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Injunction against Fastweb S.p.A. - July 26, 2018

Register of measures

no. 441 of 26 July 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 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;

NOTING that the Office of the Guarantor, with deed no. 13913/120543 of 11 May 2018 (notified on the same date by certified email), which must be understood as fully reported here, challenged Fastweb S.p.A. (hereinafter "Fastweb" or "Company"), in the person of its pro-tempore legal representative, with registered office in Milan, via Caracciolo n. 51, tax code 12878470157, the violations envisaged by articles 13, 23, 37, 130, 161, 162, paragraph 2-bis, 163 and 164-bis, paragraph 2, 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:

- on 18 April 2018, the Guarantor adopted provision no. 235 (in www.gpdp.it, web doc. n. 9358243), to which reference is made in full, following the outcome of the investigation of an administrative proceeding initiated against Fastweb;

- the proceeding originated from numerous reports complaining of receiving telephone calls with operators with promotional content in the interest of Fastweb;

- the aforementioned provision of 18 April 2018 revealed "first of all, [...] the presence, in the period considered by the checks, of a considerable number of contacts made by partners relating to numbers not included in the contact lists sent by the Company (so-called "off list"); overall these contacts, even repeated with respect to the same user, amounted to over 1,000,000 with regard to the system currently in use and over 7,200,000 with the pre-existing system (which would correspond to around 2.7 million personal data)";

- "Always following a preliminary assessment by the Office of the elements acquired during the investigations carried out in September 2017, it was also possible to ascertain the presence on the system, in the "Outcome" field entered by the partners following a telephone contact (made or attempted), of some numerical codes which correspond to the evaluations "Elderly person" (for over 1,000,000 users), "Low spending customer" (for over 139,000 users) and "High cost customer" (for over 38,000 users). With respect to these annotations it was specified that, «on the basis of the sales script, the operators ask the contacted person some questions aimed at identifying whether he represents a potential sales target, on the basis of which the "Outcome" field can be filled in. The information reported in this field can be used by the partner to avoid re-contacts in the same campaign and by the Company to evaluate the opportunity of any re-contacts in subsequent campaigns. As regards the division between "low spenders" and "high spenders", the party specified that prospects who spend higher sums on telephone rates than [a predetermined threshold] are considered "high spenders", below which are considered "low spenders". This information may be used in the future to modulate the proposals on the occasion of future contacts"";
- "it must be considered that Fastweb, in the period considered by the inspections and beyond the individual reports received by the Authority in the period considered by the inspections (some of which were the subject of in-depth analysis during the on-site inspections) , has violated the personal data protection regulations, having carried out a plurality of processing operations for marketing purposes and, among these, the extraction of data referring to the interested parties from their own systems, the inclusion of the same in the contact lists and their subsequent transmission to their partners with the execution, finally, of commercial contacts in the absence of valid consent (originally or following its revocation or opposition to the processing of personal data for marketing purposes) of the concerned [...] and has also failed to carry out the necessary checks on the work of its partners";
- "The detected violations took place both with reference to the personal data of the whistleblowers for whom, [...], no valid consent has been proven [...], and with reference to the processing of personal data referring to prospects who were contacted in the interest of the Company in the context of campaigns carried out via the telephone channel (telemarketing/teleselling) in the absence of a validly expressed consent by the same to such treatment, or, in any case, in the presence of a revoked consent or, again, in times subsequent to the opposition pursuant to art. 7, paragraph 4, lett. b), of the Code; circumstances, these, all resulting from the Company's systems and from the elements supplied by it";
- "from the comparisons, a considerable number of contacts emerged in violation of the law through the system previously

used by the Company, given the presence of the contact numbers on the black list in correspondence with the promotional campaigns carried out; in particular, there were a total of just over 267,000 unwanted contacts with regard to teleselling campaigns aimed at the prospect base";

- "It should also be noted that during the investigations, some so-called numberings were also subject to verification. identified randomly, some of which [...], from the analysis of the Company's systems, were found to be contacted by Fastweb's partners in violation of the law, despite having previously been included in the black list [...]".

- "With regard to the processing of data referring to the so-called "off the list" [...] first of all, the dimension, in very significant absolute values, of contacts (equal to over 8 million) and users involved (based on what was declared by the Company, referring to at least 2.7 million individuals). These values are in stark contrast to the instructions given by the Company to its partners in the aforementioned Manual - in which, as has been said, this type of contact is allowed only exceptionally and under certain conditions"

NOTING that with the aforementioned deed dated May 11, 2018 Fastweb S.p.A. was challenged:

a) pursuant to art. 162, paragraph 2-bis, violations of articles 23 and 130, ch. 3, of the Code, in relation to "[...] the ascertained lack of consent of the interested parties (prospects and former customers) with respect to the processing of personal data for marketing purposes in the context of the campaigns subject to verification [...]";

b) pursuant to art. 161, the violation of the art. 13 of the Code, as "[...] The information provided on the occasion of the finalization of the purchase proposal, which however concerns only a part of the audience considered, does not in fact contain information that allows to clearly trace the profiling [elderly person, low spending or high spending] thus effected [...]";

c) pursuant to art. 162, paragraph 2-bis, the violation of art. 23 of the Code, as "[...] With respect to this segmentation of customers [elderly, low or high spending] on the basis of the aforementioned qualities, [...] it is not known, from the outcome of the investigations, [...] that it was in this regard acquired a distinct consent of the interested parties (Article 23 of the Code) [...]";

d) pursuant to art. 163, the violation of the art. 37 of the Code, in relation to data "[...] subject to profiling [...] due to incomplete notification to the Guarantor [...], as referred to in the introduction;

e) the violation provided for by art. 164-bis, paragraph 2, of the Code, for having carried out the above conduct in relation to databases of particular relevance and size;

GIVEN that, for the violations referred to in points a), b), c) and d), a reduced payment was made, pursuant to art. 16 of the law no. 689/1981, carried out on 6 July 2018; having also noted that for the violation referred to in point e) the right to extinguish the sanctioning procedure by means of a reduced payment is not envisaged;

READ the written defense presented by Fastweb on 11 June 2018, which must be understood as fully reported, in which it is represented:

- “the provision of April 27, 2018 examines, without particular distinctions regarding subjective imputability, both conduct implemented by Fastweb and conduct attributable to autonomous actions by its agencies. This is understandable in a provision aimed at ascertaining and, if necessary, at/inhibiting conduct that does not comply with the treatment regulations. The notice of contestation [...], for its part, seems to consider for sanctioning purposes: i) the individual contacts relating to the specific reports received from the Guarantor and which have become the object of the inspections [...]; ii) the existence of contacts with numbers that were included in the blacklist [...]; iii) the so-called contacts off the list [...]”;

- "as for the specific reports, the same information provided by Fastweb indicates that the established contacts were the result of independent initiatives by the agencies. The conduct would have been difficult to intercept in advance because, whatever the technical system for channeling outbound calls, it is not possible to completely exclude eccentric conduct by individual agencies. For these cases, one could at most raise the issue of joint and several liability of Fastweb, not direct liability, with all that ensues in terms of the dispute procedure and the criteria for quantifying”;

- "The writer then notes that, for a part of the specific reports, it was not possible to unequivocally verify the circumstances complained of. These cases cannot be taken for granted on the basis of reports alone. Without wishing to question the good faith of the whistleblowers, there may be errors of memory and overlapping in the names of the operators which do not allow us to rely on the reports alone. In this regard, one of the cases considered by the provision of 27 April 2018 can be cited [...]. Subsequent communications from the whistleblower, once he became aware of the start of the preliminary investigation, precisely highlighted an uncertainty regarding the initial involvement of Fastweb, rather than other operators”;

- “Fastweb, moreover, in a spirit of loyal collaboration, has indicated to this Guarantor contacts resulting from its systems distinct from those reported and which have not been confirmed by checks on the systems. If for the latter the proof can be considered achieved, for the former the threshold of doubt remains too high even in the context of an administrative assessment. Nor can a reversal of the burden of proof be imagined, since, in the face of a possibly erroneous statement by the

whistleblower, the operator would have no way of providing negative proof of the contrary, since it is not - hypothetically - even that the contact does not appear from its systems and that the calling number does not correspond to those known from one of its own agencies";

- "In relation to contacts with numbers included in the blacklist, here too it would be necessary to distinguish the phenomenon attributable to misalignments in Fastweb's systems from that deriving from independent behavior of the agencies. The processes that Fastweb applies to the lists to be provided to the agencies include, among other things, the exclusion of numbers included in the blacklist. The provision of April 27, 2018 found that, with the use of Reitek, there were around 267,000 "unwanted" contacts. However, this number is reduced to only 278 cases with the Invoice system, a substantially infinitesimal percentage of the total number of calls. This makes it all the more necessary to distinguish the component of unwanted calls attributable to Fastweb's systems from that resulting from independent actions by the agencies";

- "As for the "off-list" contacts, the dispute would seem to hypothesize Fastweb's "omitted control" as a reason for directly attributing the violations [...]. The provision recognizes that the phenomenon took place in contrast with the instructions given by Fastweb but bases its assumption on the "dimension in absolute values" of the contacts and users involved, considered indicative precisely of the omitted control";

- "The violations relating to profiling concern the annotation by Fastweb operators, on the Reitek system, of the terms "old person", "high" or "low spending" in relation to the results of the contacts. These annotations were "inferred" directly by the operator during the interview. The dispute assumes that such treatments constituted "profiling", in the absence of consent, of the information and of a complete notification of the treatment to this Guarantor. Without prejudice to the already completed fulfillment of the inhibitory provisions of this Guarantor, the undersigned first of all believes that the operations described above cannot be considered "profiling" within the meaning of the confidentiality regulations. An essential element of the notion is that the "inferences" are the result of automated forms of processing [...]. A further element of the notion of profiling is its aim at evaluating aspects of the person or predicting future behaviour. The simple indication of a personal data, moreover an approximate one, such as seniority does not imply any assessment of the person [...] nor a prediction of specific behaviours. Otherwise, any annotation, for example on whether the interested party is below or above a given age threshold, possibly relevant to being able to access or not access rates, discounts, etc., should be considered profiling. Even the indication of the expenditure thresholds was not made to evaluate or judge the economic capacity but only for the pertinence of the specific

offers to be proposed [...]";

- "Even assuming that the treatments constituted profiling, the undersigned considers that the objection on the incompleteness of the notification to this Guarantor cannot be shared. The latter takes place with a form that provides for schematic descriptions, a play of summary force with respect to the innumerable possible variants of the treatments in practice. In this case, Fastweb's notification identifies the recipients - customers or users, even potential ones - for commercial or direct marketing purposes, proceeding through "data collection from the interested party" and "data collection through forms, coupons and questionnaires". in the latter case without limitation to the written form. From which, from the combined reading of the provision of 27 April 2018 and of the dispute, no elements emerge to identify for which profiles the notification was incomplete";

- "[…] the undersigned observes that the dispute pursuant to art. 164-bis, paragraph 2, refers to the phenomenon of "off-list" contacts [...]. The violations relevant to the law are those "in relation to databases of particular relevance or size". The "off-list" contacts, however, by definition took place outside the databases created by Fastweb and made available to the agencies. As far as is known, in individual cases these contacts could have occurred with extemporaneous contacts, on the basis of information not systematized in a database. The results of the contacts were exported to the Fastweb system only after they had occurred, so that the supposedly unlawful conduct precedes its representation in a database. "involvement of numerous interested parties", which is considered by Article 164-bis, paragraph 3, as an alternative to the hypothesis referred to in paragraph 2. The greater statutory limits referred to in paragraph 3, in any case, do not constitute a autonomous case of offence. Even if article 164-bis, paragraph 2, were deemed applicable, the data involved should be reduced according to what was previously stated, with all the consequences on the imputable direct nature of the conduct to Fastweb [...]. There would therefore be no scope for applying the case in question to Fastweb";

CONSIDERING that the arguments put forward by Fastweb do not allow the exclusion of the Company's liability for the disputed violation, for the following reasons:

- it must first of all be taken into consideration that provision no. 235 of 18 April 2018 and, before that, the results of the investigation and inspections carried out by the Office of the Guarantor, have brought to light a particularly alarming situation with reference to the overall implementation of promotional campaigns by and in the interest of Fastweb ;

- the assessment activities carried out by the Office and the overall assessments expressed in the provision of 18 April 2018

make it possible to analyze the disputed conduct not through a parcelling out of the individual operations and the subjects of the processing involved, unsuitable for outlining the overall impact that such behaviors have had on the sphere of the rights of the interested parties, but from a "system" perspective which must be constantly taken into consideration by the owner when he proceeds to the processing of a significant amount of personal data, in particular in the pervasive sphere of the activities promo-advertising;

- this perspective requires the Authority to adopt decisions and promote interventions suitable for affecting the complex of activities carried out and direct them primarily towards the only subject capable of making significant changes to the generality of processing operations, i.e. the owner;

- this approach was clearly explained in the general provision of 15 June 2011 concerning the "Ownership of the processing of personal data of persons who make use of agents for promotional activities", published in the Official Gazette no. 153 of 4 July 2011 (in www.gpdp.it, web doc n. 1821257), which, among other things, points out that "outsourced agencies that process personal data [...] cannot be considered as independent owners, since the alleged formal ownership does not correspond, even in concrete terms, to the powers strictly envisaged by the Code for the configuration and exercise of ownership, which are and remain the exclusive prerogative of the principals. Among these, first of all: making decisions relating to the purposes of processing the data of the recipients of promotional campaigns for the purpose of sending advertising material or direct sales or commercial research or commercial communication carried out by third parties who act in outsourcing for the performance of the mentioned promotional and marketing activities for goods, products and services; issue binding instructions and directives towards the outsourcers, substantially corresponding to the instructions that the data controller must issue to the manager; carry out control functions with respect to the work of the outsourcers themselves";

- in the cases examined with the provision of 18 April 2018, the set of anomalies ascertained can only be attributed to Fastweb's responsibility, both those directly connected to the company's activities and those connected to operations carried out by the agencies and commercial partners of the same, given that Fastweb was in a position to notice the enormous number of contacts of individuals not included in the lists provided to the call centres, the failure to cross-reference the numbers with the company's black-list and with the register of objections and the significant number of reports of interested parties who complained of unwanted contacts on behalf of Fastweb itself;

- as regards the aspects related to the failure to notify the Guarantor of profiling activities, the existence of this violation profile

must be confirmed, given that Fastweb has notified the Authority only of "aggregate profiling based on provision Guarantor of 21/01/2010" (annotation reported in the notification document present in the register of treatments) and not those of profiling aimed at individualizing the commercial offers, detected by the provision of 18 April 2018. It must also be highlighted that, from the examination of the point 4, lett. a), b) and c) of the Guarantor's resolution no. 1 of 31 March 2004, relating to cases to be removed from the notification obligation (in www.gpdp.it, web doc. n. 852561), the profiling treatments described in the provision of 18 April 2018 do not fall within the cases of exclusion of the notification obligation provided for by art. 37 of the Code;

- lastly, with reference to the disputed violation pursuant to art. 164-bis, paragraph 2, it must be highlighted that the data acquired during the profiling activities have enriched the corporate databases and concerned more than one million users. As for the data processed in the context of promotional activities, the same refer to over eight million contacts and these data have also been merged into the Fastweb databases, since it was precisely through the analysis of the Company's databases that it was possible to reconstruct the methods of carrying out marketing campaigns. With reference to the so-called data "off the list", it must in any case be represented that the same, although not forming part of the registry assets available to Fastweb from the beginning, constitute an organic set of particular relevance and size of personal data all subject to the same operating procedures, used to achieve the Company's commercial objective. For the use of this set of data, the precautions and enhanced protections that the law intended to introduce through paragraph 2 of art. 164-bis, of the Code;

NOTING, therefore, that Fastweb S.p.A., on the basis of the above deeds and considerations, 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 points a), b), c) and d) of the notification no. 13913/120543 of 11 May 2018, for which the short term definition and, consequently, the violation envisaged by art. 164-bis, paragraph 2, for having committed the violations referred to in points a), b), c) and d) in relation to databases of particular relevance and size;

CONSIDERING the art. 164-bis, paragraph 2, of the Code which punishes the violations of a single or more provisions indicated in part III, title III, chapter I of the Code (with the exception of those envisaged by articles 162, paragraph 2, 162-bis and 164), orders in relation to a database of particular importance and size, with the administrative sanction of the payment of a sum from 50,000 to 300,000 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:

to. with regard to the aspect of seriousness, with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are of significant gravity taking into account the multiplicity of illegal conducts carried out in the time period in question examination, the number of data subjects who contributed to determining the overall pattern of violations, as well as the failure by Fastweb to adopt stringent forms of control over its business partners in order to discourage practices that do not comply with the provisions on the protection of personal data;

b. for the purposes of assessing the work performed by the agent, the fact that Fastweb, as also highlighted in the provision of 18 April 2018, must be considered in favorable terms "autonomously introduced the first precautions [...] which flowed into some measures aimed at strengthen control over the correct execution of commercial campaigns" and has "communicated the first results resulting from the development of a more rigorous monitoring system (through specific reporting) of the work of its sales network (setting apart the Authority of some of the "sanctioning" measures adopted against partners with respect to which it has found the violation of the contractually established conditions), and with regard to the phenomenon of the so-called "off the list" [...], both in relation to the execution of commercial contacts by the partners in times subsequent to those established for the validity of the lists ("Out of range") and, again, in relation to the phenomenon of the so-called references".

c. regarding the personality of the author of the violation, the circumstance that the Company is burdened by numerous previous sanctioning proceedings defined in brief or following an injunction order, also in the capacity of jointly liable for the payment of the administrative sanction, must be considered;

d. with regard to the economic conditions of the agent, the ordinary financial statements for the year 2017 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 150,000 (one hundred and fifty thousand) euros for the violation pursuant to art. 164-bis, paragraph 2, of the Code.

CONSIDERING also that, in relation to the economic conditions of the offender, having regard in particular to the data relating to shareholders' equity, the total profit for the year, the value of production and the gross operating margin (EBITDA), as well

as the circumstance that Fastweb S.p.A. holds a significant market share in the telecommunications sector in Italy (about 1,160,000 total mobile lines and about 2,451,000 residential lines) the aforementioned fine is ineffective and must therefore be increased by four times, as provided for by art. 164-bis, paragraph 4, of the Code (from €150,000 to €600,000);

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. Antonello Soro;

ORDER

to Fastweb S.p.A., in the person of its pro-tempore legal representative, with registered office in Milan, via Caracciolo n. 51, tax code 12878470157, to pay the sum of 600,000 (six hundred thousand) euros as an administrative fine for the violation indicated in the justification;

ENJOYS

to the aforementioned Company to pay the sum of Euro 600,000 (six hundred thousand), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of the adoption of 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, 26 July 2018

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

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