[doc. web n. 8146774]

Order injunction against N.J.L. & Time by Bernasconi Nadia - 11 January 2018

Record of measures

n. 6 of 11 January 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of Dr. Augusta Iannini, vice president, of Dr. Giovanna Bianchi Clerici and of Prof. Licia Califano, components and of Dr. Giuseppe Busia, general secretary;

NOTING that, following a report received by the Authority on 17 June 2015, complaining about the receipt of promotional e-mails concerning training courses, coming from Italia Consulenze & Formazione s.r.l., the Office formulated a request for information from the aforementioned company (note no. 18339 of 23 June 2015), in response to which the same declared that the e-mail address of the reporting party was contained in a database of "profiled lists with consent (...) , [in which] there are e-mail addresses with company name, contact person and region in Italy and in Europe with contact request IP address ", purchased on May 8, 2015 by N.J.L. & Time by Bernasconi Nadia (hereinafter "N.J.L.");

GIVEN the request for information no. 27573 of 6 October 2015, formulated by the Secretary General pursuant to art. 157 of the Personal Data Protection Code (Legislative Decree no. 196 of 30 June 2003, hereinafter the "Code"), against N.J.L., notified by the Privacy Unit of the Guardia di Finanza;

GIVEN the documents of the inspection carried out by the Privacy Unit of the Finance Police at the headquarters of N.J.L. on 10 and 11 November 2015, which showed that:

- N.J.L. collects personal data (including name, telephone, e-mail address, corporate interest) through a form on the website www.njltime.com, for which the absence of the information referred to in the art. 13 of the Code;

- N.J.L. holds "a database of users residing in Italy and a database of users residing in European Community countries, created through previous activities over time" which consists of approximately 883,000 total users. These data were collected "through a form dedicated to companies on the old website, which allowed registration for the exchange of promotional information between companies and professionals (...). Campaigns were carried out on behalf of companies to the users contained in our database (…). From 1 January 2015 to today [11 November 2015, date of the inspection assessment] approximately 2,350,000 emails have been sent for the aforementioned services, to a part of the Italian users contained in our

database (…) ";

- with reference to the manner in which the information was provided to the interested parties whose data are contained in the aforementioned database, N.J.L. stated that "with regard to the form on the old site for the registration of companies (...) at the time there was a specific information with relative consent collection. (...) Regarding (...) the data provided by the clients, the preliminary contact carried out via email, I sent the necessary information in order to trace the origin of the data, the information on the methods, purposes and rights referred to in art. 7 of the code (…) ". However, the party stated that it no longer had any documentation on the matter;

- with reference to the ways in which consent was acquired, N.J.L. stated that this "was collected through the registration of the user's IP address made through the service offered by the provider used, DreamHost, based in California";

GIVEN the minutes n. 100/2015 of 11 November 2015, with which the privacy unit of the Guardia di Finanza, upon the outcome of the inspection, challenged N.J.L., based in Guasila (CA), via della Resistenza n. 42, P.I. 03115060125, the administrative violation provided for by art. 161 of the Code, for having carried out a processing of personal data by means of the data collection form, present on the website www.njltime.com, without providing the information pursuant to art. 13 of the Code;

NOTING that from the report prepared by the aforementioned Unit, pursuant to art. 18 of the law n. 689/1981, the reduced payment was not made;

NOTING that the Authority has adopted against N.J.L. provision no. 49 of 11 February 2016 [Doc. web n. 4885578], notified on 4 March 2016, which is referred to here in full, in which it is established that "the individual enterprise [has] collected personal data in its database, which is then transferred to ICF, without being able to demonstrate course of the investigations to have provided (in this case to the reporting party) the information required by art. 13, paragraph 1, of the Code. Likewise, from the acquired elements it is not even proven (...) that NJL has acquired the consent of the interested parties (and, among these, of the reporting party) required by art. 130, paragraphs 1 and 2, of the Code, for the carrying out by the same of marketing activities by sending emails, as well as, pursuant to art. 23 of Code, to communicate e-mail addresses to third parties, in this case to ICF ";

CONSIDERING that the Authority, in the same provision, prohibited N.J.L., pursuant to art. 143, paragraph 1, lett. c) and 154, paragraph 1, lett. d), of the Code, the further processing for marketing purposes of the personal data contained in its

databases (because collected in the absence of suitable information pursuant to art. 13 of the Code and without having acquired the consent referred to in 130, paragraphs 1 and 2, of the Code), as well as the communication of the same to third parties, and invited the party, pursuant to art. 157 of the Code, to communicate the initiatives taken to implement what is prohibited in the provision and to provide documented feedback, indicating the deadline within which to provide feedback and the consequences envisaged by art. 164 of the Code in case of non-compliance with the request formulated;

GIVEN the minutes n. 11810/100164 of 22 April 2016, which is referred to here in full, with which N.J.L., in the person of the pro-tempore legal representative, have been challenged:

- the administrative violation provided for by art. 161 of the Code, applied in conjunction with art. 164-bis, paragraph 3, for having carried out a processing of personal data in the absence of suitable information for the various purposes of the processing in question (marketing and communication of data to third parties), in violation of art. 13 of the same Code;
- the administrative violation provided for by art. 162, paragraph 2-bis, applied in conjunction with art. 164-bis, paragraph 3, of the Code for having communicated personal data to third parties, in the absence of the specific consent of the interested parties pursuant to art. 23 of the Code;
- the administrative violation provided for by art. 162, paragraph 2-bis, applied in conjunction with art. 164-bis, paragraph 3, of the Code for having carried out a processing of personal data aimed at sending promotional communications to the e-mail address of the interested parties, in the absence of consent pursuant to art. 130, paragraphs 1 and 2 of the Code;

NOTING that the report prepared by the Office pursuant to art. 17 of the law of 24 November 1981 n. 689 it does not appear that the payments have been made in a reduced amount;

GIVEN the minutes n. 17191/100164 of 10 June 2016, with which N.J.L., in the person of the pro-tempore legal representative, was also charged with the administrative violation provided for by art. 164 of the Code, for failing to respond to the request made by the Guarantor, pursuant to art. 157 of the Code, regarding the initiatives undertaken to implement the provisions of the aforementioned provision of 11 February 2016;

NOTING that the report prepared by the Office pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment was not made;

NOTING that, at the same time as the notification of the notice of dispute no. 17191/100164 of 10 June 2016, a new request for information was made pursuant to art. 157 of the Code (note n. 17192) notified through the Privacy Unit of the Guardia di

Finanza on 22 June 2016, and aimed at knowing the decisions taken to implement the provisions of the Guarantor in the aforementioned provision;

GIVEN the report of operations carried out drawn up by the aforementioned Unit on 22 June 2016, in which the party declared that "the day after the activity carried out by the Special Privacy Unit I deleted the database that I normally used. From that date I updated the site , by inserting an information and, where necessary, the collection of consent. The company, in relation to provision no. 49 of 11 February 2016, has no longer carried out a processing for marketing purposes of the personal data in the database in question, as permanently canceled (…) ";

GIVEN the defensive writings, sent on 6 December 2015 pursuant to art. 18 of the law n. 689/1981, with which the party, with reference to the contestation deed no. 100/2015 of 11 November 2015, stated that the lack of suitable information at the bottom of the data collection form was absolutely involuntary, believing that the companies, by entering their data, consented to be contacted. The party then highlighted how, following the notification of the complaint report, it has made the necessary changes to make the processing compliant with the provisions of the Code, inserting specific information and specific consent formulas based on the different purposes pursued;

GIVEN the additional defensive writings, sent on 21 July 2016, pursuant to art. 18 of the law n. 689/1981, in which the party, with reference to the complaint report no. 17191 of 10 June 2016, relating to the violation of art. 157 of the Code, noted how he provided all the information requested by the Guarantor already during the first inspection visit, carried out by the Privacy Unit of the Guardia di Finanza, and then subsequently with the note dated 6 December 2015, to which he attached the file "New attachment for Garante.pdf ", in which he acknowledged the changes made and which" constituted proof of the fulfillment of the adaptation requirements imposed on N.J.L. ". Therefore, against the provision of the Guarantor no. 49, the same "mistakenly believing that it has already fulfilled the same requirements imposed by the writing Authority in November 2015, did not find the measure with a message of fulfillment (...). Considering the economic-operational context and the personality highlighted during the "Assessment by the young owner of the N.J.L. would seem correct to justify the violation of art. 157 of the code as involuntary and produced by excusable ignorance (...)".

On the other hand, as regards the notice of dispute no. 11810 of 22 April 2016, with which the violations of art. 13, 23 and 130 of the Code, the party has represented how its services are aimed exclusively at companies, businesses and freelancers, towards whom it has always considered the legislation on the protection of personal data not "fully" applicable, but, rather, the

provision of art. 24, paragraph 1, lett. b), of the Code in the part in which it establishes that consent is not required "when the processing is necessary to perform obligations deriving from a contract to which the interested party is a party or to fulfill, before the conclusion of the contract, specific requests of the interested". Therefore, he considered "irrelevant and lost all reason to be the introduction of a complete privacy policy pursuant to art. 13 of the Code on the site access platform". In retracing the methods by which the companies provided their data, the party specified that, following the registration procedure cd. Double opt-in, registered the user's IP address which, in his opinion, was equivalent to a manifestation of the company's consent to receive advertising material. This procedure according to the party does not conflict with the provisions of art. 130 of the Code;

CONSIDERING that the arguments put forward do not allow to exclude the responsibility of the party in relation to the disputed, for the reasons set out below.

- With respect to the violation referred to in art. 161 of the Code, detected with the complaint report no. 100/2015 of 11 November 2015, it is noted that the provision pursuant to art. 13 of the Code establishes that, in the face of a processing of personal data (in this case, a collection of data by means of a form), the interested party must be informed about the main characteristics of the processing, including the indication of the owner of the treatment, of the purposes and methods of the same, the possible communication of data to third parties (circumstance recognizable in the case in question), the exercise of the rights referred to in art. 7 of the Code, etc. The fact that the user / interested party sends a contact request using a form in which to enter their personal data, does not exempt the data controller from the obligation to provide him with the information. Therefore, the violation of art. 13 of the Code has been correctly found, not being able, among other things, to accept the argument of the party according to which this omission was involuntary.

- With respect to the violation of art. 157 referred to in the notice of dispute no. 17191 of 10 June 2016, it is noted that the Guarantor, in the aforementioned provision no. 49, has ordered that the party, within 60 days of receipt of the provision (which took place on 4 March 2016), communicate about "the initiatives taken to implement what is prohibited in this provision". Therefore, the statements made by the party with the note of 6 December 2015 (following the notification of the notice of dispute of 11 November 2015), obviously cannot contain any useful reference with respect to the requests made by the Guarantor with the aforementioned provision, which in fact it is chronologically subsequent; rather, with the aforementioned note, the party reported on the obligations relating to the obligation to make the information on the website, the omission of

which had been the subject of prominence in the complaint report no. 100/2015. Therefore, the error excusable for ignorance of the precept invoked by the party cannot be recognized in the present case, since the error is neither innocent nor inevitable, according to the canons of ordinary diligence;

- finally, with respect to the notice of dispute no. 11810 of 22 April 2016, the arguments put forward by the party in relation to the omitted information and the omitted acquisition of consent, both referring to the personal data of the users in the database subject to transfer, must be rejected in full. In the first place, in relation to the violation of art. 13 of the Code, it is noted that the party, despite having declared during the verification operations of 10 November 2015, to have provided users (whose data had flowed into the database) appropriate information, both by means of a link present on the old website, either by email sent by the same following contact, in reality it has not provided any documentary confirmation regarding the aforementioned fulfillment. Among other things, these statements are not matched by what was subsequently asserted by the party in the defensive writings, where the same declared that it considered "irrelevant" the inclusion of the information in the access platform to the website, on the assumption that the art. 24, paragraph 1, lett. b) of the Code. In reality, this argument must be rejected, since the aforementioned provision governs a specific case of exclusion of consent, in the face of the processing of personal data, while it does not affect the obligation to provide information. The latter, in fact, pertains to a fulfillment that the data controller must always put in place with which, as already mentioned, the interested party must be provided with all the information necessary to allow him to know the processing of data concerning him. With reference, however, to the failure to acquire the consent referred to in Articles. 23 and 130, the Guarantor, in the aforementioned provision no. 49, clarified how the registration of the users' IP address cannot be considered sufficient to "prove the effective manifestation of a free and specific will of the users to the processing of data for promotional purposes". This taking into account the provisions of the Guidelines on promotional activities and the fight against spam, adopted by the Guarantor on 4 July 2013 (web doc. 130, paragraphs 1 and 2, of the Code, according to which the use of these tools for marketing purposes is allowed only with the prior consent of the contractor or user (so-called opt- in) "and that" for the purposes of the legitimacy of the promotional communication made, it is not permissible, with the same, to warn of the possibility of opposing further sending, nor is it permissible to ask, with this first promotional message, the consent to data processing for purposes promotional ". Therefore, it is reiterated that the aforementioned provision of art. 24, paragraph 1, lett. b), as the violation of articles 23 and 130 refers, respectively, to the failure to obtain consent with respect to the two distinct purposes of the transfer of data to third parties and the marketing

activity carried out by the party, which go beyond the specific purpose of the data collection which would have consisted in the " exchange of promotional information between companies and professionals ". As for the argument put forward by the party according to which the legislation on the protection of personal data would not be "fully" applicable to legal persons, reference is made to the provisions of provision no. 262 of 20 September 2012 (web doc. No. 2094932) where it is clarified that the provisions contained in Title X of the Code, also following the changes made to the Code by art. 40 of the d.l. 201/2011, continue to be applied to legal persons, entities, associations, as "contractors".

Finally, with reference to the application of the aggravating circumstance referred to in art. 164-bis, paragraph 3, of the Code, it is noted that this provision has been applied in consideration of the significant number of data that the party has collected over time and that have flowed into the database;

HEREBY NOTED that N.J.L. & Time di Bernasconi Nadia, as data controller pursuant to art. 28 of the Code:

- has processed personal data through the website www.njltime.com, failing to provide the information;

- has carried out a processing of personal data in the absence of suitable information and a specific acquisition of consent for the various purposes of the processing in question (marketing and communication of data to third parties);

did not respond to the request made by the Guarantor, pursuant to art. 157 of the Code, regarding the initiatives undertaken to implement the provisions of the aforementioned provision of 11 February 2016;

GIVEN art. 161 of the Code, which punishes the violation of art. 13 of the same Code with the administrative sanction of the payment of a sum from six thousand euros to thirty-six thousand euros;

GIVEN art. 162, paragraph 2-bis, of the Code which punishes the violation of the provisions indicated in art. 167 of the Code, including that referred to in Articles. 23 and 130 of the same Code, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred twenty thousand euros;

GIVEN art. 164 of the Code, which punishes the violation of art. 157 of the Code with the administrative sanction of the payment of a sum from ten thousand to sixty thousand euros;

GIVEN art. 164-bis, paragraph 3, of the Code which provides that in cases of greater gravity and, in particular, of greater significance than the prejudice for one or more interested parties, or when the violation involves numerous interested parties, the minimum and maximum limits of the sanctions are applied twice as much;

NOTING that the conditions exist for the application of the aggravating circumstance of the sanction pursuant to art. 164-bis,

paragraph 3, of the Code, with respect to the violations of arts. 13, 23 and 130 of the Code (referred to in minutes no. 11810), in consideration of the circumstance that the violation involves numerous interested parties;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERING that, in the case in question:

a) with regard to the severity aspect with reference to the elements of the extent of the injury or danger, the manner of conduct and the intensity of the psychological element, the violations committed by the party must be assessed in consideration of the significant number of data processed in the absence of the assumptions provided for by the Code. As for the violation of art. 157 of the Code, these elements must be assessed in the light of the fact that the failure of the party to reply has prevented a rapid definition of the investigation in progress;

b) for the purposes of evaluating the work carried out by the agent, it must be noted that the party has changed the text of the information and the formula for acquiring consent, present on the website, and to delete the database established over time, in absence of the conditions provided for by the Code;

c) with regard to the economic conditions of the agent, the elements of the tax returns relating to the 2016 tax year were taken into consideration;

CONSIDERING, therefore, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole:

- to the extent of € 6,000.00 (six thousand) for the violation pursuant to art. 161 of the Code, with reference to the omitted information at the bottom of the data collection form;
- to the extent of € 12,000.00 (twelve thousand) for the violation pursuant to art. 161, applied in conjunction with art. 164-bis, paragraph 3, with reference to the omitted information regarding the user data in the database;
- to the extent of € 20,000.00 (twenty thousand) for the violation pursuant to art. 162, paragraph 2-bis, applied in conjunction with art. 164-bis, paragraph 3, with reference to the violation of art. 130, paragraphs 1 and 2, for having carried out a processing of personal data aimed at sending promotional communications to the e-mail address of the interested parties in the absence of the relative consent;

- to the extent of € 20,000.00 (twenty thousand) for the violation pursuant to art. 162, paragraph 2-bis, applied in conjunction with art. 164-bis, paragraph 3, with reference to the violation of art. 23, for having made a communication of personal data to third parties;

- to the extent of € 10,000.00 (ten thousand) for the violation pursuant to art. 164, with reference to the failure to reply to the request made by the Guarantor pursuant to art. 157 of the Code;

for a total amount of Euro 68,000.00 (sixty-eight thousand);

GIVEN the documentation in the deeds;

GIVEN the law of 24 November 1981 n. 689, and subsequent amendments and additions;

GIVEN the observations of the Office, formulated by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

Rapporteur Dr. Giovanna Bianchi Clerici;

ORDER

to N.J.L. & Time di Bernasconi Nadia, based in Guasila (CA), via della Resistenza n. 42, P.I. 03115060125, in the person of the pro-tempore legal representative, to pay the sum of 68,000.00 (sixty-eight thousand) euros as a pecuniary administrative sanction for the violations envisaged by art. 161, 162, paragraph 2-bis, of the Code, applied in conjunction with art. 164-bis, paragraphs 3, 161 and 164 as indicated in the motivation;

INJUNCES

to the same subject to pay the sum of 68,000.00 (sixty-eight thousand) euro according to the methods indicated in the annex, within 30 days from the notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to art. 152 of the Code and 10 of Legislative Decree n. 150/2011, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller resides, within thirty days from the date of communication of the provision itself. , or sixty days if the applicant resides abroad.

Rome, 11 January 2018

PRESIDENT

Soro

THE RAPPORTEUR

Bianchi Clerici

THE SECRETARY GENERAL

Busia