

Injunction order against KRI S.p.A. - January 18, 2018

Record of measures

n. 17 of 18 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 the special privacy unit of the Finance Police, in execution of the request for information pursuant to art. 157 of the Code regarding the protection of personal data - Legislative Decree June 30, 2003, n. 196 (hereinafter referred to as the Code) no. 14898/97157 of 21 May 2015 formulated by this Authority, carried out at Shell Italia Holding s.p.a. the assessments referred to in the minutes of transactions completed dated 16 September 2015 from which, following the dissolution, with a note dated 30 September 2015, of the reservations formulated therein, it was ascertained that Shell Italia S.p.A. now KRI S.p.A. VAT number: 01841620154, with registered office in Rome, Viale dell'Oceano Indiano n. 13, in the person of the pro-tempore legal representative, as the incorporating company of Shell Gas Italia S.p.A. and Shell Services Italia S.r.l., was required to notify the cessation of the processing of personal data referred to in tables 3 (Processing of data indicating the geographical position of persons or objects via an electronic communication network), 6 (Processing carried out with the use of electronic tools aimed at defining the profile or personality of the interested party, or at analyzing consumption habits or choices, or at monitoring the use of electronic communication services with the exclusion of the technically indispensable treatments to provide the services themselves) and 8 (Processing of data recorded in specific databases managed with electronic tools and relating to the risk on economic solvency, the financial situation, the correct fulfillment of obligations, illegal or fraudulent behavior) for both companies, as required by the aforementioned articles . 37 and 38, paragraph 4, of the Code, as well as prescribed by the Guarantor with provision of 8 April 2009, publ. G.U. n. 106 of 9 May 2009 ("Requirements for merger and spin-off transactions between companies" - on www.garanteprivacy.it, web doc. 1609999). The same control activity also made it possible to ascertain that KRI S.p.A. has not provided, pursuant to the aforementioned articles 37 and 38, paragraph 4, to notify the data controller of the change in the data controller following the corporate change (with respect to the previous name, Shell Italia S.p.A.) or, alternatively, the possible termination of the processing, if the same ceased following the

aforementioned corporate transformation. So, in summary, KRI S.p.A. .:

- a) on its own (as a company that took over from Shell Italia S.p.A. on 30 June 2014), failed to notify the change in the data controller following the corporate change that took place, pursuant to Articles 37 and 38, paragraph 4, of the Code;
- b) as the incorporating company of Shell Gas Italia S.p.A., it failed to notify the termination of the processing by that company (which had made the first notification on May 12, 2004), as required by art. 37 and 38, paragraph 4, of the Code, as well as by the aforementioned provision of the Guarantor;
- c) as the incorporating company of Shell Services Italia S.r.l., it has failed to notify the termination of the processing by that company (which had made the first notification on 11 May 2004), as required by art. 37 and 38, paragraph 4, of the Code, as well as by the aforementioned provision of the Guarantor;

GIVEN the report no. 1896/102021 of January 26, 2016 (which is understood to be fully referred to here) with which they were challenged to KRI S.p.A. three distinct administrative violations provided for by art. 163 of the Code, in relation to the ascertained omissions in relation to the obligations of notification to the Guarantor pursuant to art. 37 of the Code, informing you of the right to make a reduced payment pursuant to art. 16 of the law n. 689/1981;

EXAMINED the report of the Guarantor's Office prepared pursuant to art. 17 of the law of 24 November 1981, n. 689 from which no reduced payment was made for any of the three disputed violations;

GIVEN the written defense dated 15 March 2016 pursuant to art. 18 of the law n. 689/1981 in which the company highlighted that "No relationship of a corporate nature has ever occurred between the undersigned company (KRI S.p.A.) and Shell Gas Italia S.p.A. and Shell Service Italia S.p.A., both incorporated into Shell Italia S.p.A. at an earlier time, respectively, more than 10 and 5 years from the date on which Kuwait Petroleum Italia S.p.A. and Kuwait Petroleum Europe B.V. acquired the entire share capital of Shell Italia itself (30 June 2014) ". In view of this, he observed that "The treatments object of the disputes addressed to KRI S.p.A. by this Most Excellent Authority (...) have (...) all ceased prior to the completion of the aforementioned transaction (Kuwait Petroleum Italia S.p.A. and Kuwait Petroleum Europe B.V. have acquired on 30 June 2014 the entire share capital of Shell Italia S.p.A), with the consequence that the undersigned company (KRI S.p.A.) never received any news of, nor was it ever informed by Shall Holding Italia S.p.A. of such treatments ".

On the merits, then, referring to the corporate events described in the defense brief, he suggested, with reference to the violations referred to in the above specified points b) and c), how "(...) the disputed violations (...) should have been carried out

in epoch prior to the termination of the two treatments and, therefore, before 29 December 2005 (date on which Shell Gas Italia S.r.l. ceased its activity following the merger by incorporation into Shell Services Italia S.p.A. - now KRI S.p.A.) and before the 1st August 2010 (date on which Shell Services Italia S.r.l. ceased its activity following the merger by incorporation into Shell Italia S.p.A. - now KRI S.p.A.) ", reason why, on the basis of the provisions of art. 38, paragraph 4 of the Code, "(...) it is clear that the offense under dispute - rectius the obligation to pay for any sanction - must now be considered prescribed for some time".

Furthermore, with regard to the violation referred to in the aforementioned point a), he found that "It is not true (...) that the processing of personal data subject to the notification to which Shell Italia S.p.A. proceeded on 11 May 2004 (later amended to date 9 May 2007) are still in progress. These treatments, on the other hand, ceased in the period prior to the purchase by Kuwait Petroleum Italia S.p.A. and Kuwait Petroleum Europe B.V. of the shares of Shell Italia S.p.A. and the consequent change in the company name of the latter in KRI S.p.A ". On this point, he had to specify how "the undersigned company (KRI S.p.A.) (...) is unfortunately not able to provide any element that allows identifying the date of termination of the treatments in question and this due to its extraneousness with respect to to said processing and Shell Holding Italia S.p.A.'s failure to communicate any useful information for this purpose. However, taking into account that the notification that should have been modified was finalized by Shell Italia S.p.A. in 2004 and then amended on 9 May 2007, it is possible that the relative treatments have ceased since an epoch dating back. In this perspective it is also conceivable that the cessation of the relative treatments has occurred for over five years and that (...) any violation should be considered prescribed (...) " ;

GIVEN the minutes of the hearing of the parties drawn up on 12 September 2016 pursuant to art. 18 of the law n. 689/1981, in which the company substantially reiterated what was argued in the defense brief;

CONSIDERING that the arguments put forward do not allow to exclude the liability of the company in relation to the dispute in question. The corporate events repeatedly described in the defense brief, in respect of which "The treatments object of the disputes addressed to KRI S.p.A. (...) are (...) all ceased in the period prior to the completion of the aforementioned transaction (Kuwait Petroleum Italia S.p.A. and Kuwait Petroleum Europe B.V. acquired on 30 June 2014 the entire share capital of Shell Italia S.p.A), with the consequence that the undersigned company (KRI S.p.A.) never received any news of, nor was it ever informed by Shell Holding Italia S.p.A. of such treatments ", do not substantiate any exemption from the alleged violations.

Under the profile of the discipline of the protection of the personal data, the art. 38, paragraph 4 of the Code, certainly provides

unequivocal information about the obligations regarding the responsibility for the processing of personal data, providing for the need for a new notification to change some of the elements to be indicated in the notification itself, including the new name of the data controller. Therefore, the alleged circumstance for which "(...) the undersigned company (KRI S.p.A.) has never heard of it, nor has it ever been informed by Shell Holding Italia S.p.A. of such treatments, is of no importance", both as such This statement, by the same admission of KRI S.p.A., is not supported by any evidence, both because this argument does not substantiate any of the constituent elements of the discipline of excusable error referred to in art. 3 of the law n. 689/1981 also in the light of the relevant jurisprudence (Cass. Civ. Section I of 21 February 1995 no. 1873; Cass. Civ. Section II of 13 March 2006, no. 5426).

Furthermore, with reference to what is proposed regarding the fact that "These treatments, on the contrary, ceased in the period prior to the purchase by Kuwait Petroleum Italia S.p.A. and Kuwait Petroleum Europe B.V. of the shares of Shell Italia S.p.A. and of the consequent change in the company name of the latter in KRI S.p.A "it is highlighted that, in addition to having to take into account the above arguments, it must be considered that all three violations pertain to the failure to notify the Guarantor which substantiates an offense of a permanent nature. This type of offense determines the identification of its consumptive moment upon ascertaining the violation which took place on January 26, 2016 with the drafting of the complaint report, or upon termination of the conduct. Regarding this latter eventuality, it is noted that the company erroneously believes that the hypothetical and unproven cessation of the treatments subject to the obligation of notification, could substantiate the cessation of the conduct object of the dispute. Those object of dispute, in truth, are the omissive conducts relating to the obligations of notification of the termination of the processing (findings referred to in points b) and c)) as well as the obligation to notify regarding the change in the name of the data controller (observation referred to in point a)). Such conduct, in the case of the findings referred to in points b) and c), ceased only on 13 April 2016 with the notification of the termination of the processing carried out by Shell Italia S.p.A., despite the fact that this company, as reported in the documents, has changed its name in KRI S.p.A. on 30 June 2014. Instead, in the case of the finding referred to in letter a), it is noted that KRI S.p.A., to date, has not yet notified the Guarantor for the change in the company name of the data controller (from Shell Italia S.p.A. to KRI S.p.A.) pursuant to art. 37 and 38 of the Code, thus determining the continuation of the conduct object of the dispute; NOTING that KRI S.p.A. :

a) on its own (as a company that took over from Shell S.p.A.), it failed to notify the change in the data controller following the

corporate change that took place, pursuant to art. 37 and 38, paragraph 4, of the Code;

b) as the incorporating company of Shell Gas Italia S.p.A., it has failed to notify the termination of the processing by that company, as required by art. 37 and 38, paragraph 4, of the Code, as well as by the aforementioned provision of the Guarantor;

c) as the incorporating company of Shell Services Italia S.r.l., it has failed to notify the termination of the processing by that company, as required by Articles. 37 and 38, paragraph 4, of the Code, as well as by the aforementioned provision of the Guarantor;

GIVEN art. 163 of the Code which, for each of the three alleged violations, punishes the violation of the provisions of art. 37 and 38 with the administrative sanction of the payment of a sum from twenty thousand euros to one hundred twenty thousand 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 of 24 November 1981 n. 689, 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 and that therefore the amount of the pecuniary sanction for the violation of art. 163 of the Code must be determined in the amount of € 20,000.00 (twenty thousand) for each of the three alleged violations, for a total amount of € 60,000.00 (sixty thousand);

CONSIDERING that, in relation to the economic conditions of the offender, having regard in particular to the data relating to the active fixed financial assets, the functional assets invested and the value of production, as well as the fact that KRI S.p.A. (formerly Shell Italia S.p.A.) is, to date, a leading company in the marketing of chemical and petroleum products, the aforementioned financial penalties are ineffective and must therefore be increased by three times, as required by art. 164-bis, paragraph 4 of the Code (three penalties pursuant to art. 163, from € 60,000.00 to € 180,000.00)

HAVING REGARD to the documentation on file;

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

GIVEN the observations of the Office made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000, adopted by resolution of June 28, 2000;

SPEAKER Dr. Augusta Iannini;

ORDER

to KRI S.p.A. (formerly Shell Italia S.p.A.) VAT number: 01841620154, with registered office in Rome, Viale dell'Oceano Indiano n. 13, in the person of the pro-tempore legal representative, to pay the sum of € 180,000.00 (one hundred and eighty thousand) as a pecuniary administrative sanction for the three violations envisaged by art. 163 of the Code, due to the omission of notification to the Guarantor provided for by art. 37 and 38 of the same Code;

INJUNCES

to the same company to pay the sum of € 180,000.00 (one hundred and eighty thousand), 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 deeds pursuant to art. 27 of the law of 24 November 1981, n. 689, prescribing that, within the term of 10 (ten) days from the payment, a receipt of the payment is sent to this Authority, in original or authenticated copy.

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, January 18, 2018

PRESIDENT

Soro

THE RAPPORTEUR

Iannini

THE SECRETARY GENERAL

Busia