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Injunction against Wind Tre S.p.A. - July 9, 2020

Register of measures

no. 143 of 9 July 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of Dr. Giovanna Bianchi Clerici and of Prof. Licia Califano, members, and of Dr. Giuseppe Busia, 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 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 the national legal system to the aforementioned Regulation (hereinafter the "Code");

HAVING REGARD TO the complaints and reports received by the Guarantor, with regard to various processing of personal data carried out by Wind Tre S.p.A. (hereinafter also referred to as: "Wind Tre" or "the Company");

HAVING REGARD TO the results of the inspections carried out on Wind Tre and some of its commercial partners;

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 Dr. Antonello Soro;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

With a plurality of reports and complaints, various treatments of personal data put in place by Wind Tre were brought to the attention of the Authority, mainly (but not exclusively) attributable to conduct aimed at promotional activity.

Taking into account that the Company has already been the recipient of an injunction and prescriptive measure for similar

treatments carried out under the previous regulatory framework (see provision no. 313 of 22 May 2018, in www.garanteprivacy.it, web doc. no. 8995285), the investigation conducted took into consideration only the applications received after 25 May 2018, which were the subject of a cumulative investigation pursuant to art. 10, paragraph 4, of the Guarantor's internal regulation n. 1/2019 (web document n. 9107633). This first preliminary investigation will also be referred to in this provision as "procedure A".

With a different procedure (see files 139150, 139507, 139505, 140416, 141133) other aspects of the owner's activity were then taken into consideration connected to reports received by the Authority informing of promotional activities, put in place for it by the supply chain of sub-agents of an accredited supplier, by contacting customers of another telephone operator whose personal data was acquired in an illegitimate manner.

This second procedure will also be referred to hereinafter as "process B".

As a result of these activities, several violations of the rules on the protection of personal data emerged.

2. RESULTS OF THE INVESTIGATION

The investigations conducted involved the examination of over 100 files, as well as the carrying out of inspections at Wind Tre itself, at some partners and at another telephone operator. The topicality of the conduct or, in any case, its effects must also be considered, given the requests, of similar content, received by the Authority even after the formal complaint sent to the Company on 13 May 2020, to be understood here as fully referenced and to the which reference is made for each item of detail.

2.1. Promotional activity through text messages, e-mails, faxes, telephone calls and automated calls

In the period in question, as mentioned, the Guarantor received numerous complaints and reports relating to the receipt of unwanted promotional contacts made by telephone, text message, e-mail, fax or automated calls. In many cases it has been reported that contacts have been received even after the withdrawal of consent or the exercise of the right to object.

In response to specific requests for information, the Company,

1. in some cases, documented the acquisition of a specific consent by showing the contracts (purchase proposals - pda) signed by the interested parties;

2. in others it documented the acquisition of consent which, in the light of the investigations conducted, proved to be unsuitable;

3. in the remaining cases it was not able to document the acquisition of consent.

2.1.1. Contacts made without consent

In some feedback provided, the Company stated that the contact was made by mistake (see files 128119, 127661, 130539, 123638,134545, 142932, 121112); in other cases, that the revocation had not been promptly implemented due to problems related to the management of the correspondence or to the identification of the interested party, which will be explained further below (see files 141011, 134392, 130266, 130344, 145996, 124985, 134434, 133063, 133372, 134997, 128000, 128805, 130356, 129952, 127784).

2.1.2. Contacts made on the basis of a consent to be considered unsuitable

In other cases, the Company has responded to specific requests for information by documenting the acquisition of consent which, in the light of the evaluations carried out, has proved to be unsuitable.

2.1.2.1. Consents dating back and not compliant with the new regulatory framework introduced by the Regulation

In particular, in three cases (see files 133088, 134927, 131464), the consent was documented by attaching the contracts signed by the customers. These, however, dating back to the years 1998/99 are no longer suitable with respect to the current regulatory framework as they do not allow to document a free, specific and informed will of the interested party as only one consent is required for different processing purposes (promotional activity of the owner , third parties, customer satisfaction assessment, credit protection); in this regard, reference is made to the articles 4, point 11, and 7 as well as the content of recital n. 171 of the Regulation on the basis of which «if the treatment is based on consent pursuant to directive 95/46 / EC, the interested party does not need to give his consent again, if this has been expressed in a manner compliant with the conditions of this regulation , so that the controller can continue the processing in question after the date of application of this Regulation". Therefore, it is the owner's responsibility to assess whether the consents already acquired are still to be considered compliant with current regulations; among these, we also recall the regulatory changes that occurred after 1999 aimed at regulating, with provisions of a special nature, the treatment implemented in the context of electronic communication services (Article 130 of the Code and provisions on the subject of the Register of Oppositions) to be considered by now known to all operators in the sector, also in the light of the numerous pronouncements of the Guarantor.

2.1.2.2. Consents acquired directly from commercial partners

In one case (see file 130729), the receipt of an unwanted text message was justified by claiming that the sending was carried

out directly by XX Srl, without using Wind Tre lists, on the basis of an autonomously acquired consent for the promotion of services of third parties (not shown together with the answer).

In this regard, it should be noted that the Company, with attachment 1 to the note dated 15 July 2019, provided a copy of a communication sent to its commercial partners to remind them to comply with current legislation on marketing. Among the provisions contained in this communication, we highlight what is indicated in point I) where the Company requests to "verify that, in the event that promotional activities are implemented for our offers, only the authorized numbers are contacted for commercial contacts of which Wind Tre is owner or legitimately acquired by you on your own and of which you are legitimately the owner, similarly consenting to commercial contacts and communication to telecommunications companies".

From this communication and on the basis of what was declared in relation to the report relating to file 130729, it can be seen that the Company provides, among the methods for carrying out promotional campaigns, also the possibility of entrusting this treatment to third parties as independent data controllers without however ensure that such contacts do not prejudice the will, specifically expressed by the interested parties towards Wind Tre, not to receive promotional contacts.

2.1.2.3. Consent acquired through the MyWind and My3 apps.

In other cases, the Company has documented the consent by providing the screen of the internal information system from which consent has been given through "interactive channels" or "SelfcareAppAndroid".

An examination of the attached documentation shows that the consents were provided by the interested parties by accessing their personal area via the MyWind or My3 app.

In particular, in three cases (see files 134496, 138094 and 140940) the consent, originally not present, is acquired following an IT recording described as a "variation", which, according to what is subsequently illustrated by the Company, would indicate the fact that the interested party himself, operating directly through the Selfcare channels (of which apps are a tool) would have requested a change in the status of the consents, granting them where not present. In two of them (files 134496 and 138094) this change was made in December 2018, the date on which a change to the app was implemented. Furthermore, in two circumstances (files 138094 and 140940), this variation is simultaneously provided for all types of processing listed on the home page of the app (marketing, profiling, data enrichment, geolocation, transfer to third parties). In this latter regard, one of the complainants (see file 138094), in reply to Wind Tre's reply, reiterated his perplexities regarding the consents that were granted, pointing out that he had no idea, for some treatments, even of the meaning of what reported (for example for "data

enrichment") and also observed that he would have had no reason to provide the operator with all the consents at a time when, due to the numerous disservices, he was no longer satisfied with the service provided.

In this regard, it should be noted that the operation of the MyWind and My3 apps, responsible for managing the user profile connected to the telephone service, was brought to the attention of the Guarantor with a plurality of other reports and complaints (files 116325, 133895, 133630, 132819, 132840, 132535, 134089, 135405). All the requests received complained, in a similar manner and with the attachment of the relative screenshots, that the apps in question forced the user to provide, with each new access, a series of consents for various processing purposes (marketing, profiling, communication to third parties, enrichment and geolocation) only to then allow them to be revoked after 24 hours.

With a note dated 17 April 2019, the Company, in declaring that it had made some changes to the apps in question in the last quarter of 2018, attached the login screens of both, similar to those already presented by the whistleblowers, from which the following emerged:

- the will of the owner to carry out the five treatments described was stated;
- it stated that "if you prefer you can choose [...] which consents to lend on Consent management. By pressing Accept, you allow Wind Tre to collect and use the information listed above and personalized by you. I also declare that I accept the terms and conditions and that I have read the privacy policy";
- by pressing the "Cancel" button, it was not possible to use the app because, according to the Company, the terms and conditions were not accepted and the disclosure was not read.

Wind Tre, in this regard, stated that there was no obligation to provide the consents since these were previously manageable from the "Consent management" link present in the body of the text and "probably some users may have misunderstood the contents of the page". In fact, going to Consent Management you could choose individual preferences; then "having made this choice, the customer by returning to the previous page and pressing accept confirms the choice on the consents just made and at the same time accepts the terms and conditions".

In such cases, therefore, it is highlighted how the procedure followed was complex, inadequate for rapid use, typical of a smartphone application and, for these reasons, suitable for generating errors on the part of the interested party with direct repercussions on the legitimate expression of consent . In any case, despite the reports received from time to time, the Company did not deem it necessary to promptly intervene in the configuration described.

Similarly, it should be considered, in general, that apps such as My3 and MyWind perform the essential function of allowing the user to monitor consumption and service usage thresholds and, therefore, to control overall telephone spending . The impossibility of keeping running costs under control may have represented a further negative element for the interested party, in his capacity as a consumer.

Furthermore, with a complaint dated 8 January 2020 (file 145970), the conversation held in chat with customer service operators was documented, confirming that "... the consents are revoked. if you found them temporarily granted, it could have been due to the latest update of the customer area because, in order to access, you are first asked to give your consent and then they can be revoked again".

With a note dated February 17, 2020, the Company, in reiterating that the expression of specific consents was always possible through the "Consent management" link, added that, in order to streamline the use of the app, by pressing the " Accept" the customer could simultaneously confirm acceptance of the terms and conditions but also of the optional consents not previously expressed, subject to the possibility of subsequently modifying them. The same also added that "Mr. ... has repeatedly changed his will by giving and revoking the previously granted consents".

Finally, with a complaint dated 5 February 2020 (file 146873) the impossibility of using the app was once again complained of without necessarily clicking on the "Accept" button and without the effects of this expression of will being clearly understood. The claimant has documented that, once indicated "Accept", the consents present in the personal area were all conferred. The same also attached an exchange of correspondence with privacy@h3g.it from which it emerged that the Company provided feedback indicating, initially that "once you have logged in to the App, you will be able to modify the consents to the section Tools - Settings - Consent Management". To the customer's subsequent negative remarks, the Company replied that "For the sole purpose of facilitating and streamlining the first access to the My3 App by our Customers, we have provided, in the event that the Customer does not want to go to the dedicated section Consent management to avoid a further step, an operation which can however be carried out at any time, to provide an Accept button both for the Terms of Service and for Consents not previously expressed. On the other hand, the Accept referred to the privacy information is to be understood not as a constraint of the consents to use the functions but rather as an acknowledgment of the methods and purposes of the processing".

These justifications provided by the Company were not considered acceptable and a specific objection was therefore formulated pursuant to art. 166, para. 5 of the Regulation. On the basis of what was stated by Wind Tre, in fact, the intent of

the request would have been to have the contractual conditions accepted and demonstrate acknowledgment of the information. Obviously, however, the intention to acquire previously unexpressed consents had to be added.

Based on what was declared, therefore, these three different expressions of will (when the app was opened, with a single question, the following were asked: 1) to accept the contractual conditions; 2) to accept the information; 3) to provide - or "validate" all the required consents) should have been expressed with a single action, consisting in the selection of the "Accept" button. Even if one wanted to admit the usefulness of this type of procedure, the failure to comply with the provisions of art. 7, par. 2 of the Regulation as well as in recitals 42 and 43 regarding the awareness of the subject who expresses a consent in the context of a written declaration that also contemplates other issues.

Furthermore, the proposition of the aforementioned requests also appears to be without logical sense since it is not possible to understand why these were repeated each time the app was accessed. In this sense, even having wanted to consider the request only as a confirmation of having read the information, it appears completely specious in the absence of changes to the information itself that would make it necessary to re-propose it. A similar consideration can be made with regard to the contractual conditions, which are supposed to be made known at the time of signing the service contract (and not modified at each single access).

The numerous reports received (all of similar content) lead us to believe that, behind the lack of clarity, there is therefore a rule for the collection of consent preordained to force the will of the users, a rule that has not been changed even after the receipt of the numerous reports.

The provision of a method of choice (allegedly preventive) via the "Consent Management" link, in addition to proving to be difficult to understand, also appears juridically insufficient to guarantee the expression of a valid consent since, in the absence of specifications to this effect, it could always have been considered superseded by the expression of will subsequently expressed by pressing the "Accept" button. And, above all, it does not appear justified in its reiteration.

Finally, the remedy consisting in the possibility of revoking (however not before 24 hours) the consents expressed involuntarily is to be considered completely insufficient, since, as known, the expression of the will must be free and preventive. Wind Tre itself acknowledged that, in several cases, the consents were given and then revoked several times. Remaining to underline the risk of use of data during the aforementioned 24 hours.

Such treatment, therefore, cannot be considered lawful and the consents collected in the manner described above cannot be

considered suitable for proving a free and specific manifestation of will by the interested parties.

With the defense brief of June 15, 2020, the Company declared that, to date, the two apps have been replaced by the single WINDTRE app, which no longer requires consent to access.

2.1.2.4. Consent given in an unlawful manner (not free expression of consent).

As highlighted in point 2.1., in numerous cases the Company has documented the acquisition of consent by providing copies of the contracts signed by customers (so-called pda).

Without prejudice to the specific anomalies already indicated above, we now want to examine the general methods of obtaining consent when signing a contract for the purchase of a mobile or fixed user. This is because several times over the years the Guarantor has been brought to the attention of the difficulty of expressing free and specific consent for all processing purposes, despite the Company's declarations regarding the instructions given to its partners in this regard.

Lastly, reference is made to a report dated March 13, 2020 (see file 148352) in which, with notes also sent to Wind Tre, the impossibility of expressing free consent for promotional purposes was complained of, both before and after signing the contract activated with a reseller.

We also refer to the complaint (see file 136370) with which it was represented, in a very timely manner, that the sales operator had prepared a contract with all the boxes relating to the consents already pre-selected and, after some resistance opposed to the customer's requests, it only modified the selections in the system without reprinting the contract. When asked about this, the Company replied with a note dated 17 July 2019, stating that the customer's will was probably misunderstood by the operator. On the basis of these elements, the Office had ordered the closure of the investigation on 20 November 2019.

However, in the light of some supervening facts, which are illustrated below, what emerged also from the described investigation must be considered again, evaluating the good faith of the statements provided at the time by the Company

In fact, with a complaint dated 17 June 2019 (see file 139604) it was complained that, for the activation of a new user account at a dealer, the latter would have prepared a contract for signature containing the consents already selected without having previously requested the customer to express a willingness to do so; given the size of the characters in which the text relating to the expression of consent was written, it would not have been possible to immediately notice what was being presented for signature; to obtain the printing of a new contract without the selected consents, there would have been much resistance from the salesman.

In this case, the Office requested an inspection from the retailer XX S.r.l. of Merano, where the user in question had been activated and which operated as data controller of Wind Tre. The inspection activity, delegated to the Special Privacy Unit, was carried out on 11 and 12 December 2019 and the following emerged:

the registration of consents is carried out using the Wind Tre application called "Wind Station";

with regard to the effective methods of collecting the customer's wishes, the operator declared in the minutes that "following the indications of the area manager Mr. ..., during each activation of the sim card, the reference operator must flag all the consents provided therein. Among other things, this operation is facilitated by a special button present within the management [...]. Only if, when signing the paper model printed by the system and submitted to the attention of the interested party for acceptance of having read the information and release of the consents, the latter should express perplexities about the consents present in the reference model, the operator shall modify them according to the indications provided directly by the interested party"; it follows that the operator, by default, values all the consents and prints the contract, thus prepared, for the customer to sign;

the tax inspectors acquired a copy of the contract signed by the complainant on 21 May 2019 in which there is, on the top right-hand side, a box called "keep in touch with Wind" containing a declaration of acknowledgment of the information and authorization to process the data personal data for marketing purposes by Wind Tre and its partners; profiling; geolocation; communication to third parties and data enrichment. The size and spacing of the text contained in this box are considerably smaller than those of the characters that make up the annexed contract so as to be objectively difficult to read both as regards the entire text and, above all, as regards the display of a any flag in the boxes relating to individual consents;

the operator heard in this regard, declared that he had received verbal instructions regarding the operating procedure described above for the acquisition of consent and, in order to document what was alleged, handed over a copy of two e-mails received from the manager of Wind Tre : in one of them, dated 25 May 2019, there is a graph that describes the percentages of consent acquisition achieved by the dealer with an invitation "once again to reach 100% on everything"; with the second e-mail, dated June 5, 2019, the Wind Tre sales representative sent the dealer a report of the services performed for the purpose of assessing the supplier; the text reads "pay attention to the quality data entered, in particular the flags must be 100% on everything"; a table is attached to this email which clearly shows that obtaining high percentages of consent flags is counted among the quality indicators;

finally, by examining the content of the management system provided by Wind Tre to the reseller, access was gained to the communication published by Wind Tre on March 22, 2019 entitled "New consents from POS NG". This notice informed the partners of the change made to the list of consents starting from 25 March 2019 which concerned, in particular, the unification of the first two consents in a single expression of will, presented to the subscriber with the following text: " Wind commercial communications: I consent to the processing of my personal data for Wind to receive communications regarding special offers, discounts and promotions relating to Wind products and services and partners selected by Wind"; a single consent was thus required to receive promotional communications from both Wind Tre and third parties. Furthermore, in the event of an "Offer modification for existing customers acquired before 9 January 2017, only the 2 old consents valued as expressed in the activation phase and the new 4 consents not valued (blank) are displayed. It is possible to modify the first 2 and acquire the 4 new consents [...] but if the retailer tries to acquire only some of the 4 new consents or modify one of the 2 old ones, the blocking warning will be displayed, where it will be indicated to valorise all 6 consents. […]. For customers acquired from 9 January 2017, by Modification Offer, all 6 consents are already valued with the possibility of modifying them together with the commercial variation of the offer".

2.1.2.5. Consents of customers of another operator acquired with illegal methods

The results of the investigations of the CD are referred to here. "proceeding B" referred to in the introduction and carried out after the Authority learned, from a report, of the existence of a call center in Rome which allegedly carried out contact activities with potential customers and offered telephone services on behalf of the Company, by acquiring customer data from another telephone operator in an unlawful manner and in any case outside the regulatory framework outlined by the Regulation and the Code.

The Office, having carried out the necessary checks relating to the personal data of the subjects indicated in the report, delegated to the Guardia di Finanza, special unit for the protection of privacy and technological fraud, the performance of inspections at said call-centre.

The inspection verification revealed that the activities carried out there belonged to Alessandro Corbelli Sunrise s.r.l.s. and, despite the same, during access, had been presented as training activities for the start-up of future call center operators, the results of access to workstations showed that - precisely at the time of the assessment - they were Promotional telephone contacts of the services of the company Wind Tre are in progress.

The telephone contacts of potential customers, addressed to the business area, provided for the setting of appointments for the compilation of contract proposals, appointments which were "uploaded" into the electronic diaries of the people who were supposed to go to the customers.

In the call centre, large Wind contractual forms were found, prepared for business customers, and numerous Wind-branded sim-cards.

The contact activities were carried out in seven workstations through the use of personal computers and mobile phones. In the chronology of the aforementioned telephones, traces of hundreds of telephone calls made in the three days prior to the inspection were found. From the accesses to the computers used by the operators, it was possible to acquire numerous files in Excel format containing lists consisting of personal data and telephone contact information of companies and individuals. All the operators interviewed stated that these files were uploaded daily on the PC desktops by the contact person and that they contained the names and telephone numbers of the subjects to be contacted. Excel files containing personal data (name, surname, company name, tax code, landline phone number and mobile phone number) of over 500,000 users were found on the contact person's PC and in another workstation. IT traces of access via virtual machines to the database of another telephone company were also found.

With reference to the origin of the personal data found in the various call center workstations, a specific inspection carried out at the headquarters of the telephone operator from which - according to the report referred to above - these would have been stolen, did not allow for the full acquisition proof in this sense, while the contact person present in the call center at the time of the assessment declared that "the activity of this call center on a typical day requires me to distribute to the operators the lists of subjects to be contacted who are present on my PC of which I cannot define the origin [...]; with reference to the SIMs present in the call center and to the contractual documentation and brochures, I represent that all this material comes from Wind agencies whose name and company name I do not know and are presumably intended for agents [...] which, however, I I don't know personally."

These declarations of the contact person, paradoxical, unreliable and made in disregard of the duties of collaboration towards the Authority, were not able to prove that the acquisition of the personal data of the potential customers had taken place in compliance with the provisions of the Regulation and the Code, with particular reference to the regulation of consent, and, in any case, they highlighted that the call center activities took place outside the procedures implemented by Wind Tre to regulate

telemarketing and teleselling activities. Furthermore, the methods of contacting potential customers took place without providing the necessary information required by art. 14 of the Regulation as evidenced by the absence of information on the processing of personal data in the call script acquired during the assessment, thereby corroborating the consideration that any consent collected cannot in any case be considered valid due to lack of the necessary preventive information.

Basically, the call center activity appeared to be completely abusive, in violation not only of the provisions on the protection of personal data but also of those in the fiscal, tax and employment fields for which the privacy unit proceeded to involve the competent branches of the Guardia di Finanza. It was also conducted by a company not present in the register of communication operators, using numbers not recorded in the same register, in an extremely worrying situation of lack of interest for the rights of the interested parties and for the necessary security guarantees which should have presided over each processing operation .

During the verification carried out at the said call-centre, documentary evidence of a significant operational link between it and the Merlini s.r.l. agency was acquired. which carries out marketing activities for the products of the Wind Tre company at its operational headquarters in Ponsacco (PI).

The Office therefore delegated to the Guardia di Finanza the carrying out of an inspection assessment against the aforesaid agency, from which it emerged that Merlini s.r.l. operates exclusively on behalf of Wind Tre, under an agency contract which also provides for its designation as data controller. Merlini s.r.l. carries out its activity through collaborators present on the national territory, called "procurers". Among the brokers who collaborate with this company was also the company Alessandro Corbelli Sunrise s.r.l.s. and, with reference to it, Merlini s.r.l. produced some invoices, lists of acquired contracts and emails containing copies of customer documents.

Regarding the activity of the brokers, Merlini s.r.l. exhibited a copy of some letters of appointment in which it is reported verbatim: "your activity must be carried out in full autonomy, following only the indications and instructions that will be given to you regarding our products, the conditions of sale and other commercial provisions. The activity. it may in any case be carried out in collaboration with production and/or marketing personnel, with its own agents". Merlini s.r.l. he declared that he had not identified the procurers as data controllers or authorized to carry out processing operations as they "operate autonomously" and "each procurer is free and, therefore, autonomous in the search for the subjects to whom to direct the commercial proposals".

With a note dated 25 October 2019, the Office requested Merlini s.r.l. to exhibit a copy of the letter of appointment conferred on the company Alessandro Corbelli Sunrise s.r.l.s., and of any other legal transaction stipulated with the same. Merlini s.r.l. provided feedback by e-mail dated November 4, 2019, representing "that he did not have further documentation and in particular a copy of other mandates. As already explained during the investigation of July 9, verbal agreements are and were in progress with many collaborators (including Corbelli) and the relationship materialized with the sending of Wind contract proposals by the collaborators and the punctual payment of the business procured by our company" and also adding "that when it comes to starting new collaborations with procurers, the written mandate is the last thing that matters [...]".

With specific reference to the above incident, the Office also delegated two inspections to the Guardia di Finanza which took place at the Wind Tre headquarters in Rome.

With regard to relations with Merlini s.r.l., Wind Tre produced the agency contract stipulated between the two companies and a summary statement of the documentation acquired and the process carried out to affiliate the sales agents to the Wind Tre network. This affiliation process includes, among other things, the acquisition of chamber of commerce registrations, due diligence and scoping questionnaires, banking and tax documentation and the curriculum vitae of legal representatives.

Among the documentation, a questionnaire was submitted to the sales agent regarding the obligations regarding the protection of personal data. Among the answers provided by Merlini s.r.l., numerous elements emerged which could generate doubts regarding the correct processing of personal data and the effective management of collaborators. For example:

- to the question (present in section 6 "Composition of commercial contact lists" of the questionnaire) "Does the partner acquire the lists of subjects to be contacted by telephone through channels other than Wind Tre?", Merlini s.r.l. he replied in the affirmative without indicating the acquisition channels of the aforesaid lists;
- to the question "Does the partner guarantee the correct use of the contact lists within the scope of their temporal validity previously communicated by Wind Tre and cancel them, after the deadline, from any system/memory medium?", Merlini s.r.l. he answered in the negative;
- to all questions relating to the "obligations relating to data processing for commercial calls" and the "code of conduct for telemarketing activities" Merlini s.r.l. replied that they were not conferring with respect to their own activity, despite the fact that they concerned the ethical rules and the operating instructions present in sections I and L of the agency contract signed by Merlini s.r.l.

No verification appears to have been carried out by Wind Tre, in the light of the feedback provided by Merlini s.r.l., regarding the network of collaborators of the latter company and, in particular, if these collaborators had been identified on the basis of the same requirements required by Wind Tre, as well as launched promotional activities on the basis of the same operating procedures identified in the agency contract stipulated between Wind Tre and Merlini s.r.l..

2.1.3. Contacts made without the acquisition of a suitable consent having been documented

The Company, in various circumstances, has not been able to document the acquisition of consent, stating, depending on the case:

a) that the calling numbers indicated by the whistleblowers were not attributable to those held by the partners or,

b) that the user called was not present in the lists to be contacted for promotional purposes (see files 128220, 127687, 132667, 132114, 131606, 131684, 135017, 136153, 136903, 137035, 136371, 136650, 13761537, 23781537, 13761537 , 138316, 138667, 139253, 140782, 139839, 140716, 140463, 140391, 142109, 144236, 146789) or more,

c) that the methods used to carry out the promotional campaign were not recognized as complying with the company communication policies (see files 134997, 130266, 145996, 123638, 130729, 113495, 133984, 134569, 132667, 133372, 134927, 132256, 1341 , 131606, 131897, 131464, 135017, 136903, 136945, 137003, 137392, 139253, 140782, 139839, 140343, 140391, 144236, 146789);

that is to say:

d) not providing any element (informative or documentary) capable of proving the possession of a suitable consent, limiting itself to ensuring that the number of the interested party has been included in the black list (see files 134569, 132256,133372, 131897, 136945, 137035, 139126, 142352, 139839);

e) documenting the consent by attaching copies of contracts that are illegible or proving only the contractual intentions and not also the choices regarding personal data (see files 128208, 130787, 113495, 131896).

2.2. Methods of responding to requests to exercise rights by data subjects

In many cases, the failure to respond to requests to exercise rights made by data subjects was complained of, even repeatedly, with particular regard to opposition to processing for promotional purposes or the exercise of the right of revocation.

The Company, with the notes sent in response to the various requests for information formulated by the Authority, represented

that some requests were not found or were not promptly found because:

a) received at an address not responsible for managing this type of request (see files 130344, 133911, 142614, 145996, 124985, 134434, 133063, 133372, 137580);

b) in compliance with a company procedure, which was later superseded, identification was requested by sending a document (see files no. 130344, 128000, 128805, 130356, 129952, 127784, 128208);

c) there have been errors or problems in receiving paper or electronic mail (see files no. 141011, 134392, 130266, 130539).

2.2.1. Instances received with incorrect addresses

With regard to what is represented in point a), in particular, the Company pointed out that the communications that did not receive an adequate response were received by e-mail addresses or pecs not manned by personnel suitable for handling requests relating to the protection of personal data. The same also highlighted that in a complex structure, such as that of Wind Tre, it is not possible to ensure the correct management of requests if they do not receive the correct contact details, as indicated in the information on the websites of the Wind and Tre brands.

The office therefore verified, on 26 February 2020, the publication of these contact details on the Company's websites, finding the following:

a) in relation to the references for the Wind brand,

- on the website www.wind.it at the "privacy" link there was a list of various information followed by the "cookie policy" at the bottom of which it is reported that "Any requests pursuant to articles from 15 to 22 of the European Regulation, must be addressed to Wind Tre S.p.A. - Ref. Privacy CC, PO Box 14155- Milano Post Office 65, 20152 Milan (MI)";

- if instead you followed the link relating to the "New Privacy Policy art. 13 and 14 of the GDPR as a modification of the information already provided pursuant to art. 13 Legislative Decree 196/03, so-called Privacy Code" it was reported that, for various processing purposes, the consent given "may be revoked at any time, by writing to Wind Tre Spa - Ref. Privacy CC Post Office Box 14155, Milano Post Office 65 20152 Milan (MI) or by calling 155". Finally, in the same disclosure, it was indicated that requests relating to the exercise of the rights of the interested parties "may be addressed to Wind Tre Spa - Ref. Privacy CC Post Box 14155, Milan Post Office 65 20152 Milan (MI) and providing, as an attachment with the request, an identity document in order to allow WIND TRE to verify the origin of the request";

therefore, only the physical address of a post office box was made available to Wind customers or, alternatively, they were

invited to call customer service;

b) in relation to the references for the Tre brand,

- on the website www.tre.it at the "privacy" link there was a list of various information followed by a document called "Privacy policy" which specified that "Any requests pursuant to articles from 15 to 22 of the European Regulation, must be addressed to Wind Tre S.p.A. - Ref. Privacy CC, PO Box 14155- Milano Post Office 65, 20152 Milan (MI)";

- if instead you followed the link relating to the "New Privacy Policy art. 13 and 14 of the GDPR as a modification of the information already provided pursuant to art. 13 Legislative Decree 196/03, so-called Privacy Code" it was reported that, for various processing purposes, the consent given "may be revoked at any time, by writing to Wind Tre Spa - Ref. CC Privacy – Via Alessandro Severo 246, 00145 Rome, or by writing to privacy@ tre.it or by calling 133";

- finally, in the same disclosure, it was indicated that requests relating to the exercise of the rights of the interested parties "may be addressed to Wind Tre Spa - Ref. CC Privacy - Via Alessandro Severo 246, 00145 Rome, or by writing to the address privacy@tre .it. and providing, attached to the request, an identity document in order to allow WIND TRE to verify the origin of the request";

For Tre customers, therefore, a physical address was made available which referred first to a post office box and, subsequently, to the address Via Alessandro Severo 246, Rome, without clarifying which was the correct address to use; furthermore, an ordinary e-mail address was provided or, alternatively, customers were invited to call customer service.

However, it should be noted that the numerous requests received all complained, in a similar manner, of the failure to respond to requests sent almost always to the same addresses: windtrespa@pec.windtre.it, servizioclienti155@pec.windtre.it and windtreitaliaspa@pec. windtre.it.

The recurring use of the same contact details by numerous whistleblowers, instead of those reported in the disclosures, can be considered indicative of the fact that, first of all, they have in some way been disclosed to customers (probably in the contractual documentation or, as reported in some reports, provided by telephone by the same customer service). Wind Tre itself, with the reply provided on 26 November 2019, in contesting the use of a non-existent certified email address, stated that "the correct address is servizioclienti155@pec.windtre.it as reported in the General Contract Conditions" .

Furthermore, taking into account the technology currently available, it cannot be considered sufficient - and in these terms the Company has been challenged - the provision of only the physical channel for sending the requests, obliging the interested

parties to send a letter or a registered letter (possibly also with return receipt, to confirm receipt), bearing the related costs.

The alternative of telephone contact with customer service or the ordinary e-mail address (moreover provided only for the Tre brand and not for Wind) do not satisfy the needs of those who want to prove that an application has been sent.

In this regard, reference is made to the provisions of art. 12, par. 2 of the Regulation on the basis of which the data controller facilitates the exercise of the rights of the interested party, as well as the provisions of art. 7, par. 3 according to which consent is revoked as easily as it is granted.

Finally, while deeming the Company's need to channel requests relating to the protection of personal data to a single "channel" to be understandable, the number of complaints received has made it clear that the interested parties are not always able to autonomously bring their requests to issues related to the regulation of data protection.

As can be seen from the numerous reports sent to this Company, not only the average user but also various professionals (engineers, lawyers, etc.), have made use of the PEC addresses mentioned above, considering them correct and only in very few cases has the contact of the dpo (mostly after previous unsuccessful attempts). Similarly, we recall the difficulties represented by those who, although they have never been customers or no longer are, have been the subject of promotional campaigns without having, however, had the possibility of identifying a correct address to which to address their refusal to treatment (given that even in these cases the first attempt was made using the customer service channel).

It follows that the customer service, which in fact represents a primary interlocutor for the interested parties, was not sufficiently trained for the correct management of the requests received (at least at a first level of reception and sorting), with the consequence that numerous requests remained unfulfilled or have been treated improperly.

However, we acknowledge what was communicated by the Company with a note dated 6 March 2020 regarding the preparation of a new information notice, introduced following the establishment of the single Wind Tre brand, which indicates, as channels of communication with the owner , a physical address, a pec and a telephone number. Wind Tre itself intended to highlight, in its defense brief, that this corrective measure was put in place on a date prior to the receipt of the communication of the initiation of the proceeding by the Guarantor, received on May 13, 2020.

2.2.2. Applications not accompanied by identification documents.

In other cases, as mentioned above, the Company then declared that it had not promptly responded to the requests of the interested parties because they were not accompanied by an identity document. In particular, in the various response notes

received, the same has repeatedly stated that initially the company procedures provided for the obligation to present an identity document. Subsequently, also following the numerous reports forwarded by the Guarantor, a simplification was implemented, guaranteeing in any case the revocation of consent for marketing purposes even in the absence of the document, provided that the same came from an e-mail address attributable to the customer, " requesting the identification of the interested party at a later time".

In the current regulatory framework, the identification of the interested party exercising his rights is a necessary prerequisite for the correct response of requests. It is, in fact, quite evident that the data controller, in providing answers to the requests of the interested parties, must guarantee them from any prejudices, including access to unauthorized third parties. Therefore, the art. 12, par. 6 of the Regulation allows the data controller to request further information that is necessary to confirm the identity of the data subject, but only if he has reasonable doubts about the identity of the person submitting the request. This parameter of reasonableness is also referred to in recital 64 which suggests the adoption of "reasonable measures" to verify identity. This in order to avoid excessive requests aimed at discouraging the exercise of rights but also in order to avoid the collection and storage of unnecessary data. The identification of reasonable measures, therefore, should be guided by compliance with the principles of proportionality, necessity and adequacy.

In the light of these principles, the reasonableness of the measures adopted can be assessed taking into account the context and the potential risks but also the usefulness in achieving the purpose (of achieving correct identification).

In the case in question, it is possible to operate a different quantification of the risk associated with the withdrawal of consent for commercial purposes compared to that deriving from the exercise of other rights (such as, for example, rectification, cancellation, portability, access). This above all in consideration of the few consequences that the withdrawal of consent for commercial purposes can have in the legal sphere of the interested party compared to those, much more prejudicial, deriving from the exercise of other rights, where it were a third party ill-intentioned to exercise them. Furthermore, a request for revocation of consent or opposition for marketing purposes can probably be considered attributable to the subject proposing it, since it cannot be assumed that other subjects could have an interest in this sense (unlike what could happen with the exercise of other rights).

Finally, the measures adopted must, as mentioned, limit the acquisition and retention of unnecessary data. This eventuality could instead occur in the case of subjects who, while not being customers of Wind Tre, but having been contacted (correctly

or not) for a campaign of the latter, wish to present a specific refusal to receive promotional messages: the request addressed even for these subjects to provide an identity document appears even more disproportionate and may involve the acquisition of personal data that are not already available to the holder and which are therefore not necessary.

In conclusion, an uncertain and contradictory picture emerged from the Company's responses in the description of the technical and organizational measures adopted to identify the data subjects in a reasonable manner, representative of an insufficient assessment of the different interests at stake.

The initial request for a copy of the identity document for all subjects, customers and non-customers, and for any type of request, according to what was stated, was subsequently revised providing for an immediate response to the withdrawal of consent; however, it is not understood what is the need, once the request of the interested party has been accepted, to request in any case, even at a later stage, the sending of the identity document.

2.2.3. Requests not found due to errors or problems in receiving paper or electronic mail

In a remaining number of cases, Wind Tre justified the failure to respond to the requests sent by the interested parties by proposing the recording of episodes in which the correspondence was lost or did not reach the correct recipients due to errors or reception problems.

These events must be assessed in the light of the observations made so far regarding the suitability of the organizational measures adopted by the Company.

2.3. Information for interested parties

Recalling what was reported in the previous point, it should be noted that, before the corrective action carried out with the introduction of the single brand, the information made available on the Wind and Tre websites indicated non-unique contact details and different from the customer service addresses, also communicated by the Company and used more frequently by the interested parties. According to the Company, this led to difficulties and delays in managing the requests.

With regard to compliance with the provisions on transparency, pursuant to art. 12 of the Regulation, we must also add what emerged from the preliminary investigation initiated following a complaint (see file 143394) regarding the exercise of the right of access to traffic data stored for billing control purposes.

With a note dated 26 November 2019, the Company justified the failure to respond to the requests forwarded by the complainant by stating that the same had been sent to non-existent addresses and, therefore, having now passed more than

six months, access to such data was no longer possible . Regardless of the specific fact, probably originating from the customer's error, it must however be noted that, as also contested in the same complaint, the information provided to the interested parties pursuant to art. 13 of the Regulation did not indicate the data retention period envisaged by art. 123 of the Code. In this case, this led to an erroneous reliance on the much broader data retention period indicated by the Company for the execution of the contract (10 years and six months).

In fact, the provisions of art. 123, paragraph 4 of the Code regarding the obligation of the service provider to include, in the information provided pursuant to articles 13 and 14 of the Regulation, also information regarding the retention of traffic data.

In this context, therefore, it is not possible simply to oppose to the user the lack of knowledge of the rules, since the purpose of the infringed provision - the art. 123, paragraph 4 - is precisely to balance the information asymmetry towards users.

2.4. Publication and updating of data in telephone directories

The Authority then received numerous complaints complaining of the never-authorised publication of personal data in telephone directories, as well as the impossibility of obtaining their cancellation from Wind Tre. In response to specific requests for information, the Company provided the following reasons:

a) the publication took place due to material error or misalignment (see files 137276, 128170, 128336, 133645, 146363);

b) the cancellation request was not promptly accepted due to communication difficulties with the customer (see files 134918, 142978); in the latter case, reference is made to what has already been observed regarding the adequacy of the organizational measures aimed at guaranteeing communication with the interested parties, to which these further cases are added as an example of the prejudicial consequences.

In particular, it should be noted that, with a note dated November 28, 2019, addressed to the Guarantor and to the complainant, the Company declared that the latter's user was published in the lists by the previous operator to which they belonged "therefore the request for cancellation had to be sent to Società Italia on Line S.p.A.". In reality, as has been known for some time now (see provisions of the Guarantor of 15 July 2004, web doc 1032381 and of 1 April 2010, web doc 1711492 regarding the publication of personal data in public directories), the telephone operator to which as data controller, he is the only subject to whom users must address requests for modification of the publication of the data in the list. Therefore, the reference made by Wind Tre to the need to contact the Italia on Line company directly appears incomprehensible. At the same time it should be noted that, despite the assurances provided by the Company in the same acknowledgment note, as of 16

March 2020, the data of the complainant was still present on the website www.paginebianche.it.

With regard to the complaint referred to in file 146363, with which the failure to respond to the request for cancellation from the lists was also complained of, it should be noted that, with a note dated March 12, 2020, the Company declared that "the competent department of the Undersigned manages the instance promptly trying to activate the cancellation process, which however was not successful". However, it was not specified why the cancellation had not been successful, nor was it documented if, contrary to what was claimed in the complaint, the relative response to the request forwarded by the customer had been given. Also in this note, the Company stated that the account had been entered by the previous manager and that the complainant should have contacted Italia on Line.

3. THE DEFENSE OF THE OWNER

Following the communications of the initiation of the procedure for the adoption of corrective and sanctioning measures sent by the Office pursuant to art. 166, paragraph 5, of the Code (note dated May 13, 2020 - proceeding A and note dated December 19, 2019 - proceeding B), the content of which is to be understood as fully reported here, the Company, with briefs dated June 15, 2020 (procedure A) and of 3 February 2020 (proceeding B), provided its observations, supplemented during the hearing on 25 June 2020 (procedure A) and 25 May 2020 (procedure B), of which the respective minutes were drawn up. Even the defense considerations, to guarantee the part, must be taken for granted here as fully reproduced.

In addition to what is reported in relation to the individual disputed points, Wind Tre has provided the following additional specific elements to justify its conduct.

3.1. Promotional activity not authorized by the interested parties

With regard to the disputed activities in point 2.1., Wind Tre, in particular, also recalling the interventions already in place, declared that all the partners and agents have been appointed as data processors. They were required to comply with the instructions conveyed through communications on the dedicated portal and with specific training activities. Furthermore, single-firm agency, consumer, microbusiness and business contracts have been integrated with the recent introduction of a "decalogue" of rules on the protection of personal data (the non-compliance with which can be assessed as a prerequisite for contractual termination). One of these rules imposed on the partners concerns the obligation to present the calling line unencrypted and to communicate to Wind Tre, following a specific procedure, all the numbers used; this declaration is essential to assign the partner a code in the company system.

The Company then recalled the use of the Campaign Management system, already in use and mentioned several times in the replies provided to the Authority's requests for information; this system has the function of centralizing the creation of individual promotional campaigns by conveying to the partners the initial instructions and lists of names to contact and receiving as input any withdrawals of consent collected during the calls made. In this regard, Wind Tre clarified that the lists are mainly provided by the owner, who also takes care of the checks in the Opposition Register, but it is possible that the partners also make use of their own lists: in this last case, it is the prior authorization of Wind Tre to use the list is required.

Furthermore, again with regard to the measures adopted to ensure greater control of the supply chain, the Company added that it has "...asked physical channel partners who intend to use contact lists for mere appointment-making activities, to provide specific evidence and request a subject to authorization, which will in any case be subsequent and possible with respect to the sample checks carried out by the undersigned Company. Physical channel partners were also required to keep a record of all contacts (both successful and unsuccessful ones) with indication of the source of the contact and evidence of consent. Upon request, this register must be available to the Undersigned Company, as data controller, and exhibited in the event of a request from the competent Authority. A process has also been set up internally according to which, following the activation of contracts (in outbound mode, physical channel), the undersigned company verifies the entire supply chain that has followed up on the activation, thus including the origin of the contact made" . This register can be filled in from 4 February 2020.

Finally, Wind Tre has adopted an internal procedure to formalize the checks to be carried out following the signing of subscription offers by customers: among these there is a section dedicated to the collection of personal data and consents.

In view of the measures described above which, in the Company's intentions, should allow each call to be traced back to the partner who made it, the same however added that, not having other means of investigation, it is unable to identify subjects who instead make calls without complying with these precautions.

The Company also added that, as already pointed out in previous discussions with the Guarantor, all agents have received specific instructions and are subject to periodic checks, carried out by answering questionnaires and, randomly, through on-site checks.

In this regard, the specific defensive considerations that the Company carried out in relation to "proceeding B" (point 2.1.2.5. above) are inserted, in relation to which it represented that:

a) the scope of activities of the company Merlini s.r.l. on behalf of Wind Tre it is not telemarketing or teleselling but is

represented by the so-called "physical channel", which provides for the promotion of sales contracts for telecommunications services and products offered by Wind Tre in a specific geographical area, through a direct interview and therefore without carrying out remote sales activities; the customers to whom this channel is dedicated are business customers, mainly made up of legal persons, for whom the regulatory framework relating to the protection of personal data should not apply;

b) since the activity carried out by Merlini Srl should not have configured telemarketing activities aimed at teleselling, Wind Tre has never provided Merlini s.r.l. contact lists of potential customers, with the exception of customers and former customers who had given specific commercial consent when signing the contract and had not revoked it, on whom Merlini had to perform loyalty-building tasks; therefore it cannot be affirmed that a promotional activity of the telephone services of the company Wind Tre was in progress at the call-centre subject to the inspection;

c) Wind Tre has on several occasions carried out training and awareness activities on the protection of personal data, both with reference to the internal corporate population and with reference to its Partners and Agents; as shown by the latest extraction requested from the Human Resources department, the training intervention was completed by all the Area Managers, District Managers and Channel Managers authorized to control the Business Agencies (including the Agency managed by Mr. Merlini) ;

d) since the contract entered into by Wind Tre with Merlini Srl did not constitute an agency contract aimed at carrying out telemarketing activities aimed at teleselling and, in any case, should have concerned exclusively the offer of products and services to legal persons , the Company had no suspicions precisely because, on the basis of the provisions of the contract, they did not reveal either the teleselling activity or the processing of personal data.

With specific regard to the disputed unsuitability of the methods of obtaining consent, formulated on the basis of the investigations conducted at the partner XX (point 2.1.2.4 above), the Company has declared that the conducts described do not fall within the established company procedures and do not correspond to the instructions given to their dealers also by means of the sales agents competent for the territory.

Therefore "any verbal or written indication from the Agent to the points of sale managed by them and not explicitly reported in the official procedures, is to be considered an initiative not attributable to the undersigned Company". She also added that the systems responsible for printing the contracts have the default consents set to "blank" and that "regarding the graphs sent via email by the Agent to the point of sale, it is noted that they say nothing about the acquisition procedures consents, nor do they

appear to be against such procedures". Furthermore, with regard to the ascertained presence of a single consent for the receipt of promotional messages from Wind Tre and third parties, the Company has clarified that this method of obtaining consent does not involve the communication of data to third parties but offers the interested party the possibility of receiving promotional messages in which the content conveyed may be for the benefit of Wind Tre or a third party. Therefore, the purpose of the processing remains unique and the content of the messages that are still conveyed by Wind Tre changes.

With specific regard to the disputed methods of obtaining consent through the MyWind and My3 apps, (previous point 2.1.2.3), the Company stated that it had made changes to them already in the phase prior to receiving the initiation of the procedure by the Guarantor, setting up the request for consent only during the initial configuration of the app. Subsequently, in consideration of the adoption of the single brand, the two apps mentioned are no longer available and have been replaced by a single WINDTRE app; this no longer requires the expression of consent, not even in the first configuration phase, but is limited to reporting the customer's wishes as registered and already present in the systems, while still allowing them to be modified from the same app.

More generally, with regard to the extent of the violations ascertained, the Company finally observed that "considering that the reports in this provision are approximately 95 for the years 2018-2019, it should be noted that they represent approximately 0.026% of total management carried out by the undersigned Company" and therefore the disputed cases, taking into account that the Company has about 32 million customers, can be considered attributable to a physiological margin of error with the exception of some specific cases which are instead considered attributable to fraudulent activities of third parties and are already been the subject of specific complaints to the Judicial Authority.

3.2. Exercise of rights by interested parties

With the note dated 15 June 2020, the Company also provided its observations on what was represented in the previous point 2.2. and, in particular, the availability of suitable contact channels as well as the procedures adopted to guarantee the exercise of the rights of the interested parties.

The same first recalled that, with the birth of the single brand, all contact channels were unified and made known through the new information and by sending individual communications to customers; therefore, to date, a post office box, the pec of the customer service and the telephone number 159 are available (and the previous contact channels will in any case be maintained for about a year).

The customer service is duly trained in the field of personal data protection, but the Company has ensured that every request received, even to non-dedicated channels, is managed, even if it is necessary to highlight the difficulties encountered in a complex structure.

With regard to the measures adopted to guarantee the exercise of rights, the Company has preliminarily observed that some cases disputed by the Guarantor, which complained of receiving promotional contacts even after the withdrawal of consent, were due to the timing of alignment of the systems which, in the years immediately following the corporate merger, they took longer to integrate. However, the Company has declared that, to date, "the consent is updated every 15 minutes and at the latest within 24 hours of entering the revocation on the system".

Finally, with respect to the procedures adopted to guarantee the exercise of the right of revocation, the Company reiterated that originally it required the request to necessarily accompany the request with an identity document but, already in the first months of 2018, steps were taken to simplify this procedure by giving course of the revocation request as long as it is received from a customer's email address known to the Company and postponing the receipt of the document even to a later time.

The choice of this method originated from the fact that, for the activation of each user, the Company was required to acquire a copy of a document and therefore considered it consistent to identify the interested parties using the same means.

Furthermore, the same added that the request for identification by means of a document had become necessary in the past following numerous requests for withdrawal of consent received from third parties in the name and on behalf of various interested parties.

To date, however, it confirms that it has changed the procedure by admitting the request even without attaching the document as long as it comes from an email address attributable to the customer.

3.3. Information for interested parties

With reference to what is represented in the previous point 2.3., the Company, following the dispute received, has ensured that it has already taken steps to integrate the information with the specific mention required by art. 123, paragraph 4, of the Code and in any case observed that the details of the telephone traffic carried out can in any case be consulted independently through the app or the Customer Area.

3.4. Updating data subjects in telephone directories

Finally, with regard to the disputed point 2.4 above. the Company articulated its defense by representing that the cases

brought to the attention of the Guarantor represent individual events for which the cancellation process had not been successful.

4. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also on the basis of the declarations of the Company for which one responds pursuant to art. 168 of the Code, the following assessments are made in relation to the profiles concerning the regulations on the protection of personal data.

4.1. On the methods of collection and withdrawal of consent and opposition to processing for promotional purposes

The behaviors described, with particular regard to the settings of the apps and the results of the inspection conducted at the dealer XX, have highlighted an operating method strongly oriented towards encouraging the collection of consent for promotional purposes, in the face of opposition procedures instead made it more cumbersome.

While it is true that the Company has declared that it has implemented specific corrective actions, the effectiveness of which will be discussed later, the assessment of the illegality of the previous conduct remains essential, especially with regard to the possibility of continuing to use such data for promotional purposes.

It should also be noted that, with specific regard to case XX, the Company did not deem it necessary to intervene at the procedural level but limited itself to disavowing the incident, qualifying it as an autonomous initiative of the Agent, with respect to which there is no however, no "call-up" activity has been carried out.

Furthermore, it should be noted that in the same defense brief, Wind Tre described in great detail the numerous activities implemented to train and control the subjects appointed to operate on its behalf, up to the point of declaring that it had no "reasons to doubt the legitimacy of the activities carried out by Partner-Agents given the training, awareness and control tools put in place".

Therefore, if the instructions given to the dealer by the commercial agent are the result of an independent initiative by the latter, it follows that the training and control measures would have proved to be completely unsuccessful in this case. If, on the other hand, more likely, it is admitted that the agent would have had no personal advantage in asking the dealer to obtain the maximum approval, it must be assumed that the interest in encouraging this practice is generally shared at the company level. And this interest is easily identifiable in the economic benefit resulting from the transmission of third party promotional campaigns, made possible thanks to the request, described above, of a single overall consent for promotional purposes. This

would also explain the various complaints received over time by the Guarantor with which it was represented, in a similar way, that the contracts had been presented for signature with the consent boxes already pre-selected, resisting the requests for modification. Cases declassified by the Company as "misunderstandings", which nevertheless left intact the questions regarding the underlying reasons for the described behavior of the various dealers and the relative personal interest in forcing the will of customers. The investigations conducted on these complaints, given the presence of formally correct instructions and systems, had so far not allowed to ascertain these elements. In the case in question, in fact, they emerged only thanks to the acquisition of documentation generated by the company's activity but not subject to specific procedures.

Furthermore, contrary to what Wind Tre asserts, the graphs attached to the agent's e-mails are extremely explanatory regarding the fact that the dealer is required to obtain the maximum consensus; these, in fact, contain unequivocal references to the percentages of the flags obtained on the processing of personal data, divided on the basis of the consent expressed with the first flag (promotional purposes of Wind Tre and third parties) and with all the other flags, and are even counted among dealer quality indicators.

Having said that, it is evident that it is of no importance to underline the correctness of the instructions given and of the setting up of the systems, since the will of the interested party can in any case be easily circumvented if the person who has to collect it is encouraged to do so.

To this it must be added that the pda model acquired in the file presented a setting of the print character of such small dimensions compared to the rest of the text, such as to make it very difficult for the interested party to verify the consents expressed. On this last point, Wind Tre has not provided specific observations, but has attached a copy of the new pda model (see attachment 7 to the brief of June 15, 2020) in which fonts of the same size are used throughout the text.

Even the investigations described regarding the functioning of the apps showed a conduct strongly oriented towards circumventing the will of the users. The numerous reports received (all of similar content) lead us to believe that, behind the lack of clarity, there was a hidden consent collection rule designed to force the users' will. Such treatment, therefore, cannot be considered lawful and the consents collected in the manner described above, before the changes have occurred, cannot be considered suitable for proving a free and specific manifestation of will by the interested parties.

Furthermore, again with regard to the carrying out of promotional activities in the absence of consent, one must recall what is described in point 2.1. regarding the assignment to third parties who, using their own lists, act as data controllers. Even if

considered a residual activity, the Company made use of these services without however guaranteeing that the contacts made did not prejudice the wish, specifically expressed by the interested parties towards Wind Tre, not to receive promotional contacts. The acquisition by the partner of a generic consent for third party promotional activities cannot, in fact, be considered sufficient to circumvent the desire not to be contacted (more) specifically expressed towards Wind Tre. It is therefore the responsibility of the latter to verify that the subjects who have revoked their consent or have expressed a specific refusal are no longer the subject of promotional activities on behalf of Wind Tre. A prescription in this sense had already been given to the Company with the provision of 22 May 2018, n. 313.

At the same time, the observations made regarding the methods offered to implement the opposition or the right of revocation must be considered. In fact, numerous requests received complained of receiving promotional contacts even after expressing a specific refusal to process them and, from the preliminary findings, it emerged that the procedures adopted by the Company did not prove to be suitable for correctly transposing the requests of the interested parties or aggravated the presentation of requests by requiring the attachment of an identity document.

In this last regard, without prejudice to the need to adopt, if necessary, measures to identify the interested parties, we reiterate what has already been observed in point 2.2.2 regarding compliance with the proportionality of these measures to the protected right, being considered sufficient for the 'exercise of the revocation of consent even just by sending an email from a recognizable address. Furthermore, the request for an identity document is superfluous in the case of subjects who do not have a contractual relationship with the Company but who, contacted for promotional purposes, still wish to oppose their refusal.

Therefore, the conduct described acknowledges the lack of adequate technical and organizational measures to allow data subjects to exercise their rights, in violation of art. 24 of the Regulation, with the consequence of unjustifiably aggravating the withdrawal of consent or opposition to processing for promotional purposes and, in many cases, completely nullifying its effects.

Furthermore, the Company has processed the personal data of the whistleblowers in the absence of suitable consent, in violation of article 130 of the Code as well as of articles 6, par. 1, lit. a) and 7 of the Regulation. These treatments, systematic and not occasional, must also be considered potentially carried out against a very large number of interested parties (customers and non-customers).

At the same time, the behaviors described acknowledge the lack of adequate technical and organizational measures, in violation of art. 24 of the Regulation, with particular regard to the inability to effectively control the supply chain of partners who carry out promotional activities to their advantage.

Furthermore, the methods of collecting consent upon signing the contract at the dealers constitute a total lack of correctness and transparency towards the interested parties, in violation of art. 5, par. 1, lit. a) of the Regulation, highlighting a conduct that is not only negligent but deliberately designed to circumvent the rules aimed at protecting the freedom of expression of the will of the interested parties. In this regard, the art. 25, par. 1 of the Regulation, with regard to the definition of the procedures imposed on dealers, through highly incentive mechanisms, for the acquisition of consent. And, again, this conduct must be evaluated, as well as the entire consent management method, in the light of the huge economic benefit deriving to the Company from the acquisition of the greatest number of consents for promotional purposes since, having prepared the box with the request for a single consent for itself and for third parties, has every interest in expanding the pool of subjects to whom promotional messages are to be conveyed.

Finally, with specific reference to the results of "procedure B", it must be considered that the entire structure of the Regulation is based on the accountability of the data controller. Due to the fact that the personal data of the subjects contacted who have subscribed to the promotional offers are destined to flow into the company databases, these should adopt special guarantee measures in order to prove that the contracts and activations registered in their systems originate from contacts made in full compliance with the provisions on the protection of personal data, in particular those referred to in articles 5, 6 and 7 of the Regulation relating to consent.

From this point of view, even the implementation of rigorous procedures that govern telemarketing and teleselling activities cannot constitute a valid barrier to the widespread practices of undue contacts by telephone service users if they are not accompanied by equally rigorous control procedures of contracts and activations, to be completed only if the legitimacy of the treatments is proven, from the first contact.

In the case in question, even the measures recently implemented, such as the adoption of the contact register, when they do not allow for an automatic and selective link between offer promotion activities and service activation procedures, are not suitable for preventing contacts made through the processing of illicit data, contracts and activations are then perfected, feeding that "undergrowth" of abusive procurers who act, as ascertained, not only in disregard of the relevant provisions on

employment and social security, but also in violation of the provisions on the protection of personal data indicated in the articles 5, par. 1 and 2, 6 and 7 of the Regulation and 1, paragraph 11, of the law n. 5/2018, in relation to the following paragraph 12 and to art. 130, paragraph 3, of the Code. The data controller must also answer for the latter violations due to the weakness of the above control procedures.

Moreover, again with specific reference to procedure B, it must be highlighted that the consideration that the above treatments were addressed to the business area and therefore, for the most part, to legal persons, is irrelevant, given that the art. 130, paragraphs 3 and 3-bis, of the Code also extends to these subjects the provisions on consent and opposition to the processing provided for natural persons therein.

Given the above, having ascertained the illegality of the processing in the terms described above, it is considered:

• to have to prohibit Wind Tre, pursuant to art. 58, par. 2, lit. f), the processing of personal data for promotional purposes collected through the MyWind and My3 apps before the changes occurred, as well as the personal data of subjects whose acquisition and validity of a freely given consent cannot be demonstrated;

• to have to order the same, pursuant to art. 58, par. 2, lit. d), to adopt, without prejudice to the corrective measures already introduced, suitable procedures to verify the correctness of the consent acquisition procedures by its sales network and that subjects who have already expressed opposition to the treatment of Wind Tre are not contacted by third parties acting as independent data controllers;

• to have to adopt an injunction against Wind Tre, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanctions provided for by articles 83, para. 4 and 5, of the Regulation and 166, paragraph 2 of the Code.

4.2. On the control of the supply chain

The results of the preliminary investigation reconstructed above with regard to the numerous promotional contacts complained of which, also in consideration of the numerous reports, appear to be supported by a reasonable presumption of validity, are attributable to a common conduct, the carrying out of promotional contacts in the interest of Wind Tre, for which the Company was unable to provide a legal basis and limited itself to disavowing the authorship of these contacts. Furthermore, in the case of text messages, faxes and automated calls, the textual indication of the content proves that the promotional activity was undoubtedly carried out for the benefit of Wind Tre albeit in ways that the Company itself claims it has not authorized: it follows

that a promotional activity was in fact carried out for the benefit of Wind Tre but, not being recognized by it, was in any case carried out in the absence of the necessary control of the supply chain.

Despite the assurances given and all the corrective actions put in place, a situation persists in which, in the face of the preparation of procedures that are in some cases even formally correct, in practice conducts that do not comply with the provisions of the law are carried out, put in place by subjects who, even where they remain unknown to Wind Tre, they operate in the interest of the latter.

In this regard, we refer to the considerations expressed in a general way by the Guarantor with the provision of 15 June 2011 (in www.garanteprivacy.it, web doc. n. 1821257), according to which the subjects who act on behalf of the principal , generating a legitimate expectation in the recipients of the communications regarding the effective ownership of the promotional campaign, are qualified data controllers. And this qualification with regard to the legal relations between the parties can be considered to exist even in the event that the subject who materially makes the contact, while remaining unknown to the data controller, in fact establishes a contractual relationship similar to that existing with the partners contracted directly. Also the art. 1, paragraph 11, of the law n. 5/2018, introduced into our legal system an express principle of joint responsibility of the owner-client for promotional activities entrusted to third-party call centers, establishing that "The owner of the processing of personal data is jointly liable for violations of the provisions of this law even in the case of outsourcing of call center activities to third parties for making telephone calls".

Furthermore, the Company, in various acknowledgment notes, has indicated that the subjects who carry out a promotional activity on their own behalf have been appointed as data processors and are "subject to supervision, through a questionnaire, reporting a good level of compliance". With regard to the suitability of this control procedure using questionnaires, express reference must be made to "Procedure B" which demonstrated the ineffectiveness of tools based largely on the exchange of letters. In the case in question, there were many elements that should have led Wind Tre to carry out additional checks such as:

to. the origin of the activations not only from the territorial operating area of Merlini s.r.l.;

b. the answers to the verification questionnaires in which acknowledgment of activities carried out by external subjects with the use of lists not acquired by Wind Tre and without being able to guarantee compliance with the provisions on privacy;

c. the absence of any form of communication relating to the work of external collaborators, even in the face of a significant

contractual activity that could not reasonably be supported by a modest-sized company.

Faced with these elements, Wind Tre should have carried out more stringent checks, concerning the network of business agents organized by Merlini s.r.l., which had to be correctly classified in the context of the processing of personal data, based on the provisions on managers and sub - those responsible pursuant to articles 28 and 29 of the Regulation.

As for the training and awareness-raising activities regarding the overall change in the legal framework regarding the protection of personal data, the defensive arguments were contradicted by the statements made by Merlini s.r.l. which represented that “Wind Tre S.p.A. did not carry out courses or conventions on the protection of personal data for agents, not even in conjunction with the entry into force of EU Regulation 679/2016".

Lastly, it cannot fail to be noted that, as confirmed by Wind Tre during the hearing, the company, following the very serious events relating to Alessandro Corbelli Sunrise s.r.l.s., proceeded to direct Merlini s.r.l. a simple reminder for a more careful application of the rules and provisions set forth in the agency contract, rather than undertaking more incisive actions.

The conduct described acknowledges the lack of adequate technical and organizational measures, in violation of articles 24 and 25 of the Regulation, with particular regard to the inability to effectively control the supply chain of partners who carry out promotional activities for the benefit of the Company.

Given the above, therefore, having ascertained the unlawfulness of the conduct outlined above, it is deemed

to have to prohibit Wind Tre, pursuant to art. 58, par. 2, lit. f), also in relation to the results of "procedure B", the processing of personal data of subjects for whom he cannot demonstrate that he has acquired suitable consent;

to have to enjoin the same, pursuant to art. 58, par. 2, lit. d), to adopt suitable corrective measures to ensure effective control of the processing chain;

to adopt an injunction against Wind Tre, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanctions provided for by art. 83 of the Regulation.

4.3. On information to interested parties

As described in point 2.2, the information on the company websites provided non-unique contact data while, in practice, the interested parties made greater use of the customer service channels, conveyed by the Company itself and indicated as the correct channel also in one of the answers provided to the Guarantor. This approach, confused and plethoric, has led to some

difficulties and delays in responding to the requests of the interested parties. To this must be added the presence of a procedure for identifying the interested party which, as mentioned, has proved to be disproportionate with regard to the exercise of withdrawal of consent and opposition to the treatment.

However, it is acknowledged that the Company, with the introduction of the single brand, has modified the information to the interested parties by unifying them in a single information and identifying the point of contact with the interested parties in the customer service only. It also simplified the procedure for identifying and responding to the requests.

Furthermore, as described in point 2.3, it was ascertained that the information prepared by the Company did not contain any indication relating to the retention terms of the traffic data and was correctly integrated only following receipt of the notice of initiation of the procedure.

Therefore, the violation of art. 12, par. 1 and 2 of the Regulation and of the art. 123, paragraph 4 of the Code with regard to the information published on the website before the modification, as well as the excessively onerous methods of exercising the rights.

Having ascertained the illegality of the conduct summarized above, however, having taken note of the corrective measures already implemented, it is not deemed necessary to intervene further on this point.

On the other hand, it is necessary to adopt an injunction order against the same Company, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanctions provided for by art. 83, paragraphs 4 and 5, of the Regulation and 166, paragraph 1 of the Code.

4.4. On the publication of data in the list

On the basis of the requests received by the Guarantor and the feedback provided from time to time by Wind Tre, it is noted that in some cases customer data was found in the telephone directories despite the sometimes repeated request for cancellation.

This would have occurred, according to the Company, by mistake or due to communication problems with the applicant. In this context, the suggestion made by Wind Tre to some complainants to make a request directly to the directory manager is also inappropriate given that, as is now known, the latter limits itself to publishing what is communicated by the telephone operators and is unable to satisfy directly user requests. On the other hand, it is the telephone operators who are responsible for updating the data contained in the single database(1).

Therefore, recalling what is set out in point 2.4, it must be recognized that the procedures have not been adopted to allow the rectification and cancellation of data from public telephone directories, in violation of art. 5, par. 1, lit. d) of the Regulation, as well as the publication of personal data in the absence of consent, in violation of art. 6, par. 1, lit. a) of the Regulation.

Having therefore ascertained the illegality of the conduct in the terms outlined above, it is deemed:

to order Wind Tre, pursuant to art. 58, par. 2, lit. d), to adopt suitable corrective measures to solve the repeated misalignments of the systems;

of having to adopt an injunction order against the same Company, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanctions provided for by art. 83, par. 5, of the Regulation.

4.5. On compliance with the principles of accountability and privacy by design

In addition to what has already been disputed in detail in the previous points, it is necessary to highlight, also in a more general way, a conduct that has proved to be on the whole elusive of the principles of accountability and privacy by design, set out in articles 5, par. 2, 24, para. 1 and 25, para. 1 of the Regulation.

In fact, "taking into account the state of the art and implementation costs, as well as the nature, scope, context and purposes of the processing, as well as the risks having different probabilities and seriousness for the rights and freedoms of the natural persons" the Company had suitable tools and sufficient knowledge, also conveyed by the consolidated rulings of the Guarantor (also directly addressed to Wind Tre), to assess the risks associated with the processing and to prepare, consequently, adequate technical and organizational procedures.

On the contrary, the preliminary investigation results showed an overall picture unsuitable for satisfying this requirement of adequacy, since the lack of suitable technical and organizational measures was repeatedly found, in some cases having to add the aggravating circumstance of the pre-ordering of the conduct (in cases relating to the collection of consent via the app and by signing the contract with the dealers) and also having to point out how, on several occasions, the Company has not been able to demonstrate compliance with the rules of the treatments put in place and the effectiveness of the measures adopted, as prescribed by art. 5, par. 2 of the Regulation.

On the other hand, in acknowledging the corrective measures introduced, in part already before the notification of the initiation of the procedure by the Guarantor, potential solutions can be glimpsed to strengthen the guarantees. We refer in particular to

the centralization of the promotional activity in the Campaign management system or to the provision of the contact register to be kept - for the moment only - by the agents of the physical channel. However, these measures will be able to develop a potential, which at the moment can be defined as embryonic, only when they are supported with greater contractual consequences for those responsible who do not scrupulously comply with these instructions.

For example, the centralized Campaign management system, which has already been in use by the Company for some time, has not prevented the occurrence of contacts, brought to the attention of the Guarantor, for which the Company has not been able to provide explanations, without count the fact that many of these were made using contact channels other than the telephone one. Such fervent promotional activity cannot simply be disregarded and classified as an autonomous initiative by unauthorized parties, given that the interest in taking action certainly does not appear to belong solely to the latter. And this interest, evidently, does not diminish as long as this activity, albeit unauthorized, is in any case remunerated. But even the provision of a contact register, which for now is addressed only to the agents of the physical channel and not to all partners, while functional in its intention to trace the supply chain, nevertheless seems weak if left entirely to the arbitrary compilation of the agent. This is also taking into account that the Company has not currently envisaged direct consequences in the event of undocumented contact, reserving the right only to make use of the termination clause in the contract. In other words, despite the feared (but entirely possible) consequences on a contractual level, the activation of a contract is always possible and illegal conduct is not, as a result, discouraged.

Even the same possibility of immediately acknowledging the revocation, at the time of the call, although appreciable in intention, is in fact not very profitable since it is entrusted solely to the intervention of the call center operator who makes the contact. In fact, in the face of the constant complaints received by the Guarantor regarding the annoyance of receiving continuous promotional calls and the protests allegedly made several times by the whistleblowers already against the caller, the Company declared that, in the first half of 2020, only 0, 3% of the people contacted requested the withdrawal of consent during the phone call (see table attached to the report of the hearing of 25 June 2020). Also in this case, similarly to what was observed for the procedures for activating contracts with dealers, it is of little use to have set up a formally correct system if the person in charge who must use it has an incentive to acquire (or maintain) the consents.

Also recalling the preliminary investigation conducted in "procedure B", there is evidence of the fact that the Company had adopted control measures on suppliers and had set control measures (only) on the activity carried out by the directly

contracted partner (Merlini S.r.l.). However, these measures did not prevent this agent from making use of other subjects who, with unlawful conduct, procured contracts from which Wind Tre also benefited financially, despite the alleged unawareness.

Moreover, still in the aforementioned "procedure B", it emerged that the measures formally envisaged, in particular the control of suppliers through questionnaires, had subsequently proved to be useless since the answers provided by the partner, although questionable, had not given rise to any consequence and under no control.

In fact, having ascertained the violations and critical issues in terms of consent and correct identification of the chain of responsibility in the context of processing, it clearly emerges that the consolidation of such anomalous conduct has been favored:

a) from the failure to set up effective procedures and controls to ensure compliance by the data controller Merlini s.r.l. and of the company Alessandro Corbelli Sunrise s.r.l.s., of the principles indicated in the art. 5, par. 1, of the Regulation;

b) failure to verify that the data entered into its databases following the promotional activity carried out by Merlini s.r.l. and by Alessandro Corbelli Sunrise s.r.l.s., had been acquired legitimately;

c) the underestimation of the need to guarantee the "chain" of treatment starting from the phase of acquisition of personal data to carry out marketing campaigns. These circumstances reveal an incomplete assimilation and application, by Wind Tre, of the principle of privacy by design to guarantee the rights of the interested parties.

It is therefore believed that the measures described by the Company must be accompanied by greater effectiveness on a practical level in order to be considered sufficient to stem a phenomenon, that relating to promotional contacts, which generates constant and widespread social alarm as well as favoring, making use of the tolerance of the operators, unlawful conduct such as that described in the Merlini case.

In fact, it cannot fail to point out strongly that the lack of control of the supply chain involves the Company in a "personal data market", already the subject of specific information from the Guarantor to the Public Prosecutor's Office at the Court of Rome, in which, alongside the violation of the provisions with regard to the processing of personal information, serious violations of labor law, tax and probably of a criminal nature emerge, fueling an "undergrowth" which in some cases could also be the object of attention by criminals.

On the basis of the elements set out above, having found the violation of articles 5, par. 2, 24, para. 1 and 25, par. 1 of the Regulation, it is deemed necessary:

order Wind Tre pursuant to art. 58, par. 2, lit. d), of the Regulation, to adopt technical and organizational measures suitable for achieving effective control over the processing chain in order to avert illegal practices and the carrying out of promotional contacts with subjects who have not provided adequate consent;

adopt an injunction order against the same Company, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanctions provided for by articles 83, par. 4, lit. a) and 83, par. 5, of the Regulation.

With regard to the provisions indicated in this section, please note that in the event of non-compliance, the sanction referred to in art. 83, par. 5, letter. e), of the Regulation.

With regard to the conduct attributable to Merlini s.r.l. and Alessandro Corbelli Sunrise s.r.l.s., the Authority will proceed with an independent prescriptive and sanctioning procedure.

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

5.1. Methods of collection and withdrawal of consent and opposition to processing for promotional purposes.

The conduct ascertained in point 4.1 integrates the following violations: art. 5, par. 1 and 2 of the Regulation; articles 6, par. 1, lit. a) and 7 of the Regulation; articles 24 and 25 of the Regulation; art. 130 of the Code.

Therefore, the pecuniary administrative sanction pursuant to articles 83, para. 4 and 5, of the Regulation and 166, paragraph 2 of the Code.

5.2. Control of the supply chain

The conduct ascertained in point 4.2 integrates the violation of art. 24 of the Regulation.

Therefore, the pecuniary administrative sanction pursuant to art. 83 of the Regulation.

5.3. Information for interested parties.

The conduct ascertained in point 4.3 integrates the following violations: art. 12, par. 1 and 2 of the Regulation and art. 123, paragraph 4 of the Code.

Therefore, the pecuniary administrative sanction pursuant to articles 83, para. 4 and 5, of the Regulation and 166, paragraph 1, of the Code.

5.4. Publication of data in list.

The conduct ascertained in point 4.4 integrates the following violations: art. 5, par. 1, lit. d) of the Regulation and art. 6, par. 1,

lit. a) of the Regulation.

Therefore, the pecuniary administrative sanction pursuant to art. 83, par. 5, of the Regulation.

5.5. Compliance with the principles of accountability and privacy by design.

The conduct ascertained in point 4.5 integrates the following violations: articles 5, par. 2, 24, para. 1 and 25, par. 1 of the Regulation.

Therefore, the pecuniary administrative sanction pursuant to articles 83, par. 4, lit. a) and 83, par. 5, letter. a) of the Regulation.

5.6. Quantification of the pecuniary administrative sanction.

The violations found in the proceedings described above must be assessed in the light of the fact that the same Company, with regard only to the period following the company merger between Wind S.p.A. and H3G S.p.A., was the subject of an injunction and prescriptive measure with regard to similar types of violations (see provision of 22 May 2018, web doc n. 8995285), which was followed by an injunction order adopted with provision of 29 November 2018 (web doc n.9079005). Following these measures, the same has implemented some corrective measures also referred to in this decision.

However, the persistence of numerous reports and complaints received by the Guarantor was noted; following the analysis of the overall documentation acquired in deeds, in consideration of all the elements that emerged, this Authority - having also evaluated the measures already implemented by the Company - deems a broad-spectrum intervention necessary (inhibitory, prescriptive and sanctioning), in order to ensure compliance with current legislation of the treatments covered by this provision.

The aforementioned violations ascertained against Wind Tre, in fact, represent proof, on the one hand, of company choices aimed at bending the rules to market needs; on the other hand, of the alarming context in which the phenomenon of unwanted promotional calls must take place. For more than fifteen years, this phenomenon has been the subject of social alarm on the part of citizens and attention on the part of the legislator and the Guarantor. The numerous regulatory interventions connected to the regulation of the sector have been accompanied by constant control activities by the Authority, carried out in a widespread manner with reference to all aspects of the phenomenon, from the relationships between the various subjects involved, to the correct acquisition of the lists of interested parties who can be contacted , from the management of telephone directories and the public register of oppositions, to the use of call centres. The numerous measures adopted on the subject have all been published and carefully reported by the media, without this having led to a significant reduction in the phenomenon, so much so as to induce the Authority, in April 2019, as mentioned, to send a general information to the Public

Prosecutor's Office of the Republic at the Court of Rome aimed at highlighting the criminal consequences of telemarketing activities carried out in violation of the provisions on the protection of personal data.

The Company has raised an objection regarding the number of cases reported to the Guarantor which, in its opinion, cannot be considered significant in the face of approximately 32 million users activated, therefore deeming that the related scope should be resized and placed in a physiological margin of error.

In this regard, however, it must be noted that: a) for various reasons (character, availability of time, tools, etc.), notoriously reports and complaints are made by a significantly very small number of people compared to those who believe they are have been subject to unlawful processing; b) for obvious reasons of procedural economy, several reports (of the order of around a hundred) having proved to be repetitive or less detailed, were not forwarded by the Authority to the Company; c) even after the formal notification of the violations, similar complaints continued to be received from various users.

Finally, beyond the numerical quantification, account was taken above all of the relevance in terms of contents and effects. Moreover, as we have seen, two single cases (the aforementioned XX and Merlini) were sufficient to bring out conduct which, due to its characteristics, lack of controls and repressive actions by the Company, can certainly be considered to have a more general.

On the basis of the elements set out above, the violations indicated in par. 4 of this provision, it is deemed necessary to adopt an injunction order against Wind Tre, pursuant to articles 58, par. 2, lit. i), of the Regulation, 166, paragraph 7, of the Code, and 18 of law n. 689/1981, for the application of the pecuniary administrative sanction provided for by art. 83, para. 4 and 5, of the Regulation.

In fact, various provisions of the Regulation and of the Code have been violated in relation to connected treatments carried out by Wind Tre, for which it is necessary to apply art. 83, par. 3, of the Regulation, on the basis of which, if, in relation to the same treatment or to related treatments, a data controller violates, with willful misconduct or negligence, various provisions of the Regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation with consequent application of the sole sanction provided for by art. 83, par. 5, of the Regulation.

For the purpose of determining the amount of the pecuniary sanction, it is necessary to take into account the elements indicated in art. 83, par. 2, of the Regulation, which, in the present case, are relevant in the following respects:

1. the wide scope of the treatments, concerning the generality of customers and users of the telephone service and connected

services, as well as the high number of interested parties involved, including non-customers, who have been the recipients of unwanted promotional contacts (art. 83 , paragraph 2, letter a, of the Regulation);

2. the seriousness of the violations found, based on:

a) illegitimate contacts made in the context of telemarketing and teleselling activities (potentially harmful to various fundamental rights and, in particular, in addition to the right to the protection of personal data, the right to individual tranquility and the right to privacy);

b) data collection procedures, such as those envisaged for the MyWind and My3 Apps or such as that found at the dealer subject to inspections such as, in fact, to coerce the free expression of the will of the interested parties with regard to the processing of their data and therefore also to undermine the fundamental right to self-determination of the interested parties;

c) the difficulties that the interested parties have encountered in curbing the phenomenon of unwanted marketing, also considering the inadequate management of the right to object;

d) the multiplicity and variety of conduct attributable to Wind Tre in violation of several provisions of the Regulation and of the Code;

e) serious organizational deficiencies that have resulted in:

- inadequate implementation of the fundamental principles of data protection by design (privacy by design) and accountability;
- violation of the fundamental principles of data accuracy with regard to the publication of personal data in telephone directories (Article 83, paragraph 2, letter a, of the Regulation);
- the creation of a parallel chain of data collection of possible customers in defiance of the legislation on the protection of personal data and other relevant provisions, also probably of a criminal nature, with the supply of an illegal and potentially suitable "undergrowth" to favor widespread forms of crime in the country;

3. the significant duration of the violations, which started at least from 25 May 2018, the date of full operation of the Regulation and not yet fully regulated or still the subject of the complaints received by the Guarantor (Article 83, paragraph 2, letter a, of the Regulation);

4. the malicious nature of the following conducts, with particular regard to their conception and implementation, in relation to the following profiles: the incorrect information provided to the interested parties as part of the installation procedure of the aforementioned apps and the methods of acquiring the consent of the interested parties who they have not ensured its free

manifestation; the methods for collecting consent, which is not free, by signing a PDA with dealers (Article 83, paragraph 2, letter b, of the Regulation);

5. the seriously negligent nature of other treatments, such as: the inadequate implementation of the fundamental principles of privacy by design, privacy by default and accountability, proven by the obvious difficulties in proving ownership of the promotional activities carried out in your interest; failure to share blacklists with marketing service providers who operate as independent data controllers; inadequate control of the work of one's partners despite obvious elements of alarm (Article 83, paragraph 2, letter b, of the Regulation);

6. the existence of a previous provision - adopted by this Authority against Wind Tre - inhibitory, prescriptive and sanctioning, relating to conduct pertinent to that covered by this decision (Article 83, paragraph 2, letter e, of regulation);

7. the existence of significant current and potential economic advantages deriving from promotional activities, also taking into account that the choice to make use of a single consent for own and third party promotions involves, if the maximum number of consents is reached, a significant benefit in terms of offer on the market of commercial communication services (Article 83, paragraph 2, letter k, of the Regulation);

8. as a partial mitigating factor, the adoption - deemed insufficient in any case - of technical and organizational measures to bring the processing back to greater control by the owner (article 83, paragraph 2, letter c, of the Regulation);

9. as a mitigating factor, partially compromised by the answers provided at the time regarding the reported procedures for the acquisition by default of all possible consents from the dealers, the cooperation provided in the context of the on-site inspections and in the subsequent course of the preliminary investigation, while demonstrating, on the whole, obvious difficulties in reporting to the Authority on the actual processing activities carried out by third parties on their own behalf (article 83, paragraph 2, letter f, of the Regulation);

10. as a mitigating factor - despite the invasiveness of the violations found - the type of data used with respect to that held overall by the Company, i.e. identification and contact data (telephone numbers) of the data subjects involved in the marketing activities (art. 83, par. 2, letter g, of the Regulation);

11. the economic conditions of the offender, taking into account the value of production with reference to the financial statements for the year 2019 (Article 83, paragraph 2, letter k, of the Regulation).

Moreover, in application of the principles of effectiveness, proportionality and dissuasiveness with which the present Authority

must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), it is further necessary to take into consideration the following additional elements :

- the large time margin granted to all operators in the sector in order to allow them a complete and consistent adaptation of the systems and procedures to the new European legislation, already in force since 25 May 2016 and fully operational since 25 May 2018; adjustment that Wind does not appear to have completed in an appropriate manner;
- that the aforementioned provisional activity, with which indications and clarifications on the subject were provided (see general provisions and Guidelines cited in this provision), and the constant dialogue of the Authority with the subjects operating in the telemarketing sector can reasonably to make all operators believe that they have achieved sufficient awareness of the provisions that must be unfailingly observed;
- the inadequate dissuasive nature of the sanctions contested against Wind Tre so far, also taking into account the fact that the phenomenon of unwanted calls in the context of telemarketing has been the subject of constant and punctual attention by the legislator (see, most recently, Law No. 5 /2018) and of the Guarantor, as well as complaints from users;
- the current persistence of reports and complaints, received by the Authority after the date of the investigations carried out at the Company up to today's date, similar to those covered by this provision.

However, in an overall perspective of the necessary balance between the rights of the data subjects and the freedom to conduct a business and in the initial application of the pecuniary administrative sanctions envisaged by the Regulation, it is necessary to carefully evaluate the aforementioned various criteria, also in order to limit the economic impact of the sanction on the organisational, functional and employment needs of the Company.

Therefore, it is believed that - on the basis of all the elements indicated above and taking particular account - also with respect to similar checks carried out at other operators - the seriousness and effects of the conduct found following the inspections, against the maximum statutory sanction (209,120,000.00 euros, equal to 4% of Wind Tre SpA's turnover, i.e. 5,228,000,000.00 euros) - the administrative sanction of payment of a sum of 16,729,600 euros, equal to 8 % of the aforementioned maximum statutory sanction.

In this context, it is also believed - also in consideration of the invasiveness of the contested unlawful treatments with respect to the fundamental rights of the interested parties; the high number of the same, even potentially, involved; the misalignments detected in the Company's information systems; the inadequate control of the same in relation to its partners and, finally, the

lack of dissuasiveness of the measures adopted up to now by the Guarantor against the Company itself - which, pursuant to art. 166, paragraph 7, of the Code, and of the art. 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, it is necessary to proceed with the publication of this provision on the website of the Guarantor, by way of ancillary sanction.

Finally, it is believed that 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;

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the processing of personal data, in the terms referred to in the justification, carried out by Wind Tre S.p.A., with registered office in Largo Metropolitana, 5, Rho (MI), Tax Code 02517580920:

a) pursuant to art. 58, par. 2, lit. f), of the Regulation, provides for the immediate prohibition of processing:

i) personal data relating to subjects for whom consent has been given through the MyWind and My3 apps;

ii) for marketing purposes, personal data referring to subjects whose collection of suitable consent is not able to document;

b) pursuant to art. 58, par. 2, lit. d), of the Regulation, enjoins the same Company, within 180 days of receipt of this receipt, to:

i) adopt suitable procedures to ensure that subjects who have expressed an opposition to the processing of their data by Wind Tre are not contacted by third parties who operate as independent data controllers;

ii) adopt technical and organizational measures suitable for carrying out effective control over the processing chain in order to prevent the carrying out of promotional contacts with subjects who have not provided adequate consent as well as in order to be able to document the contacts that have taken place ;

iii) take corrective measures to resolve system misalignments in order to prevent the unauthorized publication of personal data in public telephone directories;

c) pursuant to art. 157 of the Code, requires Wind Tre S.p.A. to communicate, within 30 days of receipt of this provision, what initiatives have been undertaken or are intended to be undertaken in order to implement the provisions therein and in any case to provide adequately documented feedback; any failure to reply may result in the application of the pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation;

ORDER

pursuant to art. 58, par. 2, lit. i), of the Regulation, to the aforementioned Wind Tre S.p.A., in the person of its legal representative, to pay the sum of Euro 16,729,600 (sixteen million, seven hundred and twenty-nine thousand, six hundred) by

way of administrative fine for the violations indicated in the justification; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, 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 16,729,600 (sixteen million seven hundred twenty nine thousand six hundred), 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 acts pursuant to art . 27 of the law n. 689/1981;

HAS

pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and it is believed that 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.

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; moreover, failure to comply with the injunction issued is administratively sanctioned pursuant to art. 83, par. 5, letter. e), Regulation.

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 filed 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, 9 July 2020

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

Busia

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(1) With regard to the regulation of the roles of the subjects involved in the general telephone directory service (ETG) see also resolution of the Authority for the guarantees in communications n. 36/02/CONS of 6 February 2002 which governs rules and organizational methods for the creation and offer of a general telephone directory service and adaptation of the universal service.