lawyer of the accused or of the person under investigation may request, directly from the supplier, the data relating to the users in the name of assisted with the methods indicated in article 391-quater of the criminal procedure code "(132, paragraph 3, cit.). With the same provision, it was reiterated that" The request for direct access to incoming telephone communications can be carried out only when an effective and concrete prejudice may arise for the carrying out of the defensive investigations referred to in the law of 7 December 2000, n. 397 ".

The legitimacy of the complainant's request is therefore highlighted, due to the indictment in the context of criminal proceedings and the related need to carry out defensive investigations, and also the timeliness (as well as relevance) of the same - carried out the first time already on 4.07 .19 - with regard to telephone records (incoming and outgoing) concerning the limited time span included between 13.12.17 and 15.12.17; data, therefore, that Tim kept at the time and should have held out to the complainant.

With particular regard to incoming calls, in recalling the provision of the Guarantor of 3 November 2005, "Access to telephone data: guarantees for incoming calls" (web doc. No. 1189488), it must be reiterated that "the indications, principles, the measures and guarantees indicated therein can be considered valid even after the full operation of the Regulation, which, as is known, has reserved the discipline of electronic communications to a distinct next regulatory source, still referable therefore to Directive 2002/58 / EC, as transposed by the title X of the Code and therefore from the aforementioned art. 132, not repealed by the said Regulation "(see, in these same terms, the provision of 14 May 2020, cit.). On the basis of what is indicated in the aforementioned general provision, "By way of exception .... requests for the exercise of rights can be presented, and successfully processed, when they prove that the response to them by the supplier is necessary to avoid effective damage and concrete for carrying out the defensive investigations ... '"..., despite having as its object the incoming telephone traffic, understood as" any data subjected to processing for the purpose of transmitting a communication over an electronic communications network or the related billing ... " .

That said, in the specific case, although documented in documents, there is a close link between the traffic data requested and the crime hypothesis (XX) formulated by the judicial authority, as well as the need for the requested data, including incoming data, for the carrying out defensive investigations aimed at protecting the complainant's fundamental right of defense pending the pending criminal trial.

Based on the foregoing, the Office with the aforementioned note of March 5, 2021 has already challenged the Company for the possible violation of art. 15 of the Regulations and art. 132 of the Code.

As mentioned above, the case underlying this complaint is characterized by profiles of close analogy with the case subject to the provision of May 14, 2020, which was challenged by the judicial authority by Tim, also on the basis of the alleged need to receive an order promptly by the Authority to extract the printouts from the database reserved for the judicial authorities for the purposes of counter-terrorism, not having any other possible copy, in order to satisfy the claim of the complainant. The Court of XX, however, completely rejected the appeal brought by Tim, in particular confirming the legitimacy of the legal approach provided by the Authority also with regard to the need to protect the requests of the interested parties in the printouts regardless of the specific formal title used in support of the same.

Moreover, as is known, the provision referred to in art. 150, paragraph 5, of the Code which provided for the possibility, in the event of "difficulties or disputes regarding the execution of the measure", to contact the Guarantor to have "the methods of implementation", was not confirmed by the new regulatory framework, probably in accordance with the different approach based on the accountability of the owner.

Nonetheless, when defining this complaint, the Authority must first take into account that in the case in question, Tim - who did not effectively respond to the requests to exercise the right of access to the printouts promptly formulated by the lawyer of the complainant for investigations defensive in the context of a criminal proceeding - he stated that he had not kept the records, having elapsed the 24 months (provided for by paragraph 1, of art. particular crimes referred to in law no. 167/2017, according to the longer duration (72 months) provided therein.

It is therefore indisputable - contrary to what emerges from Tim's defense overall - the violation of the obligation to deliver such data in the face of a legitimate and timely request. In this sense, the availability shown by Tim - certainly not "in all forms, in all phases and to the maximum extent" (as asserted by the same Company) - but only in terms that are now out of date, cannot be relevant.

The correctness and timeliness of the request forwarded by the complainant, indeed, is a legal fact constituting the obligation of the Company to release the data.

Indeed, as an exemption from this obligation, it cannot detect the course - in the delay - of the time period of 24 months pursuant to the law envisaged for data retention, since it is in fact:

- attributable solely to the culpable inertia of the Company and, therefore, to its illicit conduct that cannot reverberate to the detriment of the complainant;
- not attributable in any way to the complainant himself, acting on the other hand in a diligent and timely manner in order to acquire the data.

Therefore, the circumstance - also attached by the Company - for which the data in question would not have been "stored" or "frozen" in the "ordinary" database pursuant to art. 132 of the Regulations, being currently held only within the functional databases exclusively to ensure the investigation and prosecution of the particular and serious crimes referred to in art. 24 of Law 167/2017:

- can not assume any discriminatory value of the obligation to release data, on the other hand, connoting the omissive behavior of the Company in terms of greater negative value and reprehensibility which, although the recipient of a timely request pursuant to art. 132 of the Regulations, has uselessly allowed the period of 24 months contemplated therein to elapse, never perishing - as well as a prudential logic and attention towards the interested party would have required - to "freeze" or "continue to keep in the 'special system' the data in question from the moment of the request;
- cannot frustrate the legitimate aspirations of the complainant to obtain, in a "specific form", the coveted good of life, with the acquisition of functional data for the full and conscious implementation of their own defensive guarantees in the criminal proceedings referred to is part.

And this in compliance with the general principles for which:

- the fulfillment of the obligation in question, in relation to the protection of the indefectible defensive prerogatives of the suspect as well as the public interest in due process (articles 24 and 111 of the Constitution; articles 6 and 13 of the ECHR; art. 47 Charter of Nice), cannot in any way be referred to the “free choice” of the subject (supplier) who is unquestionably called upon to fulfill that obligation, in an effective, diligent and timely manner;
- the "time" taken for the definition of the affair - first against the supplier, and then in the "judicial" proceedings carried out

before this Authority - cannot be detrimental to the subject "who is right".

All this considered, not being able to admit that the fundamental right of defense in criminal matters can remain substantially compromised - due to a culpable act attributable solely to the omission and defaulting behavior of the supplier - it is considered, pursuant to art. 57 par. 1, lett. f), of the Regulations, of having to adopt a measure against Tim that first of all declares the conduct of the Company unlawful as it violates the complainant's right of access to the printouts. Furthermore, pursuant to art. 58, par. 2, lett. c), of the Regulation, Tim must be ordered to satisfy the complainant's request, providing him without further delay the data in question, as promptly requested, on a date largely within the period of 24 months contemplated by law for conservation pursuant to art. 132 of the Regulation, also through the verification of suitable technical solutions for the recovery of the printouts in question.

In this case, it is deemed necessary to postpone the adoption of specific organizational and technical measures, taking into account that this requirement is already contained in the aforementioned provision of 14 May 2020 and that in the meantime (between the end of November 2020 and beginning of last February) Tim communicated to the Authority the broader measures allegedly prepared, also in relation to the clarifications requested by the Office, to manage the requests for exercising the rights referred to in Articles 15-22 of the Regulation, in implementation of the aforementioned provision of 15 January 2020.

On the other hand, it is believed that - unlike the aforementioned provision adopted on May 14, 2020 - it is not possible to postpone the application of a pecuniary administrative sanction, considering that the current case (together with further similar complaints received by the Authority) requires reading the behavior of TIM not as an erroneous outcome of the management of a single instance, but rather as a conscious corporate practice, of not adequately complying with the regulatory obligation in events in which fundamental rights of the person linked to the right of defense are at stake criminal law. In this sense, the behavior is aggravated by not even having provided for a specific precautionary method for the conservation of the records in question for the time linked to the dispute in progress.

4. Ordinance-injunction for the application of the pecuniary administrative sanction

Violation of the aforementioned rules therefore requires the adoption of an injunction order, pursuant to Articles 166, paragraph 7, of the Code and 18 of law no. 689/1981, for the application to TIM of the administrative pecuniary sanctions provided for by art. 83, par. 5, of the Regulations (payment of a sum of up to € 20,000,000 or, for companies, up to 4% of the annual

worldwide turnover of the previous year, if higher).

To determine the amount of the penalty, the elements indicated in art. 83, par. 2, of the Regulation, which, in the present case, can be considered in the following terms.

In particular, in an aggravating function, the following are detectable:

1. the nature, severity and duration of the violation that has persisted with respect to all the complainant's claims until the Authority's intervention (Article 83, paragraph 2, letter a);

2. the subjective dimension of the conduct, which must be considered grossly negligent, if not malicious, in the light of similar cases, having neglected the response to clear and justified requests, in fact and in law, as well as repeated (art. 83, par. 2, letter b);

3. the previous alleged violations and the measures adopted by the Authority against the Company, also with regard to the incorrect management of the rights of the interested parties (Article 83, paragraph 2, letter e);

4. the categories of personal data affected by the violation, identifiable in the printouts necessary for the exercise of the right of defense in the delicate procedural-criminal field (Article 83, paragraph 2, letter g).

Among the aggravating aspects of Tim's conduct, there is also the significant, even macroscopic, discrepancy of the action conducted with respect to the substantial provisional activity of the Guarantor, with which indications and clarifications were provided regarding the rights of the interested parties and the date retention (see general and specific provisions, also with regard to the same Company, some of which are cited in this provision) and which can reasonably lead to the belief that all operators in the sector have reached a sufficient awareness of the provisions that must be unfailingly observed, also because they pertain to the fundamental right of access (art. 83, par. 2, lett. k).

On the other hand, extenuating circumstances can be considered:

1. the notified adoption of measures by Tim, in the implementation of the provisions of the provision of 15 January 2020, with specific regard to the requests for exercise of the rights by the interested parties, including that of access pursuant to art. 15 of the Regulation, which reasonably should prevent or in any case limit similar problems (Article 83, paragraph 2, letter c);

2. cooperation with the Authority during the overall investigation (Article 83, paragraph 2, letter f);

3. the serious socio-economic crisis linked to the pandemic in progress (art. 83, par. 2, lett. 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 freedom of enterprise, also in order to limit the economic impact of the sanction on the organizational, functional and employment needs of the Company, it is believed that the administrative sanction should be applied to Tim spa the payment of a sum of € 200,000.00 (two hundred thousand / 00).

In the case in question, it is believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7. of the Code and art. 16 of the Guarantor Regulation n. 1/2019, taking into account the macroscopic nature of the violations found with regard to legal principles now consolidated in the provisional activity of the Guarantor and in jurisprudence.

Finally, the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Please note that, in the event of non-compliance with the same provision, the penalty referred to in art. 83, par. 5, lett. e), of the Regulations.

WHEREAS, THE GUARANTOR

a) pursuant to art. 57 par. 1, lett. f), of the Regulation, declares the conduct of Tim S.p.A. unlawful. - with registered office in Via Gaetano Negri, 1, Milan; p. VAT 00488410010 - and therefore declares the complaint founded in the terms set out in the motivation;

b) pursuant to art. 58, par. 2, lett. c), of the Regulations, orders Tim Spa to provide the complainant with the requested data, without further delay, and in any case within 20 days from the date of receipt of this provision, since it is data promptly requested by the complainant, well before the expiry of the term of 24 months contemplated by art. 132 of the Regulation, culpably left to run by TIM, generally conforming to what is indicated in the part motivating the processing of access requests pursuant to art. 132 of the Regulation, also with regard to future cases;

c) requests Tim S.p.A. to provide adequately documented feedback pursuant to art. 157 of the Code within 30 days from the date of receipt of this provision. Please note that failure to respond to the above requests integrates the details of the administrative offense pursuant to art. 166, paragraph 2, of the Code.

ORDER

to Tim S.p.A., in the person of the pro-tempore legal representative, to pay the sum of € 200,000.00 (two hundred thousand /

00) as a pecuniary administrative sanction for the violation indicated in the motivation, representing that the offender, pursuant to art . 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within thirty days, an amount equal to half of the sanction imposed;

INJUNCES

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 € 200,000.00 (two hundred thousand / 00), according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to 'art. 27 of the law n. 689/1981;

HAS

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

Pursuant to art. 78 of the Regulation, as well as art. 152 of the Code and 10 of the d. lg. 1 September-December 2011, n. 150, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed, alternatively, at the court of the place where the data controller resides or is based or at that of the place of residence of the interested party within term of thirty days from the date of communication of the provision itself or of sixty days if the applicant resides abroad.

Rome, July 8, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei