

[doc. web no. 9118445]

Filing of the sanctioning procedure - 31 May 2018

Register of measures

no. 372 of 31 May 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

NOTING that the Communications and Telematic Networks Department has launched an investigation following n. 3 reports in which the company "XX S.r.l." sent promotional communications by e-mail. (hereinafter the "Company"), with registered office in XX, VAT number XX;

GIVEN the preliminary investigation documents and the note prot. no. XX of 31 October 2016 with which the aforementioned Department, at the end of this investigation, sent the documents to the Department of Inspections and Sanctions so that it could ask the Special Privacy Unit of the Guardia di Finanza for an on-site assessment, at the headquarters of the above Company indicated;

GIVEN the note prot. no. XX of 11 January 2017 requesting information pursuant to art. 157 of the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data" (hereinafter the "Code");

HAVING REGARD to note no. 935 of 11 January 2017 of request for notification of the aforementioned note prot. no. XX and on-site acquisition of information pursuant to art. 157 of the Code;

GIVEN the documents of the inspection assessment;

CONSIDERING that, on the basis of the statements made during the inspections, as well as what was represented by the Company in a note dated February 24, 2017 and related attachments, as a resolution of the reservations formulated during the inspection, it was found that:

- the Company was incorporated on 11.11.2014 to carry out promotional activities, reward operations, loyalty programs and marketing services;
- the Company manages the "XX" reward point collection operation;
- to join the aforementioned programme, customers fill in a special paper form and/or register on the XX website, owned by the

Company, providing their personal data;

- "The database of "XX" is called "XX"; the DB is managed by XX S.p.A., by virtue of the contract and the designation as data processor (...); (...) all the data deriving from the registration forms, those coming from the XX website, the information entered by the inbound call center, the information relating to transactions at each point of sale of the promoters in which "XX" is used are entered in the DB and the points of the program to be accredited" (see report of operations carried out drawn up on 2 February 2017, point 5);
- "the registration procedure on the XX site provides for the acquisition by XX S.r.l. of the same personal data referred to in the paper registration form for the prize operation";
- "the information on the processing of personal data is present, with content similar to that of the paper form" (see report of operations carried out drawn up on 2 February 2017, point 1) in which, among the purposes, those relating to direct marketing and profiling activities;
- " (...) the consent as having read the information corresponds to the field "signature" (...);
- " (...) the privacy consent to direct marketing corresponds to three fields "send e-mail messages", "send mail" and "send text messages" (...);
- " (...) the privacy consent to profiling corresponds to the equivalent "profiling consent" field (...); (cf. report of operations carried out drawn up on 2 February 2017, point 5);
- "the three privacy consent formulas, at the bottom of the information, (relating to direct marketing and corresponding to the three fields "send e-mail messages", "send mail" and "send sms messages") with similar content to those of the paper form, are pre-flagged on the value "I consent" (see report of operations carried out drawn up on 2 February 2017, point 1);
- while expressing the refusal for these three forms of consent during the simulation of the registration carried out by the soldiers of the Guardia di Finanza, subsequently logging into the account generated, it turned out that the value referred to the consent relating to direct marketing was positive;
- in fact, to confirm this, the soldiers of the Guardia di Finanza carried out "(...) a new simulation of registration on the XX website (...)" during which "(...) expressing the refusal to direct marketing and profiling and the consent for having read the information, (the system) returned both in the generated account and in XX the positive value on the "send e-mail messages", "send mail" and "send sms messages" fields and on "signature" and the negative value with regard to profiling" (cf. report of

operations carried out drawn up on 2 February 2017, point 5);

- the Company, with reference to the activities connected to the aforementioned points collection program, is, together with other promoters, joint controller of the processing of personal data, pursuant to the combined provisions of articles 4, first paragraph, lett. f) and 28 of the Code;

- the Company, with reference to the aforementioned profiling activity for which it collects the consents of customers, has not notified the Guarantor Authority for the protection of personal data pursuant to articles 37, paragraph 1, lett. d), and 38 of Legislative Decree 196/2003;

- the Company, through the registration form on the website, does not freely and specifically acquire consent from users for direct marketing purposes, unlike

what is prescribed by art. 23, paragraph 3, of the Code and by the "Guidelines on promotional activities and the fight against spam" of 4 July 2013 (web doc. n. 2542348 available at www.gpdp.it);

HAVING REGARD TO the report of the Special Privacy Unit of the Guardia di Finanza n. 24 of 2 March 2017 with which "XX S.r.l." with registered office in XX, VAT number XX., in the person of the pro-tempore legal representative, the following administrative violations:

- processing of personal data carried out in violation of the provisions indicated in art. 167 of the Code in relation to art. 23 of the same Code, pursuant to art. 162, paragraph 2-bis, of the Code for failure to obtain the free and specific consent of users for direct marketing purposes as the fields of the form for the release of this consent during registration were pre-flagged;
- failure to fulfill the obligation referred to in the combined provisions of articles 37, paragraph 1, letter d) and 38, paragraphs 1 and 2, of the Code for failure to notify the Guarantor (art. 163 of the Code) of the profiling activity;

NOTING that from the administrative report prot. no. XX of 5 May 2017 prepared by Section I of the Special Privacy Unit of the Guardia di Finanza pursuant to art. 17 of the law of 24 November 1981 n. 689 and referring to the aforementioned dispute report, it appears that the Company has made use of "(...) the option of paying a reduced amount, provided for by art. 16 of Law 689/81, limited to Survey no. 1 and not also for Survey no. 2" and, therefore, with reference to the violation of the art. 23 of the Code relating to the failure to acquire the free and specific consent of users for direct marketing purposes;

HAVING REGARD TO the written defense dated 21 April 2017, sent pursuant to art. 18 of the law n. 689/1981, with which the party's lawyer, after having communicated that he agreed to the reduced payment request in relation to Survey no. 1 -

attaching the relative receipt of payment and illustrating, with regard to the latter, certain aspects considered useful for the overall assessment of the matter by the Guarantor - he stated that he considered the dispute concerning Finding no. 2, relating to the failure of the Company to notify the Guarantor, pursuant to articles 37 and 38 of the Code, of the profiling activity.

In fact, the party reiterated what had already been declared during the inspection, claiming that they had never carried out profiling activities. More specifically, he pointed out that he had never intended to carry out a profiling activity so much so that "the system does not have the tools to be able to do it", nor does it have "the information and data to be processed in order to proceed with the processing with these tools. XX (...) does not receive or otherwise have access to the details of the purchase receipts with the list of all products purchased. XX only receives the Card number, the date of purchase and the total points earned, which goes to accumulate the points already acquired".

And in relation to this finding, the Company requests that, "acknowledging that XX has never had the will to proceed (nor has it ever proceeded) with processing operations for profiling purposes, as it lacks the necessary information and indispensable tools for proceed with this treatment, the sanction imposed with the Dispute Report n. 24 notified on March 29, 2017".

READ the minutes of the hearing of 7 May 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party, reiterating what has already been declared in the defense briefs, with reference to finding no. 2 relating to the failure to notify the treatment for profiling pursuant to articles 37, paragraph 1, lett. d) and 38, paragraphs 1 and 2 of the Code and in relation to which it has not exercised the option of paying in a reduced amount - pursuant to art. 16 of the law n. 689/1981 - specified the concepts already expressed according to which "the Company did not carry out profiling activities as it did not receive the information necessary to implement it, the latter being limited to the number of points accumulated for each transaction" producing for this purpose the relative prospectus "Loyalty programme".

He therefore requested the annulment of the dispute and the closure of the sanctioning procedure;

CONSIDERING that the arguments put forward, all aimed at demonstrating the groundlessness of what was contested in relation to the occurrence of a profiling activity by the Company, are suitable for determining the closure of the sanctioning procedure since, in the present case, although in the presence of a specific indication relating to it in the information, the Company did not have the data necessary to carry out this activity, not having "access to the detail of the purchase receipts with the list of all the products purchased" and furthermore it was not equipped an IT infrastructure suitable for the creation and processing of any consumer profiles;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

HAVING ACKNOWLEDGED that the Company has availed itself of "(...) the option of paying a reduced amount, provided for by art. 16 of Law 689/81, limited to Survey no. 1 (...)" with reference to the violation of art. 23 of the Code relating to the failure to acquire the free and specific consent of users for direct marketing purposes;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981 and subsequent amendments and additions;

HAVING REGARD TO the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

HAS

the archiving, in relation to the report of the Special Privacy Unit of the Guardia di Finanza n. 24 of 2 March 2017, of the contestation of the administrative violation pursuant to art. 163 of the Code for failure to fulfill the obligation pursuant to the combined provisions of articles 37, paragraph 1, lett. d) and 38, paragraphs 1 and 2, of the Code, for failure to notify the Guarantor of the notification activity.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 31 May 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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