

Order injunction against Progetto Udire S.r.l. - December 16, 2021

Record of measures

n. 444 of December 16, 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 dr. Claudio Filippi, deputy secretary general;

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

With a complaint of 25 October 2019, submitted to this Authority pursuant to art. 77 of the Regulations, Mr. XX complained that he had received a communication by paper mail concerning the promotion of hearing aids. The commercial information reported in the message referred to the Company Progetto Udire S.r.l .. Mr. XX, not remembering having ever given consent, sent a pec to the Company to request "the precise indication of the origin of the consent ... collected, the indication of the operations carried out with the data processed as well as the identification details of the owner and manager ". No reply would be received to this request and, for these reasons, the interested party contacted the Guarantor.

The request for information sent by the Office on 11 May 2020 to the Company remained unanswered and it was therefore

necessary to reiterate it pursuant to art. 157 of the Code. While the silence remained, on 12 November 2020 a communication was notified by means of the Guardia di Finanza to initiate the procedure to contest the failure to respond to the request made by the Guarantor.

Concluding a subsequent and incidental access procedure to the documents, the Company therefore sent, on December 24, 2020, a defense brief in which it declared that the treatment was put in place by GN Hearing Srl, appointed as data processor. This, "without the knowledge" of Progetto Udire, would have instructed a third company, Udibox S.r.l., to find the list of subjects to whom promotional communications should be sent. Udibox sent the Guarantor a spontaneous declaration in which, confirming this approach, he represented that he had mistakenly used an outdated list but that he had in any case deleted the data of the complainant. Believing, for this alone, its conduct exempt from responsibility, Progetto Udire declared that it had "underestimated the importance of responding to the letters received".

Furthermore, with the intention of demonstrating its attention to compliance with the regulations, the Company has attached documentation proving the measures adopted after the entry into force of the Regulation (register of treatments, list of data processors, list of security measures, types of information presented to interested parties, impact assessment). The same has also attached the contract signed with GN Hearing and the letter of appointment to the data processor.

Having assessed these elements, with the note of April 16, 2021, Progetto Udire was notified of the initiation of the procedure pursuant to art. 166, paragraph 5 of the Code. The following violations on the merits were contested at that time:

- a) the violation of articles 5, par. 2, 24 and 28 of the Regulation, taking into account the fact that the roles of the parties in the processing were indeterminate, given the poor control by the Company in the processing aimed at carrying out the promotional campaign with consequent inability to comply with the obligation to prove compliance with the rules (accountability of the owner);
- b) the violation of art. 6, par. 1, lett. a) of the Regulations and art. 130 of the Code since the conduct gave rise to the processing of personal data without consent;
- c) the violation of articles 12, 14 and 15 of the Regulations since the promotional communication received from Mr. XX did not contain any information regarding the processing of personal data and because no response had been provided to the request to exercise the rights.

The Company, in exercising the right of defense, presented its observations with the certified e-mail of 28 May 2021, first of all

ensuring that it had made several corrective actions to its procedures and documentation aimed at regulating the contractual relations between the parties involved in the processing. In particular, to have signed a new agreement with GN Hearing on the processing of personal data, allowing the contract of activities to a sub-manager with the prior written authorization of the owner (authorization which was also produced as an attachment to the defense brief). The Company also specified that the choice to make use of the collaboration of GN Hearing and Udibox was dictated by the previous experience gained by them in the processing of personal data, also relating to the state of health, related to the promotion of products for diseases of auditory system.

With regard to the specific case that involved Mr. XX, although aware of the delay, the Company declared that it had sent the interested party all the information necessary to satisfy the request to exercise the rights presented at the time.

Furthermore, regarding the lack, in the promotional communication sent, of the information required by art. 14 of the Regulations, the Company clarified that it had "asked third parties to carry out a neutral advertising communication, without specific references to the interested party, containing only information about the services rendered and potential products sold by Progetto Udire".

Finally, with regard to the failure to respond to the requests of the Guarantor, the Company justified itself by highlighting the operational difficulties that occurred in 2020 due to the pandemic.

## 2. VIOLATIONS FOUND

With reference to the factual profiles highlighted above, also based on the statements of the Company to which the declarant responds pursuant to art. 168 of the Code, the following assessments are formulated in relation to the profiles concerning the regulations regarding the protection of personal data.

### 2.1 Roles of the parties in the processing and accountability of the owner

With regard to the promotional campaign subject to the complaint, the Company declared that it had entrusted it to GN Hearing and has attached, as proving documentation, an offer dated 21 January 2019, signed for acceptance, and a document called "Deed of appointment of the manager of the treatment "dated 19 July 2019.

An examination of the first document, the contract, reveals that GN Hearing should have provided, among others, a copywriting and mailing service, packaging the graphic design of the message and handling the forwarding by post. On the other hand, it is not indicated who, between the client (data controller) and the custodian (responsible), should have found the

list of recipients.

Even from the examination of the appointment deed, the instructions that the owner should have provided to the manager pursuant to art. 28, par. 3 of the Regulations, it was not possible to determine who was responsible for selecting the recipients of the promotional messages, nor to understand the criteria adopted to make this selection.

Even the new contractual documentation, presented to the Guarantor with the second defensive brief, seems not sufficiently adequate, in practice, to regulate the relations between the parties. In fact, it is noted that the agreement signed on May 27, 2021 between Progetto Udire and GN Hearing represents, for the most part, a recognition of what is already generally provided for by the regulations but does not contain specific instructions to the manager to follow in order to implement, in practice, the desired treatment. Also in this case, there is no indication regarding the retrieval of the contact lists, the verification of the lawfulness of the consents and the ways in which these lists must be used, nor are there any indications regarding the management of any requests for exercise of the rights of the interested parties.

With regard to the appointment of the sub-manager, an eventuality now foreseen by the new agreement between the owner and manager, it is noted that the written authorization to use Udibox, dated May 13, 2021, is prior to the same agreement between the parties, which as mentioned is of the following 27 May.

This confusing management of the relations between the parties is accompanied by insufficient demonstration of the owner's compliance with the rules.

In fact, it is recalled that it is the responsibility of the data controller to prove that he has used a manager who has sufficient guarantees.

Likewise, it is the responsibility of the owner to ensure that the processing is carried out in compliance with the rules, through appropriate supervisory activity. In the prospect of the defense, however, it does not appear that the owner has carried out checks on the work of the manager but, on the contrary, the Company would have learned - only after the investigation was initiated by the Guarantor - that his manager had entrusted part of the treatment to a third party "without the knowledge of Progetto Udire". Moreover, this event would seem to have remained without consequences.

While acknowledging that, in the second defensive brief, Progetto Udire clarified that it had chosen its partners by virtue of the specific experience in the field of audiological products and without wanting to enter into the merits of the entrepreneurial choices, it must however be noted that nothing has been clarified in on the verifications on the work of the manager, neither

with regard to the treatment examined starting from the complaint, nor with regard to the future treatments entrusted to him. 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). This aspect certainly appears to be the most worthy of attention since the deficiencies in the owner's organization have proved to be the prerequisite for all the other illegalities (described below) which, although autonomously reprehensible, could have been avoided or contained with the adoption of adequate organizational measures. Therefore, the violation of articles 5, par. 2, 24 and 28 of the Regulation and it is necessary pursuant to art. 58, par. 2, lett. d) of the Regulations, to order Progetto Udire to prepare suitable procedures to verify that the treatments carried out by the managers comply with the rules, supplementing the instructions already prepared pursuant to art. 28 of the Regulation. Furthermore, with regard to the treatments already carried out, also given the persistence of violations, a pecuniary administrative sanction is considered applicable, pursuant to art. 58, paragraph 2, lett. i) of the Regulations.

## 2.2 Absence of suitable legal basis for the processing

The described conduct, originating from the use of an outdated list (whose origin has not been specified) and in the absence of justifications regarding the legal basis, gave rise to the sending of a promotional communication without consent, integrating the violation of the art. 6, par. 1, lett. a), of the Regulations and art. 130 of the Code.

For completeness of the investigation, in the absence of indications from the complainant and the owner, the Office verified the presence of the address of Mr. XX in the Register of postal oppositions (1). While it is true that, as ascertained by the Office, the complainant has never entered his address in this Register to oppose paper marketing, it must in any case be noted that the Company has never clarified the origin of the data (public lists or other source), merely believing that they have no responsibility for the processing. In this regard, we must also take into account the communication sent by Udibox on 23 December 2020 which stated that he had operated "by mere material error using a database that is no longer updated" and that he had corrected the error "by resuming to use exclusively databases with the names of subjects who have given their consent ". From the content of these declarations and given that the Company has never documented that it has made preliminary checks in the Register of oppositions, it is legitimate to exclude that the source of the data, in the present case, was the public list (which would have instead allowed the sending the promotional message even without the consent of Mr. XX) and, therefore, the Company should have documented the obtaining of suitable consent.

For these reasons, pursuant to art. 58, par. 2, lett. f), it is necessary to prohibit Progetto Udire from sending promotional communications to subjects for whom it is unable to demonstrate the acquisition of suitable consent.

Furthermore, taking into account the persistent silence regarding the origin of the data and the lack of attention with which this aspect was assessed by the owner, the conditions for the application of a pecuniary administrative sanction are considered to exist, pursuant to art. 58, paragraph 2, lett. i) of the Regulations.

### 2.3 Transparency and information to interested parties

The promotional communication received by the complainant and presented to the Guarantor did not contain any of the information required by art. 14 of the Regulation. In the absence of other references, the complainant addressed directly to the Company in whose interest the promotion was carried out, to exercise their rights as described in point 1. This request, however, remained unanswered and the Company never justified itself about.

The lack of suitable information, however, cannot be considered justified, as argued by the defense of the owner, by the need to send a "neutral communication" to the interested parties. In fact, it is clear that the requirement of the impersonality of the message, aimed at preserving its confidentiality, has no logical reference to the obligation to provide information regarding the processing of personal data.

The Company, only after the initiation of the procedure, provided a reply to the complainant with a certified email of 27 May 2021, forwarding him a copy of the privacy policy.

Furthermore, it should be noted that the complainant's request to have "the precise indication of the origin of the consent ... collected" remained unsatisfied since the Company was unable to document the consent and did not provide any clarification on the matter. to the source, used erroneously by Udibox, from which the data of Mr. XX were extracted.

For these reasons, the violation of articles 12, 14 and 15 of the Regulation.

Given the above, it is considered necessary - pursuant to art. 58, par. 2, lett. d) of the Regulations - to order Progetto Udire to provide the complainant with information on the origin of their data and, more generally, to adopt suitable procedures aimed at promptly responding to the requests of the interested parties, also possibly through the person responsible for the treatment.

A pecuniary administrative sanction is also considered applicable, pursuant to art. 58, paragraph 2, lett. i) of the Regulations.

### 2.4 Failure to respond to requests for information from the Guarantor

As already described in the introduction, the Company did not respond to the first request for information sent by the Guarantor

on 11 May 2020, nor to the one subsequently forwarded, pursuant to art. 157 of the Code, on 8 July 2020.

This omissive conduct made it necessary to use the Guardia di Finanza for the notification, which took place on 12 November 2020, with a consequent aggravation of the procedure and with the impossibility of carrying out investigations during the preliminary investigation, since all feedback was delegated to the defensive phase following the initiation of the procedure. The Company defended itself in this regard by noting, at first, that it underestimated the importance of providing feedback to requests and subsequently representing the difficulties associated with the management of work during the pandemic emergency.

Therefore, the violation of art. 157 of the Code.

While having to consider that the Company failed to provide feedback in two cases, despite the correct receipt of requests via certified e-mail, it must nevertheless take into account the exceptional context in which the affair took place, acknowledging the difficulties encountered in the full development of the pandemic. For these reasons, it is believed to be able to suspend the application of a pecuniary administrative sanction but it is necessary, pursuant to art. 58, par. 2, lett. b) of the Regulations, issue a warning to Progetto Udire regarding the fact that the lack of timely feedback to the Authority's requests has resulted in the implementation of unlawful conduct.

### 3. 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 nature of the data processed since, while taking into account that in this case only common data were used, the more general activity described can potentially also involve the processing of particular categories of data (health data) in the face of measures deemed inadequate to ensure control over the manager's activity;
2. the presumed number of subjects involved since, the sending of commercial communications using an outdated list,

although it was complained only by Mr. XX, probably was not limited only to the latter considering that a promotional campaign generally involves a large number of recipients, based on what can reasonably be expected based on ordinary knowledge of the sector;

3. the degree of responsibility of the data controller who, without ever justifying himself, has not provided feedback to the exercise of the rights of Mr. XX (forcing him to contact the Guarantor) and who has not put in place any type of control over the activity of the responsible not being, thus, able to give an account of his work;

4. the measures adopted by the data controller who, despite having modified the contractual documentation, has not demonstrated that he has implemented sufficient interventions;

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

1. the level of prejudice for the interested parties which, with regard to the receipt of unwanted messages, must be considered not high, due to the less invasiveness of paper mail compared to other means of communication;

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, on the basis of all the elements indicated above, having regard to the decisions adopted in previous similar cases duly balanced with the economic results of the Company, the administrative sanction of the payment of a sum equal to 30,000 euros should be applied to Progetto Udire. , 00 (thirty thousand / 00), equal to 0.15% of the maximum legal limit of 20 million euros and, due to the aggravating elements found, the accessory sanction of the full publication of this provision on the website of the Guarantor as required by the 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 Regulations, declares the processing described in the terms set out in the motivation by Progetto Udire S.r.l., with registered office in Varese, Via Cavour 27, VAT no. 03128020124, and consequently:

a) pursuant to art. 58, par. 2, lett. lett. d), orders the Company to prepare suitable procedures to verify that the treatments carried out by the managers comply with the rules, supplementing the instructions already prepared pursuant to art. 28 of the Regulation;

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;

c) pursuant to art. 58, par. 2, lett. lett. d), orders the Company to provide the complainant with information on the origin of their data and, more generally, to adopt appropriate procedures aimed at promptly responding to the requests of the interested parties;

d) pursuant to art. 58, par. 2, lett. b), issues a warning to the Company regarding the fact that the lack of timely feedback to the Authority's requests has resulted in the perpetration of unlawful conduct;

ORDER

to Progetto Udire S.r.l., with registered office in Varese, Via Cavour 27, VAT no. 03128020124, to pay the sum of € 30,000.00 (thirty 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 € 30,000.00 (thirty 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

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 undertaken 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, opposition to this provision may be filed with 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, December 16, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE DEPUTY SECRETARY GENERAL

Philippi

(1) Which was implemented with Presidential Decree 8 November 2018, n. 149 which made changes to the Presidential Decree 7 September 2010, n. 178.