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Injunction against Vodafone Italia S.p.A. - July 5, 2018

Register of measures

no. 412 of 5 July 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

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

NOTING that the Office of the Guarantor, with deed no. 10286/118978 of 5 April 2018 (notified on the same date by certified email), which must be understood as fully reported here, challenged Vodafone Italia S.p.A. (hereinafter "Vodafone" or "Company"), in the person of its pro-tempore legal representative, with registered office in Ivrea (TO), via Jervis n. 13, tax code 93026890017, the violations envisaged by articles 23, 130, 162, paragraph 2-bis, 164-bis, paragraph 2, of the Personal Data Protection Code (Legislative Decree No. 196 of 30 June 2003, hereinafter referred to as the "Code");

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- on 8 March 2018, the Guarantor adopted provision no. 140 (in www.gpdp.it, web doc. n. 8233539), to which reference is made in full, following the outcome of the investigation of an administrative proceeding initiated against Vodafone;

- the proceeding originated from numerous reports complaining of receiving telephone calls with an operator and unwanted text messages with promotional content in the interest of Vodafone;

- the investigation carried out by the Office, also through inspections, made it possible to ascertain that "Vodafone, in the period considered by the investigations, [...], in several respects [has] violated the regulations on the protection of personal data, having put in place a plurality of processing operations for marketing purposes and, among these, the extraction of data referring to interested parties from their systems, their inclusion in the contact lists and their subsequent transmission to their partners with the execution, finally , commercial contacts in the absence of valid consent (originally or following its revocation

or opposition to the processing of personal data for marketing purposes) of data subjects, whether they are customers [...], prospects or former customers […]; likewise, the Company has not correctly qualified the opposition of the interested parties expressed in the course of commercial contacts, and summarized by the Company with the phrase "Don't call me again" [...], included in a black list (called "Outcome ") having, for the same Company, only temporary validity [...]. Finally, with respect to certain methods of acquiring consent to the processing of data for promotional purposes [...], the same was acquired in violation of the principle of correctness in the processing (Article 11, paragraph 1, letter a), of the Code) and in ways that have not ensured the free manifestation by the interested parties pursuant to art. 23, paragraph 3, of the Code [...]. The detected violations took place, first of all, as also declared by the Company, with reference to the processing of personal data referring to customers, and in particular in relation to their numbers [...]. On the other hand, the audience of prospects and former customers who have been contacted by the Company both in the context of campaigns carried out via SMS and with a telephone operator is much wider, without their consent to such treatment or, in any case, in the presence of a revoked consent or, again, after the opposition pursuant to art. 7, paragraph 4, lett. b), of the Code, circumstances, these, all resulting from the Company's systems. These contacts are in violation of the provisions contained in articles 23 and 130, paragraphs 1 and 2 (for sending text messages) and paragraph 3, of the Code (for making unwanted phone calls). […] The analysis focused on the numbering of the CDs. prospects (subjects other than customers) and former customers included in commercial campaigns □ both by telephone and by sending text messages □ in the period under observation from January 2016 to June 2017. These numbers were compared with those present in some of the the exclusion lists used by the Company □ and in particular the lists called "Privacy", "No Consent", "Data deleted" and "Results", in relation to those registered therein in the latter with the reason "do not call never again" □ at the time of carrying out the relative promotional campaigns, which, according to what was ascertained during the inspections, are aimed at excluding (precisely) certain numbers from the relative campaigns since, as stated, a registry, for «in order to be uploaded to a given campaign, it must not be present in any of the blacklists defined for that campaign». […]. The comparisons carried out revealed a large number of contacts made in violation of the law, given the presence of the contact numbers on the black list in correspondence with the promotional campaigns carried out. In particular, the results were: a. overall just over 1,214,000 unwanted contacts with regard to teleselling campaigns aimed at the so-called. prospects; b. a total of approximately 928,000 unwanted contacts with regard to teleselling campaigns aimed at former customers; with regard to sending text messages to subjects on the black list, on 13 September

2017 the Company provided two separate CDs containing two different datasets. From the checks carried out on the CD n. 2 [...] the number of contacts involving subjects on the black list was equal to over 14,420,000 units. From the checks carried out on the CD n. 1 [...] more than 21,780,000 contacts via SMS were made in violation of the will expressed by the interested parties registered in one of the aforementioned black lists of the Company";

NOTING that with the aforementioned deed dated 5 April 2018 Vodafone Italia S.p.A. was challenged:

a) the violation of the provisions of articles 23 and 130 of the Code, sanctioned by art. 162, paragraph 2-bis, for having carried out the processing of personal data aimed at making promotional telephone calls and sending promotional text messages to a significant number (over 38 million) of fixed and mobile telephone users, in the absence of the required consent of the interested parties or of the conditions for carrying out such treatments without consent;

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

GIVEN that, for the violation referred to in point a), a reduced payment has been made, pursuant to art. 16 of the law no. 689/1981, carried out on 26 April 2018; having also noted that for the violation referred to in point b) the right to extinguish the sanctioning procedure by means of a reduced payment is not envisaged;

READ the written defense presented by Vodafone on 4 May 2018, as well as the minutes of the hearing of 21 June 2018, in which the following are represented:

- “Vodafone made the choices highlighted in provision no. 140 in absolute good faith, in particular, as regards the commercial contacts made with respect to the numbers present in the "EXIT" list. With reference to these numbers, in fact, the previous procedure envisaged, in the event of the expression of the will not to be contacted again, both the freezing of contacts for the following nine months, and the invitation to the user to use one of the numerous channels available by Vodafone for the exercise of the rights referred to in article 7, paragraph 4, letter b) of the Code. Therefore, it is reiterated that the critical issues in this sense highlighted by the Guarantor are the result of interpretations made in good faith by Vodafone and not put in place with the intention of contacting subjects who had expressly revoked the commercial consent. [...] Since the start of the inspection activities and then with greater intensity following the adoption of the provision and the dispute, Vodafone has undertaken an extremely penetrating and concrete path and has put in place a series of corrective measures starting right from the registration of the will of the users contacted in the sense indicated by the Authority. The times for updating the contact lists

were also reduced from forty to fifteen days and an assessment was made both on the information and on the methods of collecting commercial consent. Added to this is that, following the notification of the measure, all contact activities of the users included in the "ESITI" DB were interrupted and that in any case Vodafone has launched and completed a significant compliance project with the new regulatory provisions introduced with the GPDR , carrying out, to date, a significant number of impact assessments concerning high-risk treatments";

HAVING ACKNOWLEDGED that the arguments put forward by Vodafone mainly relate to the quantification of the fine, which will be discussed in the appropriate section of this order. However, with reference to the aspects connected to the invoked good faith of the Company in applying the provisions on the processing of personal data for promotional purposes, it must be noted that the same has relevance in the context of sanctions if the offender's conduct depended on an inevitable error and for this purpose a positive element is required which is suitable for inducing such an error, which cannot be remedied by the interested party with ordinary diligence (Civil Cassation, section I, 05/06/2001, n. 7603). In the case in question, first of all, with reference to the nature of the declaration of revocation of consent to processing for promotional purposes, it must be noted that no provision of the Code provides for "temporary" revocation hypotheses, which is why Vodafone's decision to consider not contactable for a period of only nine months, the users of the subjects who had declared that they no longer wanted to receive promotional communications do not appear to be the result of an interpretative error of the legislation in force, but rather of a choice which is completely outside the provisions of the Code. With reference to the obligation to implement the declarations of revocation formulated by the interested party during a promotional call, it must be considered that the Guarantor, already with the provision of 16 February 2006 regarding unsolicited telephone services (in www.gpdp.it , web doc. No. 1242592) had established, as regards the exercise of the rights pursuant to art. 7, paragraph 4, lett. b), of the Code, that "in the event that the person contacted objects, even immediately, to the use of his/her data to activate the proposed service and/or for further promotions, even of other types, the internal or external to the operator must immediately register in writing the will expressed and at the same time adopt suitable procedures to ensure that this will is respected". Finally, with reference to the extendibility of the revocation to promotional communications made with different contact systems, it must be noted that, with provision no. 242 of 15 May 2013 concerning the matter of consent to the processing of personal data for "direct marketing" purposes through traditional and automated contact tools (in www.gpdp.it, web doc. n. 2543820), the Guarantor recommended, as a general canon, that the interpretations of current legislation do not tend to "lead to a reduction in the

guarantees of freedom and self-determination of the data subject" and that, consequently, the withdrawal of consent is permitted, exercised through a single act by the data subject, with reference to all methods of promotional contact, unless the interested party expressly declares that he wants to limit this revocation to certain communication channels. For these considerations, the exemption provided for by art. 3 of law no. 689/1981.

NOTING, therefore, that Vodafone Italia S.p.A., on the basis of the deeds and considerations referred to above, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code, the violations indicated in point a) of the notification no. 10286/118978 of 5 April 2018, for which a short term definition and, consequently, the violation provided for by art. 164-bis, paragraph 2, for having committed the violations referred to in point a) in relation to databases of particular relevance and size;

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

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

WHEREAS, in the present case:

to. with regard to the aspect of seriousness, with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are more serious than the previous applications of sanctions of the same kind, both in consideration of the very high number of contacts made (about 38,000,000) in a time span of less than two years, taking into account that, in the case in question, different contact channels were used which led to an exponential increase in the level of invasiveness of the promotional campaigns ;

b. for the purposes of evaluating the work performed by the agent, the fact that Vodafone has "undertaken an extremely penetrating and concrete path and has put in place a series of corrective measures starting precisely with the registration of the users' will must be considered in favorable terms contacted in the sense indicated by the Authority. The times for updating the contact lists were also reduced from forty to fifteen days and an assessment was made both on the information and on the

methods of collecting commercial consent. Added to this is that, following the notification of the provision, all contact activities of the users included in the DB "ESITI"" were interrupted;

c. regarding the personality of the perpetrator of the violation, the circumstance that the Company is burdened by previous sanctioning proceedings defined briefly or following an injunction order must be considered;

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

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of Euro 200,000 (two hundred thousand) for the violation pursuant to art. 164-bis, paragraph 2, of the Code.

CONSIDERING also that, in relation to the economic conditions of the infringer, having regard in particular to the data relating to shareholders' equity, the total profit for the year, the value of production and the gross operating margin (EBITDA), as well as the circumstance that Vodafone Italia S.p.A. holds a very significant market share in the telecommunications sector in Italy (over 12,000,000 SIMs registered on the 4G network and approximately 2,740,000 residential lines) and abroad (the Vodafone group being the second largest telephone operator in the world with over 522,000,000 mobile customers and 18,000,000 fixed network customers) the above-mentioned fine is ineffective and must therefore be increased by four times, as provided for by art. 164-bis, paragraph 4, of the Code (from €200,000 to €800,000);

HAVING REGARD to the documentation in the deeds;

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

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

SPEAKER Prof. Licia Califano;

ORDER

to Vodafone Italia S.p.A., in the person of its pro-tempore legal representative, with registered office in Ivrea (TO), via Jervis n. 13, tax code 93026890017, to pay the sum of 800,000 (eight hundred thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the aforementioned Company to pay the sum of 800,000.00 (eight hundred thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

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

Rome, July 5th 2018

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia