[doc. web no. 9052099]

Injunction against MEVALUATE ITALIA S.R.L. - July 26, 2018

Register of measures

no. 442 of 26 July 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

HAVING REGARD TO Legislative Decree No. 196 of 30 June 2003 containing the "Code regarding the protection of personal data" (hereinafter the "Code");

HAVING REGARD TO the Guarantor's document "Guidelines on promotional activities and the fight against spam" of 4 July 2013 - doc. web no. 2542348, traceable on the website www.gpdp.it;

HAVING REGARD TO Legislative Decree 7 March 2005, n. 82 containing the "Digital Administration Code" and subsequent amendments and additions;

HAVING REGARD TO the 17 reports of freelancers presented to the Guarantor during the month of October 2016 in which they complained that the Company "MEVALUATE ITALIA S.R.L." with registered office in Via Nizza 45, Tax Code 13442601004 (hereinafter the "Company"), of promotional communications by certified e-mail in the absence of specific consent, moreover, in one case, even after the exercise of the rights referred to in articles 7 and following of the Code;

GIVEN the note prot. no. 29928/100482 of 10 October 2016 with which the Department of Communications and Telematic Networks of the Guarantor requested information from the Company;

GIVEN the response provided by the Company to the Guarantor with a note dated 18 October 2016;

GIVEN the request prot. no. 39377 dated 30 December 2016 for an inspection to be carried out at the premises of the Company in the Communications and Telematic Networks Department at the Inspections and Sanctions Department;

GIVEN the request for information prot. no. 16578/100482 of 8 May 2017 - formulated by the Guarantor pursuant to art. 157 of the Code - collected from the Company by means of reports of operations carried out by the soldiers of the Special Privacy Unit of the Guardia di Finanza on 5 July 2017;

CONSIDERING the provision n. 52 of 1 February 2018 with which the Guarantor prohibited the Company, as well as the

Mevaluate Onlus Association (hereinafter "Association"), from further processing of personal data relating to the sending of unwanted PEC communications from which the reports originated above, as well as has prescribed the cancellation of data processed unlawfully without delay and, in any case, within and no later than 30 days, and the communication, within the same term, of the initiatives put in place in order to implement the provisions . This is because, following the inspections carried out by the Special Privacy Unit of the Guardia di Finanza, as well as the investigations carried out by the Guarantor's Office, it emerged that:

- "(...) the data collection operations concerned (...) certified email addresses of lawyers, accountants and/or auditors, labor consultants and notaries, results (...) recipients of the communications in question (more precisely: about 240,000 pecs to lawyers, about 117,000 pecs to accountants and/or auditors, about 27,000 pecs to labor consultants and about 6,000/7,000 pecs to notaries. (...)" (point 3.1);
- "(...) said collection was carried out, on an occasional basis (...) from the INI-PEC register (...) as well as from the website www. registriimprese.it, and, to a lesser extent, from the lists of professionals published by some provincial orders of the aforementioned categories (...)" (ibidem, as above);
- " (...) the addresses (...) were then sent by the Association to (another) third party (E-CARE S.p.A.) which was entrusted with the service of sending the announcement and subsequent communications subject to reporting (…)" (ibidem, as above);
- "(...) in relation to the recipients' consent to the processing of their data, it was deemed possible to use certified email addresses (...) without the need to collect the consent of the interested parties (...)" (point 3.2);
- " (...) in spite of what was stated in the course of the proceeding (see minutes of 5 July 2017, p. 2; point 3.1) □ according to which the Association (Mevaluate) would have operated as "data controller" and the Company (Mevaluate) as "data processor", classification formalized in the designation deed, signed by the same person, dated February 20, 2016 □ it must be considered that in the present case there is a relationship of co-ownership of data processing in question between the Association and the Company, due to the fact that the involvement of the two aforementioned subjects in the context of a single shared project is evident, as regards principles, purposes and implementation methods (Article 4, paragraph 1, letter f and 28, of the Code), also due to the identity of the legal representative as well as the common registered office (see point 3.1)" (point 4);
- further indices confirm the above assumption, such as the "(...) presence of a single "Mevaluate" brand in the announcement

and in the communications sent to interested parties (...)", the "(...) circumstance that the site www.it . mernluale.com/home refer to both the Association and the Company (...)", as well as "(...) the proposed contracting (although remained a dead letter, due to the aforementioned refusal) of the "reputational consultants" in charge to the Company, as expressly declared by the same representative («The communications in question were aimed at selecting, among the professionals who were recipients of the communications sent via pec, 12,000 professionals who would be remunerated by Mevaluate Italia S.r.l. to carry out the activity of "reputational consultant" »: see report (of operations performed) 5 July 2017, cit., p. 3)";

- " (...) the methods used to collect the personal data of the interested parties (...) violate the principles of lawfulness and correctness (Article 11, paragraph 1, letter a), of the Code) as well as purposes (Article 11, paragraph 1, letter b), of the Code) (…)". With the aforementioned provision no. 52/2018 it was, in fact, ascertained that:

a) art. 6-bis, paragraph 1, legislative decree, n. 82/2005 (...) identifies the purposes of the INI-PEC public register, namely that of "facilitating the exchange of information and documents between the public administration and businesses and professionals electronically. This purpose is expressly taken into consideration in the guidelines of the 4 July 20 I 3 on the subject of promotional activities and the fight against spam, in which the Guarantor specified that without the prior consent of the interested parties, it is not lawful to use to send promotional e-mails to the pec addresses contained in the "national address index pec" (see point 2.5 Guidelines) (...)" (point 5.1);

b) " (…) art. 16, paragraph 10, of the legislative decree no. 185/2008 (...) on the basis of which while "the consultation of individual certified e-mail addresses takes place freely and without charges" (...) "the extraction of lists of addresses is permitted only to public administrations for communications relating to administrations within their competence" (...)" (ibid., as above);

- "(...) with respect to the sending of the electronic communications in question, consider their promotional content (...), the Association and the Company, as co-owners of the processing, should have acquired the informed consent of the interested parties pursuant to of the articles 13, paragraphs 1 and 4, 130, paragraphs 1 and 2, and 23 of the Code (see also Guidelines on spam of 4 July 2013, cit., in particular point 2.6) (point 6.1);

- "(...) in relation to the declared communication to a third party (E-CARE S.p.A.) of the PEC addresses in question in view of the subsequent forwarding of emails with promotional content in the absence of prior designation of the same as data processor (...) is further violated article 23 of the Code since said processing operation (data communication) is not based on a

suitable consent of the interested parties (…)" (point 10);

GIVEN the note prot. no. 6435/100482 of 23 February 2018 of the Department of communications and telematic networks of this Authority with which the documents were transmitted to the Department of inspections and sanctions competent for assessments regarding the existence of administrative violations in relation to the processing of the personal data in question ;

GIVEN the note dated March 2, 2018 with which the Company's lawyer, in relation to provision no. 52 of 1 February 2018, acknowledged "(...) the cancellation of all the P.E.C. held by the Companies";

CONSIDERING the report prot. no. 10369/100482 of 6 April 2018 with which, having carried out the necessary assessments and fully recalling the reasons referred to in the aforementioned provision no. 52 of 1 February 2018, the Guarantor contested the Company:

- pursuant to art. 161 of the Code, the violation of art. 13 of the same Code for the failure to release suitable information for the communication of personal data of members to third parties;
- pursuant to art. 162, paragraph 2-bis, of the Code, the violation of art. 23 of the same Code for the failure to acquire a freely expressed consent regarding the communication of the personal data of the interested parties to the company E-CARE S.p.A.;
- pursuant to art. 162, paragraph 2-bis, of the Code, the violation of art. 130 of the same Code for the failure to acquire a specific consent regarding the sending of unwanted communications by pec to the professionals mentioned above;

CONSIDERING the written defenses dated 4 May 2018, formulated pursuant to art. 18 of the law n. 689/1981 with reference to the disputes referred to in the aforementioned report no. 10369/1000482 of 6 April 2018, with which the Company intended to represent its position, deeming that:

- the conduct implemented by the Company does not "(...) constitute a marketing activity or, more generally, a promotional activity (...), (but rather gives rise to) the applicability of art. 24, paragraph 1, letter c) of the Code which, as known, allows the processing, without consent, of personal data taken from public lists and registers that can be accessed by anyone (...)" since (...) the communications (...) (sent by the Company) have no advertising or promotional nature, but only information for professionals in the legal-economic area (…). In fact, (with the sending of) an initial information note was made known of the deadline of the selection notice for the new professional activity of "Reputational Consultant" (a) following (of) a prolonged study activity of the Mevaluate project by of the National Councils of Professional Orders to which the Call is directed (and) the notes subsequently sent (...) simply informed of the holding of a free Mevaluate Webinar for the clarification of aspects of the

Call. (…). (In light of this) it is (...) evident that the purpose of the contested communication does not have as its object either the sending of advertising material, or the carrying out of direct sales activities, nor even less the carrying out of market research or commercial communications .

- "(...) as regards (...) the question relating to the appointment of the data controller, no manager has been appointed for the specific activity of transmitting the information regarding the publication of the Notice since the activity is included in the broader project owned by the Mevaluate Onlus Association (…) which has appointed the company Mevaluate S.r.l. responsible for the processing of personal data, due notification of 17 February 2016 N. 2016021700219990 (…);

- can be considered "(...) also decisive from the point of view of legitimate expectations, which this Authority had already expressed (...) in the sense of the non-illegality of the same facts disputed today (...)" with provision no. 8 of 12 January 2017, with which the Guarantor ruled on an appeal brought against the Mavaluate Onlus Association and Mevaluate Italia S.r.l.;

CONSIDERING that the arguments put forward by the Company in the defense writings cited above and aimed at demonstrating the groundlessness of the findings made with report no. 10369/1000482 of 6 April 2018 are not suitable for determining the closure of the sanctioning procedure.

With reference to the argument aimed at excluding the promotional purpose of the Company's activity, we highlight what has already been represented in the provision of the Guarantor no. 52/2018 - in reference to which no objection has been filed pursuant to art. 152 of the Code and art. 10 of Legislative Decree 150/2011 - for which the electronic communications sent by the Company and from which the reports to the Guarantor by some professionals originated must instead be considered to have promotional purposes, as they are aimed at the development of activities connected to the figure of the "reputational consultant" within the CD. "Mevaluate system" against payment of a fee "to obtain the qualification certificate which enables the new professional activity from the independent certification body" (see announcement of 2 October 2016). To this should be added that the data extraction implemented by the Company, in addition to what is indicated by the Guarantor for which "without prior consent - as constantly reiterated by the Guarantor starting from the general provision on spamming of 29 May 2003 (web doc. no. 29840) - it is not possible to send promotional communications (...) even if the personal data are taken from public registers, lists, websites or documents known or knowable by anyone" (see "Guidelines on promotional activity and fight against spam - July 4, 2013" web doc. n. 2542348 in www.gpdp.it), finds a further limit in the provision contained in art. 16, paragraph 10, of the legislative decree no. 185/2008 mentioned above.

As for the absence of the appointment of the company E-CARE S.p.A. as data processor in view of the subsequent forwarding of emails with promotional content, in consideration of the co-ownership highlighted above, the Mevaluate Company and the Mevaluate Association should have appointed the E-CARE Company as external data processor pursuant to the 'art. 29 of the Code.

Lastly, with regard to the reference to provision no. 8 of 12 January 2017 as an argument aimed at demonstrating that the Guarantor had previously expressed himself regarding the non-illegality of what was contested against the Company, it is represented that in that circumstance the Guarantor correctly limited himself to evaluating and deciding on the response provided by the Company to the appellant, declaring no need to proceed having verified the sufficiency of this reply. And with reference to the legitimate expectation of the Company, it should be noted that, according to established jurisprudence, it is necessary that the error - in relation to art. 3 of law 689/1981 - in order for it to be excusable, it is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the legitimacy of his behaviour. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Company, as co-owner of the processing, was required to diligently know the exact content of the provision mentioned above in which the non-illegality of the processing carried out is not asserted in any way, as claimed by the lawyer of the party.

NOTING that the Company as co-owner of the treatment pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, on the basis of the considerations referred to above, it appears to have committed:

- pursuant to art. 161 of the Code, the violation of art. 13 of the same Code for the failure to issue suitable information for the communication of personal data of members to third parties;
- pursuant to art. 162, paragraph 2-bis, of the Code, the violation of art. 23 of the same Code for the failure to acquire a freely expressed consent regarding the communication of the data of the interested parties to the company E-CARE S.p.A.;
- pursuant to art. 162, paragraph 2-bis, of the Code, the violation of art. 130 of the same Code for the failure to acquire specific consent regarding the sending of unwanted communications by certified email to the professionals mentioned above;

CONSIDERING the art. 161 of the Code, which punishes the violation of art. 13, with the administrative sanction of payment of a sum from 6,000.00 to 36,000.00 euros;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violation of the provisions indicated in art. 167, which recalls the art. 23, with the administrative sanction of the payment of a sum from Euro 10,000.00 to Euro 120,000.00;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violation of the provisions indicated in art. 167, which recalls the art. 130, with the administrative sanction of the payment of a sum from Euro 10,000.00 to Euro 120,000.00;

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:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the alleged violations are not characterized by specific elements;

b) about the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings must be considered;

c) regarding the economic conditions of the agent, the elements of the ordinary financial statements for the year 2017 were taken into consideration;

CONSIDERED, therefore, of having 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, in the minimum amount of 6,000.00 (six thousand) euros for the violation pursuant to art. 161 in relation to the art. 13 of the Code and in the minimum amount of 10,000.00 (ten thousand) euros for each of the two violations referred, respectively, to art. 23 and art. 130 of the Code, for a total amount of 26,000.00 (twenty-six thousand) euros;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981, n. 689 and subsequent amendments and additions;

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

GIVEN 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. Augusta Iannini;

ORDER

to "MEVALUATE ITALIA S.R.L." with registered office in Via Nizza 45, Tax Code 13442601004 to pay the sum of 26,000.00

(twenty-six thousand) euros, by way of administrative fine for the violations indicated in the justification;

ENJOYS

to pay the sum of 26,000.00 (twenty-six 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, 26 July 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia