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[doc. web n. 9722894]

Order injunction against Tim S.p.A. - November 11, 2021 *

Record of measures

n. 401 of 11 November 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of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repealed the directive 95/46 / EC (hereinafter "Regulation" or "GDPR");

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");

GIVEN the declarative and corrective measure adopted against Tim S.p.a. on May 27, 2021 n. 216, doc. web n. 9689324, to provide, as a matter of urgency, timely protection to the whistleblower in the context of the ongoing criminal proceedings, as well as the related documents, to which full reference is made as of now;

GIVEN the documentation in the deeds;

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

GIVEN the reservation of the application of any pecuniary sanction manifested in the aforementioned provision of May 27, 2021;

GIVEN the brief sent in the interest of Tim on 7 June 2021 as part of the proceedings initiated on 7 May 2021, pursuant to art. 166, paragraph, 5 of the Code, for the exercise of the corrective and sanctioning powers of the Guarantor, in which the

Company referred to "all the arguments already put forward in the response 31.03.21 to the request for information" of the Office together with some clarifications;

NOTING in particular that, according to the Company: “In relation to the provisions of the aforementioned art. 83, par. 2, letters a) and b), [...] the failure to respond to the first request of the interested party was due to the formal deficiencies highlighted (illegible identity document). With regard to this, and to the other profiles, it does not seem that any willful misconduct or negligence can be configured, since TIM's position is the result of an interpretation of the delicate and complex framework of the rules on data retention, which has thus far been deemed consistent. with the previous guidelines of the Guarantor, and not having TIM, as repeatedly reiterated no interest in limiting the rights of interested parties who request access to traffic data stored for criminal purposes pursuant to art. 132 of the Privacy Code, as recently amended by Legislative Decree 101/2018. The violation, even where deemed to exist, still concerns only one interested party, and there are no conditions for considering any recidivism, given the absence, at the time, of previous univocal interpretations (also with respect to what emerged later);

NOTING also that in the memory of 7 June Tim "Regarding the provisions of art. 83, par. 2, letters c), [...] reaffirms its willingness to provide data to the reporting party, to the extent that the Guarantor enables the company to extract data from the SAG ";

NOTING also that the Company, with regard to art. 83, par. 2, recalled "the organizational and technical initiatives and measures taken overall by TIM and the further ones currently being implemented on the specific issue in question (which has already been acknowledged in recent proceedings), with particular regard to the management of requests to exercise the rights of the interested parties to access telephone traffic data, without prejudice in this case to full compliance with the response times to requests presented by the interested party and by the relative lawyer, and considering the fact that the failure to display traffic data it was in any case the result of a weighted assessment of the Company within the terms set out above and not of a delayed or non-response to the reporting party ";

GIVEN the minutes of Tim's hearing of 21 July 2021;

GIVEN the notes sent on April 23, 2021 and June 15, 2021, at the request of the Office of April 22 and June 10, 2021, by the defender of the whistleblower and containing the complete forwarding of the original access request sent by the whistleblower on 26 October 2020 (rectius: 27 October 2020, see related documents), together with the identity document (as attached to the said application);

GIVEN Tim's note dated July 28, 2021, according to which - in part contradicting what is represented in the response of March 31, 2021 and in the memorandum of June 7, 2021 -: "only after the examination of the evidence provided by the lawyer (of the reporting party) to the requests for information made by (the Office) on 22.04.2021 and on 10.06.2021, and after having submitted the same to the competent offices of TIM, it was possible to clarify that: 1. the form 26.10.20 signed by Mr. XX, never received on the XX e-mail account; 2. the same was never received by fax: contrary to what was initially reported by the structures that had investigated the case, and despite the fact that the form is designed to be forwarded by fax (as shown by the relative header), Mr. XX never appears to have used this means of transmission; 3. the form was received exclusively on 29.10.20 via PEC, sent (with a message addressed to XX) by the account "of a person other than the reporting person" without any indication of a delegation or assignment to that person for the sending the form itself ";

NOTING that in the same note Tim admits that: "As it was possible to ascertain only on the basis of the latest checks, the identity document enclosed with the form and inserted in the pdf file attached to the aforementioned PEC was actually legible", adding however that "the problem of the illegibility of the identity document arose due to an anomaly in the internal procedure for sorting the PEC to the offices responsible for processing the request: [...] how can it be found from attachment C to defensive writings of 7.06.21 […]. On the basis of this anomaly, TIM operators, found that the document was not legible, had to unsuccessfully contact Mr. XX then sending an e-mail to the same on 19.11.2020 at XX (see Annex 2); sending accompanied by some unsuccessful telephone contact attempts (which, according to what is indicated by the competent TIM offices, were made on 17.11.2020 and 7.12.2020);

CONSIDERING that, in light of the dialogue with the parties and the documentation acquired as a whole, also pursuant to art. 168 of the Code, the date of the first application cannot be affirmed with certainty or the legibility of the document attached by the reporting party to the original application addressed to the Company; that, however, the only element linked to the alleged formal unsuitability of the request (easily remedied by sending the document again) should have induced the Company to take suitable actions (also of a conservative nature) not to prejudice the right of concerned having regard to the date of submission of this original application, pending the completion of the same (see to this effect provision 8 July 2021, no. 272, web doc. no. 9693464);

CONSIDERING that the technical problem complained of by the data controller in its management procedure of such requests cannot negatively affect the right of access to the printouts of the reporting person and also that the alleged attempts to

telephone contact and the sending of a communication by e-mail ordinary for the purposes of integrating the request (moreover almost 20 days after receipt of the same) cannot integrate, even if considered jointly, a suitable conduct pursuant to art. 12, para. 2 and 3, of the Regulation, according to which "The data controller facilitates the exercise of the rights of the data subject pursuant to articles 15 to 22" and must provide "feedback to the request to exercise the rights referred to to articles 15-22 without undue delay and, in any case, at the latest within one month of receipt of the request itself ";

NOTING that this first instance, dated at the latest on October 29, 2020, concerning in particular the calls (incoming and outgoing) relating to the two users of the reporting party in the period re-included between January 1, 2018 and December 31, 2018 , could and should have been processed in an effective and not merely bureaucratic way, even if for the limited period between 29 October and 31 December 2018 (considering the 24 months prior to 29 October 2020);

NOTING that with the pec of 22 December 2020, the request was renewed by the defender of the reporting party pursuant to art. 391-quater of the criminal code (defensive investigations) and that the request was rejected by TIM, by means of a certified e-mail sent on January 8, 2021, with which, according to the lawyer of the reporting person, "it was assumed, however not very clear, that the data could not be released relating to a period exceeding two years from the date of the request ";

NOTING that with pec on the same date the aforementioned defender therefore renewed the request with reference to the different period of the previous 24 months, starting from the date of submission of the same, that is to say for the period 8-01-2019 / 8-01- 2021; persisting Tim's silence, he solicited the reply with a new pec on March 2, 2021; confirmation that was received only on 10 March (or more than 2 months after the said request of 8 January), reiterating, however, the already opposed denial;

CONSIDERING that this different reiterated request by the reporting person's lawyer, illegitimately and belatedly rejected by Tim (also in this case considering the provisions of art. 12, par. 3, of the Regulation regarding the feedback to be provided "without undue delay" and in any case, except for exceptions, within the term of 30 days), could and should have been processed in full, delivering the printouts between 8-01-2019 and 8-01-2021;

CONSIDERING, therefore, that Tim did not correctly manage even the requests presented by the defender of the reporting person, as he failed to deliver the ostensible printouts, providing a response supported by a merely temporal reason, having been answered by Tim - with apparent reference to the original request of the reporting party - that “the request could not (could) be accepted as…. the traffic data requested…. concern periods of time exceeding 24 months from the date of the

request ..., the maximum time provided for by art. 132, paragraph 1, of the Code, as amended by the legislative decree n.109 / 08 and succ. mod. " (see note Tim January 8, cit.) and, then referring to this first reply, simply reiterating that "it was not possible to follow up, because the retention terms, which always run from the date of the generation of traffic data, were already exceeded "(see note Tim 10 March cit.);

Furthermore, it was considered that this reply of 10 March is to be qualified as incongruent, as well as seriously negligent, with respect to the object of the aforementioned request of 8 January (repeated on 2 March), concerning the latter for the different period between 8-01-2019 and on 8-01-2021, which, on the date (08-01-2021) of the defender's request, was evidently clearly visible;

NOTING, however, that further argumentative elements (referred to below in this provision) were represented by the Company only in the investigation of the report and that in any case, as will be said below, they are not acceptable and therefore would not have been legitimate reasons for denial of the petitioner and his lawyer;

CONSIDERING, with particular reference to the argument, opposed by the Company, that the printouts requested would have been different from those object of a criminal dispute to the reporting party (i.e. those relating to the period from 21.08.18 to 26.09.18), to share as indicated by the defender of the reporting person ("the interest in knowing traffic data even in the period other than that for which the criminal trial is a telephone belonging to Mr. XX, XX. And for this purpose it is necessary to cross the data (possibly even only outgoing) of the two telephone numbers ");

NOTING that Tim herself in the response of March 31, 2021 clearly recognized that «the defender of Mr. XX, [...] in the declared exercise of the powers referred to in art. 391-quater, specified the following: a) your client had been convicted with a criminal [...] decree for the crime referred to in art. XX ". The decree was attached to the request; b) considering himself unrelated to the alleged offense (XX), Mr. XX had lodged an opposition against the aforementioned criminal decree. In particular, by qualifying the defensive need even more clearly, the lawyer clarified how 'the calls' (id est: the calls referred to in the criminal conviction decree) came from the mobile telephone user attributable to TIM [...] in the name of Mr. . XX but supplied to another person at the time ";

CONSIDERING therefore that, in the face of the requests for printouts - explicit, congruent with the title of the alleged crime (XX) and documented - presented by the defender of the report, like the one originally presented by the latter, Tim - even in time limits indicated above - should have guaranteed access "without undue delay" with regard to outgoing printouts and, only

with regard to incoming calls (see provision January 3, 2005, "Access to telephone data: guarantees for incoming calls ", web doc. no. 1189488), limit themselves to verifying the connection with a criminal proceeding against the applicant, without any prejudice to the interested party pending such verification, not being able to review the strategy of the defender ("From this point of view, considering that the investigations can reasonably also concern conduct and interactions connected to those object of the pending criminal proceedings, it may well be considered that the access requests can o also concern records other than those identified by the judicial authority in the complaint formulated. Not surprisingly, the same form prepared by Tim for such requests - as noted by the lawyer of the reporting party - invited the applicant to cross one of the purposes provided therein (including that of access pursuant to art.132) and , correctly, it did not require the insertion of a specific motivation to support the request for certain ta-bulati ": v. prov. May 27, 2021, cit.);

NOTICE therefore the violation of the fundamental right of access referred to in Articles 15 of the Regulation and 132 of the Code, as enhanced by the Euro-unitary legislation, for the purpose of the effective control and availability of the interested party on their data, especially in the sensitive-but procedural-criminal office;

CONSIDERING therefore, in light of all the above, that it is necessary to confirm the assessment of illegality already expressed in the aforementioned provision adopted as a matter of urgency on May 27 and, as a result, the corrective measures established therein;

CONSIDERING also that the violation of the aforementioned rules requires the adoption of an injunction order, pursuant to Articles 166, paragraph 7, of the Code and 18 of law no. 689/1981, for the application to TIM of the administrative pecuniary sanctions provided, the following is adopted

Ordinance-injunction for the application of the pecuniary administrative sanction

NOTING, in particular, that, in this case, the administrative sanction from art. 83, par. 5, of the Regulations (payment of a sum of up to € 20,000,000 or, for companies, up to 4% of the annual worldwide turnover of the previous year, if higher);

CONSIDERING that, for the determination of the amount of the sanction, it is necessary to take into account the elements indicated in art. 83, par. 2, of the Regulations, which, in this case, can be considered in the following terms;

NOTED, in particular, with an aggravating function:

1. the seriousness of the violation (Article 83, paragraph 2, letter a), with reference to the particular nature of the treatments connected to the exercise of rights in court and to the circumstance that the Company's conduct hindered the easy exercise of

one's right of defense within the terms granted by law, as - even if ensured by the intervention of the judge - an aggravation of the procedural procedures may be noted, also an element capable of affecting the subjective sphere of the interested party ;

2. the subjective dimension of the conduct, which must be considered grossly negligent, having neglected the response to clear and justified requests, in fact and in law, as well as repeated, with particular regard to those presented by the defender (Article 83, par. 2, letter b);

3. the injunctive, corrective and sanctioning measures adopted by the Authority against the Company, also with regard to the incorrect management of the rights of the interested parties, including the provision 15 January 2020, n. 7, doc. web n. 9256486; the order injunction 18 January 2018, n. 16, web doc n. 7665804, connected to the prov. 22 June 2016 n. 275 (web doc. 5255159); the order injunction n. 433 of 3 October 2013, doc. web n. 2726332 (Article 83, paragraph 2, letter e);

4. a previous specific corrective measure (provision no. 85 of 14 May 2020, web doc. No. 9442587), with which it was ascertained the incorrect management of the requests relating to the ta-bulati in the context of defensive investigations, although without imposing sanctions, having re-held the violation found in the context of the treatments covered by the aforementioned provision. January 15, 2020, as well as a previous specific sanction: the prov. 8 July 2021, n. 272, doc. web n. 9693464) (Article 83, paragraph 2, letter k);

5. the particular economic importance of the Company (Article 83, paragraph 2, letter k), taking into account the 2020 financial statements, with specific reference to total revenues and net profit;

NOTED as extenuating circumstances:

1. the notified adoption of measures, with specific regard to the requests concerning telephone calls for defensive investigations, which should reasonably prevent or in any case limit similar problems (Article 83, paragraph 2, letter c);

2. cooperation with the Authority during the overall investigation and execution of the aforementioned corrective measure (Article 83, paragraph 2, letter f).

CONSIDERED - based on the set of elements indicated above, in application of the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1, of the Regulation, taking into account the necessary balance between the rights of the interested parties and freedom of enterprise, also in order to limit the economic impact of the sanction on the organizational, functional and occupational needs of the Company - of having to apply the sanction to Tim spa administrative payment of a sum of € 150,000 (one hundred and fifty thousand / 00);

CONSIDERING that the ancillary sanction of the publication on the website of the Guarantor of this provision should also be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019, taking into account the macroscopic nature of the violations found with regard to legal principles now consolidated in the provisional activity of the Guarantor and in jurisprudence;

DETECTED the conditions referred to 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;

WHEREAS, THE GUARANTOR CONFIRMS

the assessment of illegality already expressed pursuant to art. 57 par. 1, lett. f) and art. 58, par. 2, lett. c), of the Regulations, in the aforementioned provision adopted as a matter of urgency on May 27th. and, by effect, the corrective measures established therein against Tim S.p.A., with registered office in Via Gaetano Negri 1, Milan, Tax Code 00488410010, in the person of the pro-tempore legal representative;

ORDER

to Tim S.p.A. to pay the sum of € 150,000 (one hundred and fifty thousand / 00), as a pecuniary administrative sanction for the violation indicated in the motivation, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to define the dispute, by paying, within the term of thirty days, 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 € 150,000 (one hundred and fifty thousand / 00), according to the methods indicated in the annex, within 30 days of 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

as an ancillary sanction, pursuant to art. 166, paragraph 7, of the Code and art. 16 of the Guarantor Regulation n. 1/2019, the publication on the website of the Guarantor of this provision, and, 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.

Pursuant to art. 78 of the Regulation, as well as art. 152 of the Code and 10 of the d. lg. 1 September-December 2011, n. 150,

against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed, alternatively, at the court of the place where the data controller resides or is based or at that of the place of residence of the interested party within term of thirty days from the date of communication of the provision itself or of sixty days if the applicant resides abroad.

Rome, November 11, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei

* The provision was challenged