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Order injunction against Uber B.V. and Uber Technologies Inc. - March 24, 2022

Record of measures

n. 101 of 24 March 2022

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 art. 1, paragraph 2, of the law of 24 November 1981, n. 689, according 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 Guarantor's Office, with deed no. 6254/96792/124735 of 21 February 2019 (notified by registered mail) which must be understood as fully referred to here, challenged Uber B.V., in the person of the pro-tempore legal representative, with registered office in Meester Treublan no. 7, Amsterdam (Netherlands), and to Uber Technologies Inc., in the person of its pro-tempore legal representative, with registered office at Market Street n. 1455, San Francisco, California, the violations provided for by arts. 161, 162, paragraph 2-bis, 163 and 164-bis, paragraph 2, of the Code regarding the protection of personal data (Legislative Decree 196/2003, hereinafter referred to as the "Code", in the formulation prior to the changes made to following the entry into force of Legislative Decree 101/2018), in relation to articles 13, 23 and 37 of the same Code;

NOTING that, from the examination of the acts of the sanctioning procedure, initiated with the aforementioned notice, it emerged that:

- following a data breach, which occurred in the autumn of 2016, which involved the data of about 57 million users around the world, including Italian users, the Guarantor launched a complex investigation activity against Uber B.V. (hereinafter UBV) and Uber Technologies Inc. (hereinafter UTI) aimed at acquiring elements of assessment regarding the extent of the security incident at national level, by sending a request for information to Uber Italy s.r.l. (note of 23 November 2017) and subsequently carrying out an inspection at the headquarters of Uber Italy s.r.l., in Milan, on 9 and 10 April 2018. From the examination of the overall documentation acquired, it emerged that the data breach concerned: personal and contact data (name, surname, telephone number and e-mail), access credentials to the app, location data (as they appeared at the time of registration),

relationship with other users (or travel sharing , introducing friends and some profiling information). On the Italian territory, the violation concerned data of 295,000 interested parties (52,000 drivers and 243,000 passengers);

- upon the outcome of the investigation carried out by the Office, the Guarantor adopted, on 13 December 2018, provision no. 498 (available at www.gpdp.it, web doc. No. 9069046, hereinafter the "Provision"), to which reference is made in full;

- in the aforementioned provision, the Guarantor stated that the roles covered by UBV and UTI, framed in the owner-manager relationship, were not correctly qualified, as the elements acquired in the context of the investigation and during the inspections carried out at the headquarters of Uber Italy s.r.l., have made it possible to qualify the companies UBV and UTI as joint data controllers, each responsible for the processing operations of the personal data of Italian users (drivers and passengers) occurring in violation of the provisions of the Code;

- in particular, based on the provisions of the provision, it was ascertained that the information provided to users, pursuant to art. 13 of the Code, was unsuitable, as it was "formulated in a generic and approximate manner, containing unclear and incomplete information, not easy to understand for the interested parties and liable to generate confusion on the various aspects of the treatment";

- it was also ascertained that with reference to the specific purpose qualified as a "fraud risk indicator", the information was not disclosed or valid consent was obtained from the interested parties, pursuant to Articles 13 and 23 of the Code;

- finally, it was found that the processing of data suitable for revealing the geographical position of users was carried out in the absence of prior notification to the Guarantor, as required by articles 37 and 38 of the Code;

NOTING that, with the aforementioned deed of 21 February 2019, the two companies were challenged, as joint controllers of the processing pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code:

- the administrative violation provided for by art. 161 of the Code, in relation to art. 13, with reference to the issue of unsuitable information;

- the administrative violation provided for by art. 162, paragraph 2-bis, of the Code, in relation to art. 23, with reference to the lack of consent;

- the administrative violation provided for by art. 163 of the Code, in relation to art. 37, for failure to notify the Guarantor;

- finally, the violation provided for by art. 164-bis, paragraph 2, of the Code, with reference to the circumstance that the violations committed refer to given banks of particular importance or size;

DETECTED from the report prepared by the Office pursuant to art. 17 of the law n. 689/1981 that the reduced payment has not been made in relation to the violations referred to in Articles 161, 162, paragraph 2-bis, and 163 of the Code;

GIVEN the defensive writings, sent pursuant to art. 18 of the law n. 689/1981 on 3 April 2019, which refer in full to the briefs presented to the Civil Court of Rome, in opposition to the provision of the Guarantor, with which the party has, in summary, has:

- disputed the applicability of Italian law to the present case. This is because, based on art. 5 of Legislative Decree 196/2003, in the formulation prior to the changes introduced with Legislative Decree 101/2018, and taking into account Opinion no. 8/2010 issued by the Group Art. 29, the Italian legislation would be applicable "only if the processing activities of Uber Italy in Italy were deemed to have been carried out by a UBV plant and in the context of the activities of Uber Italy (and not UBV)" . Instead, there is no doubt that Uber Italy acts only as the person responsible for the processing of personal data on behalf of UBV, providing mere customer support and marketing services, as documented during the investigation. The Guarantor, aware since 2015 (on the occasion of an initial invitation to provide information to the company) of Uber Italy's role as data processor, has considered, however, that Italian (and not Dutch) legislation is applicable "without any justification with consequent defect in the Decision as regards the absolute lack of motivation ";

- in the appeal in opposition to the provision, the role of data controller held by UBV is amply argued, with reference to the processing of personal data of users of the Uber app outside the United States, including those of Uber app users in Italy; in this regard, it was specified that "UTI acts as the data processor of UBV with reference to the data of users of the Uber app outside the United States", as regulated in the Data processing Agreement. Consequently, the conclusions reached by the Guarantor, in the contested provision, regarding the joint ownership of the processing of personal data by UBV and UTI are incorrect and constitute a prerequisite for supporting the groundlessness of the dispute relating to the unsuitable information;

- in particular, with regard to the violation of art. 13 of the Code, the party, in the appeal, has argued at length about the groundlessness of the complaints raised in the Provision relating to the unsuitability of the information provided. In fact, not only the privacy policy (constantly updated by the company), but all the documents and forms made available to the user, provide detailed information about the purposes of the processing, the mandatory nature of the provision of certain information, the exercise of rights of the interested parties. Among other things, the information that the Guarantor judged "generic and approximate" was available online and, therefore, known by the Authority at least since 2015. Nevertheless, the Authority, on

the occasion of previous contacts with the company , has never questioned Uber's practices concerning the information provided, which among other things has not been contested by the interested parties, through reports or complaints;

- in relation to the failure to obtain consent from the interested parties in relation to the processing carried out for the so-called purpose. “Fraud risk”, the company highlighted that Uber had not used the “fraud risk indicator” value for more than two years. In any case, according to Dutch law (applicable to the processing activities carried out by Uber), consent is not required for such processing operations, as the company showed that it had a legitimate interest in protecting its platform;

- failure to notify the Guarantor in relation to the processing of geolocation data cannot be contested, as this is a conduct that the Authority was aware of since 2015. Therefore, "if the Guarantor had really considered that the Uber's conduct was in violation of some law, the Guarantor could and should have informed Uber of this in 2015 ”, which never happened;

- finally, there are no grounds for the application of the sanction referred to in art. 164-bis, paragraph 2, of the Code, given that the company has always acted in good faith and collaborated proactively with the Italian Authority since 2015, providing all the information requested also during the inspection, as well as with the Dutch Authority in order to to ensure compliance with applicable law regarding the processing of personal data;

READ the minutes of the hearing of 8 October 2019, pursuant to art. 18 of the law n. 689/1981, with which the party recalled what had already been claimed in the defense briefs and in the appeal filed for the challenge of the Provision. In particular, he specified that he had proceeded to notify the processing of geolocation data to the Dutch Authority and not also to the Italian Authority, believing, in good faith, that the Italian legislation was not applicable. The party therefore requested that where the conditions for filing the sanctioning proceedings are deemed not to exist, the sanctions should be applied to the extent of the minimum legal requirement, taking into account the criteria set out in art. 11 of the law n. 689/1981;

CONSIDERING that the arguments put forward are not suitable to exclude the responsibility of the party in relation to the disputed.

Preliminary to any other observation on the merits of the matter is the question relating to the rules applicable to the case in question. On this point, the Authority believes that all the conditions exist to affirm the competence of Italian legislation for the processing of personal data put in place by Uber, on the basis of the provisions of art. 5, paragraph 1, of the Code, in art. 4, par. 1, lett. a), of Directive 95/46 / EC, (discipline applicable at the time the facts occurred), as well as what was clarified by the Group Art. 29 in Opinion no. 8/2010 of 16.12.2010 on the subject of applicable law. In particular, the application of Italian

national law to the case in question rests on the clear assumption that Uber Italy s.r.l. represents a stable organization of Uber on the national territory and that the processing activities carried out by this subject are "inextricably connected" to the processing carried out by UBV and UTI, or carried out "in the context of the activities of the establishment" of the data controller . In this regard, the fact that Uber Italy s.r.l. acts as the data processor (rather than as the owner), as it is ascertained that the activities carried out by them are aimed at allowing the interested parties, whose personal data are collected on the national territory, to make full use of the service offered by the group, providing the support activities (to customers and drivers) necessary for the correct and regular performance of the service. The Group Art. 29 in the aforementioned Opinion no. 8/2010 noted that "in order to determine whether one or more laws apply to the different stages of processing, it is important to keep in mind the global image of the processing activity: a set of operations carried out in a number of different Member States, but all intended to serve a single purpose (…) ". The Guarantor, therefore, making use of this contribution, already on previous occasions, has been able to clarify that the applicable law is not that of the Member State in which the data controller resides, but that of the country in which the processing activities are actually carried out, also taking into account the subjects to whom they are actually addressed (see, in this regard, injunction order against Facebook Ireland Ltd and Facebook Italy s.r.l., provision no.134 of 14.06.2019, in www.garanteprivacy.it, web doc n.9121486; injunction order against Yahoo Emea Limited, provision n.144 of 8.3.2018, web doc. n.9072702). It is also worth recalling the judgments of the EU Court of Justice on the cases "Google Spain and Google" (case C-131/12 of May 13, 2014) and "Weltimmo" (case C-230/14 of October 1, 2015), which state the principle according to which, when the processing is carried out in the context of the activities of an establishment of the controller in the territory of a Member State, the national law of that Member State is applicable pursuant to art. 4, par. 1, lett. a) of Directive 95/46 / EC; therefore, the supervisory authority of that Member State may exercise, pursuant to art. 28 (1) and (3) of the Directive, all the powers conferred by that right over that establishment to ensure compliance with data protection rules in that territory, regardless of whether the data controller has establishments also in other Member States (in this sense see also the Group pursuant to art. 29, opinion no. 179 - "Update of the Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain" -, dated 16 December 2015).

Having said this, it follows that the arguments put forward by the party regarding the inapplicability of the Italian legislation to the various aspects related to the processing of personal data, put in place by the company, are unfounded, even the observations made with reference to the ownership of the treatment in the head solely at UBV. In this respect, it is noted that

the elements collected during the investigation phase, also through inspections, provided a representation of the roles of UBV and UTI that did not correspond to what was described by the company. The Guarantor considered that the ownership of the processing should be attributed to both UTI and UBV on the basis of a series of elements that were adequately reported in the provision of 13 December 2018. Among these, in particular, the decisions taken with respect the purposes and means of the processing that are not prepared only by UBV; Instead, it emerged that the policies relating to the operation and management of the service were prepared solely by UTI, as the parent company. On this point, the company pointed out, during the investigation, that the choice to entrust the management of policies and the adoption of technical and organizational security measures to a single subject (in this case UTI) was aimed at guarantee the same level of protection of personal data within the group, similarly to what is done by other companies operating globally. In the case in question, however, it appears that UTI exercises an autonomous decision-making power on these aspects which cannot be considered only formal, as, among other things, confirmed by Uber, in the note of 30 April 2018, in which it states that "UBV has appointed its data controller, UTI, to decide and implement the technical and organizational security measures necessary for the protection of personal data relating to Italian (and other non-US) passengers and drivers". It should be emphasized that the issue related to the ownership of the processing of personal data has been the subject of in-depth analysis and has been the focus of similar investigations carried out by the authorities of other EU countries that were involved in the examination of the data breach occurred to the company. The conclusions reached by the Authorities concerned were, from this point of view, unambiguous, all agreeing on the joint ownership of the processing of personal data by UBV and UTI (in this regard, the Délibération n ° SAN-2018-011 adopted by the CNIL on 19.12.2018, the Decision adopted by the Dutch PA on 8.11.2018 and the ICO Decision of 26.11.2018).

Upon completion of the investigation conducted by the Office, in which all the documentation relating to the processing carried out by the company was acquired, it was found that the information provided to approximately 1,513,431 users (including drivers and passengers) did not was suitable, not only as regards the failure to indicate the joint ownership of the treatments carried out, but also in other aspects that are decisive for guaranteeing the data subjects the transparency and correctness of the treatments themselves. Given that the same information was prepared for drivers and passengers, providing an indistinct representation of the treatments carried out, of the related purposes and methods of treatment. In addition, it was ascertained that the information disclosed, in a generic and approximate manner, the purposes of the processing in relation to the

categories of personal data collected; the mandatory nature of the provision of data was not indicated, with respect to the various operations carried out and the consequences of any refusal to provide them; the information was also unsuitable in relation to the exercise of the rights of the interested parties (with reference, for example, to the right of updating and opposition for legitimate reasons). These critical issues, assessed as a whole by the Office at the outcome of the investigation, are relevant regardless of the fact that no reports and / or complaints have been submitted by the interested parties in relation to an infringement of their rights.

As regards the violations relating to the failure to acquire a specific consent in relation to the processing carried out for the evaluation of the cd. "Risk of fraud" and the failure to notify the Guarantor in relation to the processing of geolocation data, the additional arguments put forward by the company in its defense writings are not relevant, as, for both treatments carried out, the applicable regulations (referring to Legislative Decree no. 196/2003 in force at the time the violations occurred) provided for the fulfillment of some obligations by the data controller that are not carried out. In particular, on the basis of the documentation in the documents, it appears that a "freely expressed and specifically expressed consent in relation to a clearly identified treatment" has not been acquired in relation to the pursuit of the purpose relating to the indicator of the so-called "Fraud risk", reported on the profiles of approximately 1,379,000 customers (passengers), and consisting in the assignment of a qualitative judgment (eg. "Low") and a numerical parameter (from 1 to 100).

Similarly, with respect to the processing of geolocation data, the rules applicable at the time of the assessment, provided (Article 37, paragraph 1, letter a), of the Code), the obligation of preliminary notification of the treatment to the Guarantor, according to the procedures referred to in the following art. 38. Although the notification is no longer provided for in the EU Regulation 679/2016, on the basis of the previous legislation it constituted a particularly important fulfillment that required the data controller to communicate to the Guarantor a series of information relating to the treatment that he intended to initiate and related to the owner himself; this in order to provide every guarantee to protect the interested parties.

Finally, as regards the application of the sanction referred to in art. 164-bis, paragraph 2, of the Code, it is noted that this was arranged in consideration of the significant number of interested parties (approximately 1,514,000 between drivers and passengers, and approximately 1,379,000 passengers in relation to the lack of consent) whose personal data have been the subject of the processing carried out by both companies in violation of the rules of the Code. On this point, it is represented that in a recent jurisprudential ruling, the Court of Cassation reiterated that the case provided for by art. 164-bis, paragraph 2,

of the Code does not constitute an aggravated hypothesis with respect to the other contested violations, but a completely autonomous figure of offense (Cass. Civ. Section II Ord., 03/09/2020, n. 18288) ;

TAKING NOTE of the sentence no. 11803/2019 R.G. issued by the Court of Rome on 11/29/2021 with which the opposition proposed by the two companies against the Provision of the Guarantor of 12/20/2018 n. 498. In particular, the judge held that "the substantive rules applicable ratione temporis are those in force before the entry into force of the RGPD, while those of a procedural and procedural nature, immediately applicable, are those subsequent to the entry into force of the Regulation and Legislative Decree n. 101/2018 ";

NOTING, therefore, that UBV and UTI, as joint data controllers pursuant to art. 4, paragraph 1, lett. f) and 28 of the Code appear to have committed the violations referred to in Articles 161, 162, paragraph 2-bis, and 163 of the same Code, as indicated in the notice of dispute no. 6254/96792/124735 of 21 February 2019, as well as the violation of cu in art. 164-bis, paragraph 2, in relation to databases of particular importance and size;

NOTING, moreover, that in relation to the qualification of joint data controllers, the responsibility for the alleged violations must be attributed distinctly to each of the companies;

CONSIDERING that, for the purposes of the amount of financial penalties, 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;

CONSIDERING that, in the case in question:

- with regard to the severity aspect, the elements relating to the intensity of the psychological element and the extent of the danger and injury must be evaluated in consideration of the fact that the violations are committed in relation to a significant number of interested parties;
- for the purpose of evaluating the work carried out by the agent, it must be noted that, in consideration of the new obligations required by the Regulations, changes have been made, especially with reference to the information;
- regarding the personality of the perpetrator of the violation, the circumstance that there are no previous sanctioning proceedings against UBV and UTI must be considered;
- with regard to the agent's economic conditions, the financial statements for the year 2019 were taken into consideration;

CONSIDERING, therefore, that it is necessary to determine, pursuant to art. 11 of the law n. 689/1981, the amount of financial

penalties, due to the aforementioned elements assessed as a whole, to the extent of:

- € 30,000.00 (thirty thousand) for the violation referred to in art. 161 of the Code, in relation to art. 13;

- € 100,000.00 (one hundred thousand) for the violation referred to in art. 162, paragraph 2-bis, of the Code, in relation to art. 23;

- € 100,000.00 (one hundred thousand) for the violation referred to in art. 163 of the Code, in relation to art. 37;

- € 300,000.00 (three hundred thousand) for the violation referred to in art. 164-bis, paragraph 2, of the Code;

for a total amount of € 530,000.00 (five hundred and thirty thousand);

CONSIDERING, moreover, that in consideration of the economic conditions of the offender, having regard to the data relating to the total turnover and the number of users, the aforementioned financial penalty is ineffective and must therefore be increased by four times, as required by art. 164-bis, paragraph 4, of the Code, for a total amount of € 2,120,000.00 (two million and one hundred and twenty thousand);

HAVING REGARD to the documentation on file;

GIVEN the law n. 689/1981 and subsequent amendments and additions;

HAVING REGARD to 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 Attorney Guido Scorza;

ORDER

to Uber B.V., in the person of its pro-tempore legal representative, with registered office at Meester Treublan no. 7, Amsterdam (Netherlands), and to Uber Technologies Inc., in the person of its pro-tempore legal representative, with registered office at Market Street n. 1455, San Francisco, California, to pay each, the sum of 2,120,000.00 euros (two million and one hundred and twenty thousand), as a pecuniary administrative sanction for the violations indicated in the motivation;

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to the aforementioned companies to pay, each, the sum of 2,120,000.00 (two million and one hundred and twenty 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.

Pursuant to art. 152 of the Code and 10 of Legislative Decree no. 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, March 24, 2022

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei