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Order injunction against Omnia 24 S.r.l. - 2 December 2021 *

Record of measures

n. 424 of 2 December 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, Professor Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members, and the cons. Fabio Mattei, general secretary;

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / EC (General Data Protection Regulation, hereinafter the "Regulation");

GIVEN 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 national law to the aforementioned Regulation (hereinafter the "Code");

HAVING REGARD to the documentation on file;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

SPEAKER Attorney Guido Scorza;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

During 2020, the Guarantor received several requests - reports and complaints - relating to the receipt of promotional text messages for the Evo24 service, a trademark attributable to Omnia 24 S.r.l .. In one case, the name and surname of the complainant was indicated in the text of the message. and the Municipality of belonging.

In particular, with notification of 8 May 2020, the lawyer XX complained that he had received a text message following which he exercised his right of access to the data towards Omnia 24. The latter replied that he had acquired such data from La Duomo S.r.l.s. that "has guaranteed and certified the regularity of the acquisition", ensuring that the data has been deleted.

The lawyer XX therefore sent La Duomo a request to have proof of the consent issued for marketing purposes; in the absence

of a reply, he sent a reminder the following month, forwarding the pec also to Omnia 24. Not getting any response, he sent the report to the Guarantor.

With a complaint dated February 14, 2020, Mr. XX complained about receiving a text message following which he exercised the right of access to data towards Omnia 24 asking to know, among other things, how to acquire consent and the source of the data. The Company sent the following reply: “Hello, we apologize for the inconvenience and we inform you that we will not disturb you further for commercial information and promotions. Sincerely". Dissatisfied with this response, Mr. XX reiterated his requests with pec but received no response, therefore having to contact the Guarantor.

As part of the investigations initiated by the Office on the basis of the aforementioned requests, Omnia 24 replied that "our company engages external companies in relation to marketing activities, including the sending of promotional text messages. In the present case, ..., the marketing activity had been outsourced to the company La Duomo Srls [...] In providing the assignment, we request that the external company comply with current legislation and La Duomo Srl itself had guaranteed us that the lists of subjects contacted were correct. We therefore declare ourselves completely unrelated to the story ”. The Company also added that it had deleted the data of the complainants.

The company La Duomo, also requested, declared - in both cases - that it had acquired a consent but that it was unable to provide documentary proof of this acquisition and that it had deleted the data. No other information was provided regarding the origin of the data.

Subsequently, other requests were received, in some cases already forwarded by the complainants directly to Omnia 24 (and in any case all transmitted by the Office to Omnia 24), with which the receipt of unwanted text messages and the unsuitable response to the request for access to data since, in response to the request for precise information regarding the origin of the data, the Company would have responded only with a message confirming the cancellation of the data or would not have replied at all.

2. FOUND VIOLATIONS

Based on the laconic answers provided, both by Omnia 24 and by La Duomo, and in the absence of contractual documentation (never provided to the Guarantor) useful for assessing the roles and responsibilities of the parties overall, with a note dated 9 April 2021, delivered with pec , Omnia 24 was notified of the act of initiation of the procedure pursuant to art. 166, paragraph 5 of the Code.

Account was taken of the fact that neither Omnia 24 nor La Duomo provided clarification regarding the role covered in the specific treatment, but both stated that they had taken note of the opposition expressed by the complainants. Furthermore, Omnia 24 stated that it received assurances from the partner regarding the lawfulness of the data collection. These guarantees, however, were never produced in discussions with the Guarantor while, as already mentioned, the company La Duomo was not able to prove even the acquisition of suitable consents.

It is necessary to first recall the definition of owner and manager pursuant to art. 4 of the Regulation, where the "owner" is the natural or legal person who, individually or together with others, determines the purposes and means of the processing, while the "data processor" is the person who processes personal data on behalf of the owner.

In the specific case, on the basis of what is represented in the complaints, text messages containing promotional offers relating to the Evo24 service were sent. Such a configuration of the messages was evidently capable of generating in the recipients the belief that they had been contacted directly by Omnia24 and, for these reasons, they first contacted the latter, on the basis of this legitimate expectation.

In this regard, it is necessary to recall what was clarified by the Guarantor with the provision of 15 June 2011 (in www.garanteprivacy.it, web doc. 1821257) with specific regard to the fact that "... promotional contacts are made in name, however on behalf and in the interest of the principal company; with the effect that legitimate expectations are created in the interested parties, since they perceive that they are recipients of advertising initiatives conducted directly by the company on behalf of which the proposal for the sale of products or services is formulated ". In these terms, the principal, being the subject who determines the promotional purpose of the treatment and the means for its execution, as well as being the subject in whose interest the treatment is carried out, is configured as the data controller.

On the other hand, the person who concretely carries out the service on his behalf, may be, depending on the actual attitude of the roles between the parties, a co-owner or a data processor, as clarified by the Guarantor in the Guidelines on promotional and contrasting activities. to spam of 4 July 2013 (web doc. 2542348) and in the provision of 26 October 2017 (web doc. 7320903).

As specified later in the EDPB Guidelines 7/2020, regardless of the contractual qualification of the roles, the owner is the person who determines the purposes (why) and the means, that is, the methods (how), of the processing; on the other hand, the person who works on behalf of the owner is to be considered responsible, carrying out the instructions even with a certain

degree of autonomy without being able to exercise any faculty with regard to the choice of the purposes of the processing.

In the present case, therefore, it can be considered that the role of Omnia 24 is to be qualified as the data controller.

The failure to qualify the roles in relation to the processing of personal data has resulted in the processing itself being deprived of the requisites of lawfulness, correctness and transparency since it does not appear that suitable information has been provided to the interested parties, nor at the time of contact, nor subsequently in the feedback provided to requests for the exercise of rights, such as to allow the interested parties to understand their respective responsibilities in the treatment.

Moreover, with regard to the latter aspect, in some cases it was complained about the non-response to requests or the obtaining of a response that only partially satisfied the request made. The violation of art. 5, par. 1, lett. a) and art. 12, 13, 14 and 15 of the Regulation.

Furthermore, it must be remembered that the data controller is required to implement adequate technical and organizational measures to guarantee, and be able to demonstrate, that the processing is carried out in compliance with the Regulations. In the present case, however, it does not appear that Omnia24 has taken particular precautions in entrusting the promotional service to La Duomo, both with regard to liability in eligendo, and in relation to subsequent interventions in supervising.

What has been described so far allows to outline a picture of poor control by the Company in the treatments aimed at the realization of the promotional campaign with consequent inability to comply with the obligation to prove compliance with the rules (accountability of the owner). For these reasons, the violation of art. 5, par. 2, 24 and 28 of the Regulation.

Furthermore, the conduct described gave rise to the sending of promotional messages without consent - since in both cases La Duomo declared that it did not have documentary evidence - also integrating the violation of art. 6, par. 1, lett. a) of the Regulations and art. 130 of the Code.

3. CONCLUSIONS

Having acknowledged that the Company has not presented defensive writings, nor has it requested to be heard by the Authority and therefore the alleged violations have been deemed confirmed, it is necessary to order Omnia 24, pursuant to art. 58, par. 2, lett. d), if in the future it intends to make use of third parties for sending promotional messages, to adopt suitable procedures aimed at correctly regulating contractual relations with the other subjects involved in the processing, carrying out the necessary checks and preparing adequate information for the interested parties , as well as adopting suitable procedures to ensure full and effective feedback on the exercise of rights.

Furthermore, taking into account the fact that the Company has not provided any insurance regarding any corrective actions, considering instead that it has no responsibility in the treatment, it is necessary, pursuant to art. 58, par. 2, lett. f), prohibit the processing for promotional purposes of the personal data of subjects for which it is unable to prove the acquisition of suitable consent.

Finally, with regard to the treatments already carried out and the lack of suitable measures to guarantee the treatment, it is believed that the conditions exist for the application of a pecuniary administrative sanction pursuant to Articles 58, par. 2, lett. i) and 83 of the Regulation.

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

On the basis of the above, given the violations referred to, the sanction provided for by art. 83, par. 5 of the Regulation.

For the purposes of quantifying the administrative sanction, the aforementioned art. 83, par. 5, in setting the maximum legal limit in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year, whichever is higher, specifies the methods of quantifying the aforementioned sanction, which must "in any case [be] effective, proportionate and dissuasive "(art. 83, par. 1 of the Regulations), identifying, for this purpose, a series of elements, listed in par. 2, to be assessed when quantifying the relative amount.

In compliance with this provision, in the present case, the following aggravating circumstances must be considered:

1. the duration of the violation since, on the basis of what emerged from the reports, the processing lasted from 2019 to 2020;

2. the degree of responsibility of the data controller who has not put in place any type of control over the activity of La Duomo and has proved negligent in providing feedback to the requests of the interested parties;

3. the degree of cooperation shown in the discussions with the Authority since the Company limited itself to declaring itself unrelated to the processing without providing any kind of clarification regarding the implementation of the promotional campaign.

As mitigating elements, it is believed that we must take into account:

1. the nature of the data processed, of a common type, and the consequent level of potential prejudice for the data subjects;

2. the economic results recorded in the financial statements in the year 2020;

3. the absence of previous proceedings initiated against the Company.

In an overall perspective of the necessary balancing between the rights of the interested parties and freedom of enterprise,

and in the first application of the administrative pecuniary sanctions provided for by the Regulation, it is necessary to prudently evaluate the aforementioned criteria, also in order to limit the economic impact of the sanction on the needs. organizational, functional and occupational of the Company.

Therefore it is believed that, based on the set of elements indicated above, the administrative sanction of the payment of a sum equal to Euro 100,000.00 (one hundred thousand / 00), equal to 0.5% of the maximum legal limit, should be applied to Omnia 24 and, due to the aggravating elements found, the accessory sanction of the publication in full of this provision on the website of the Guarantor as required by art. 166, paragraph 7 of the Code and by art. 16 of the regulation of the Guarantor n. 1/2019.

Please note that pursuant to art. 170 of the Code, anyone who, being required to do so, does not comply with this provision of prohibition of processing is punished with imprisonment from three months to two years and who, in the event of non-compliance with the same provision, the sanction referred to in administrative office is also applied. to art. 83, par. 5, lett. e), of the Regulation.

Finally, it is believed that the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations found here in the internal register of the Authority, provided for by art. 57, par. 1, lett. u) of the Regulations.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. f), of the Regulation, declares the processing described in the terms set out in the motivation unlawful by Omnia 24 S.r.l., with registered office in Milan, Piazza della Repubblica 19, VAT no. 02240150975, and consequently:

a) pursuant to art. 58, par. 2, lett. lett. d), orders the Company, if it intends in the future to make use of third parties to send promotional messages, to adopt suitable procedures aimed at correctly regulating the contractual relations with the other subjects involved in the processing, carrying out the necessary checks and preparing an adequate information for interested parties, as well as adopting suitable procedures to ensure full and effective feedback on the exercise of rights;

b) pursuant to art. 58, par. 2, lett. f), prohibits the processing for promotional purposes of personal data of subjects for which it is unable to prove the acquisition of suitable consent;

ORDER

to Omnia 24 S.r.l., with registered office in Milan, Piazza della Repubblica 19, VAT no. 02240150975, to pay the sum of € 100,000.00 (one hundred thousand / 00) as a fine for the violations indicated in the motivation, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute, with the fulfillment of the prescribed requirements and the payment, within thirty days, of an amount equal to half of the sanction imposed.

INJUNCES

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 € 100,000.00 (one hundred thousand / 00), 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 n. 689/1981.

HAS

a) pursuant to art. 17 of the Guarantor Regulation n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lett. u) of the Regulations, violations and measures adopted;

b) pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the website of the Guarantor.

The Guarantor, pursuant to art. 58, par. 1, of Regulation (EU) 2016/679, also invites the data controller to communicate within 30 days from the date of receipt of this provision, which initiatives have been taken in order to implement the provisions of this provision and to provide however, adequately documented confirmation. Please note that failure to respond to the request pursuant to art. 58 is punished with the administrative sanction pursuant to art. 83, par. 5, lett. e), of Regulation (EU) 2016/679.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as art. 152 of the Code and 10 of the legislative decree 1 September 2011, n. 150, an opposition to this provision may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller is resident, or, alternatively, to the court of the place of residence of the person concerned. , within thirty days from the date of communication of the provision itself, or sixty days if the applicant resides abroad.

Rome, 2 December 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei

* The provision was challenged