[doc. web n. 8429624]

Injunction order against Avis Budget Italia s.p.a. - January 25, 2018

Record of measures

n. 34 of 25 January 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of Dr. Giovanna Bianchi Clerici and of Prof. Licia Califano, members 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") nr. 125 of 7 January 2016 formulated by this Authority, carried out at Avis Budget Italia s.p.a., VAT number: 00886991009 (hereinafter referred to as the "Company"), at the registered office of Bolzano, in via Roma n. 96, and in the administrative headquarters of the same in Rome, in Viale Carmelo Bene n. 70, the investigations referred to in the minutes of transactions completed dated January 26, 2016 and February 3, 2016. From these investigations it emerged that:

• the Company, after terminating the contractual relationship with OCTO TELEMATICS s.r.l., which it made use of for the installation of geographical location devices on some vehicles of the company fleet with respect to which it made the required notification to the Guarantor on 12 November 2012 , in March 2015 stipulated a product and service contract with LOJACK ITALIA s.r.l. for the supply of approximately two thousand "localization" devices, which were installed starting from April on as many vehicles in the company fleet. On January 28, 2016, the Company modified the previous notification of the treatments, inserting LOJACK ITALIA s.r.l. as the current location service provider. It was thus ascertained that the Company, due to the change in the geolocation service provider, failed to promptly amend the previous notification pursuant to art. 38 paragraph 4 of the Code, having made this change only on January 28, 2016;

• the Company acquires customers' personal data in paper form, directly in the "front-office", by signing the rental contract by the customer. At the bottom of the rental contract, the customer is given the opportunity to express a single consent in relation to multiple purposes of the processing, specifically for sending advertising information and commercial communications relating to the Company's services, as well as for analyzing customer satisfaction and habits. of consumption. It has therefore been ascertained that the Company, the owner of the aforementioned personal data processing, has acquired from the users

through the paper form of the "rental contract" a single consent with reference to several purposes indicated in the contract, differently from what prescribed by art. 23, paragraph 3, of the Code;

GIVEN the report no. 7/2016 of 12 February 2016, which is intended as fully referred to herein, with which the Company has been accused of the administrative violations envisaged by art. 163 of the Code in relation to art. 38 paragraph 4 of the Code and by art. 162 paragraph 2-bis of the Code, in relation to art. 23 of the Code, informing it of the right to make, for both, the reduced payment pursuant to art. 16 of the law n. 689/1981;

EXAMINED the report of the special privacy unit of the Finance Police prepared pursuant to art. 17 of the law of 24 November 1981, n. 689 from which the reduced payment was not made;

HAVING SEEN, regarding the alleged violation pursuant to art. 163 of the Code, the note of February 17, 2016 and the defense letter presented on March 14, 2016 pursuant to art. 18 of the law n. 689/1981, with which the Company has represented that "the devices of LOJACK ITALIA s.r.l.", unlike the previous data processing carried out through OCTO TELEMATICS s.r.l., "do not allow to continuously identify the location on the territory" (note of February 17, 2016) and, therefore, this treatment does not have to be notified, also on the basis of the interpretation provided by the Guarantor of art. 37 and 38 of the Code. The modification to the notification made "therefore had a mere purpose of recognition and continuity of information to the Authority with respect to what was previously communicated." (note dated February 17, 2016). Having considered this, the Company has emphasized its best and documented intentions to implement the applicable laws based on their official interpretation, also stating that "the system (concerning the use of LOJACK devices) is still in progress much of it is experimental and despite being in progress it still concerns only less than about 2,500 vehicles out of a fleet of about 30,000 "and therefore" the modification to the notification of the data processing in question by AVIS cannot be considered late in any way "(written defense of March 14, 2016);

GIVEN the minutes of the hearing of the parties of March 14, 2017 in which the Company stated that LOJACK does not carry out a geolocation service but "a radiolocation service that is activated only when a vehicle is the subject of theft or embezzlement upon notification of the Company against a specific complaint. This service only allows the location of the vehicle not in motion and therefore totally different from geolocation ". Furthermore, with a note dated 15 March 2017, the Company, in describing the technical characteristics of the devices supplied by LOJACK, represented that the processing of the aforementioned data falls within those exempted from the obligation to notify the Guarantor as "once the LOJACK device

has been installed inside the vehicle, the unit remains dormant until the LOJACK Operations Center activates it "and that is" only and exclusively after having ascertained the theft of the vehicle itself, or after having received a report of the vehicle made by the owner, or by the owning company ". Furthermore, "the technology used is not satellite but high-frequency wireless, therefore the signal is transmitted through the towers owned by LOJACK located throughout the territory";

CONSIDERING that the arguments put forward are not suitable in relation to what is disputed and that the transgressor mistakenly believes that he is not subject to the obligation of notification pursuant to art. 37, paragraph 1 letter. a) of the Code. In fact, in the case in question, the conditions required for notification pursuant to art. 37 and 38 of the Code, which must be carried out, as specified in the provision of the Guarantor of 23 April 2004 (www.gpdp.it web doc. in certain places, through electronic communication networks managed or accessible by the data controller. The following is noted.

• With reference to the Company's assumption that LOJACK devices do not fall within the scope of application of Articles 37 and 38 of the Code as they allow "a non-continuous detection" of the position of people or objects, the Guarantor has highlighted how the location must be notified when it allows to identify "continuously - even with possible intervals - the location on the territory or in certain geographical areas, on the basis of equipment or electronic devices held by the owner or by the person or placed on objects "(see the aforementioned provision of 23 April 2004). In this case, these devices make it possible to identify the position of the vehicle whenever the Company intends to have them activated and in particular "in the event of theft, failure to identify or misappropriate one's car ... in order to facilitate the location of the same by Third Parties. Supervisors "(see art. 5 supply contract between the Company and LOJACK). The method of activating the location reported by the Company does not exclude, for this reason alone, the possibility of continuously identifying the route taken by the vehicle on which the locator is installed or in any case with reduced time intervals (see Court of S. Maria Capua Vetere n. 2053/2016).

• Furthermore, the modification of the notification of the processing of January 28, 2016 must certainly be considered late with respect to the stipulation of the supply contract with LOJACK which took place in March 2015 and to the actual installation of the aforementioned devices which began in April. 2015 (see minutes of operations carried out on 2/3/2016). This new notification took place, in fact, only following the first assessment referred to in the report of transactions carried out on January 26, 2016.

• Moreover, the particular technology used for these devices (in this case not satellite, but high frequency wireless) assumes no importance, meaning by electronic communication networks: "transmission systems and, where appropriate, switching

equipment or routing and other resources, including non-active network elements, which allow signals to be transmitted via cable, radio, optical fiber or other electromagnetic means, including satellite networks, mobile and fixed land-based networks with switching circuit and packet switching, including the Internet, networks used for the circular broadcasting of sound and television programs, systems for the transport of electricity, insofar as they are used to transmit signals, cable television networks, regardless of type of information transported "(Article 4, paragraph 2, letter c) of the Code);

• On the other hand, the fact is that these devices make it possible to locate the vehicles that are reported from time to time by the data controller through electronic communication networks accessible by the data controller. However, the location in question allows us to trace, even indirectly, the identity of the interested parties, as specified in the aforementioned provision of 23 April 2004, if only it is thought that the aforementioned location can be activated, among other cases, in the event of failure to identify of the vehicle or misappropriation of the same (see Article 5 of the supply contract between the Company and LOJACK). Therefore, it must be excluded that the treatment in question falls within the cases excluded from the discipline of art. 37 of the Code. The provision of 23 April 2004 indicates, on the other hand, albeit by way of example, very different hypotheses from the one in question, such as the registration of entrances or exits at workplaces, the detection of images or sounds, the reading of cards electronic to provide goods, services or services such as, for example, payment cards, credit cards or loyalty cards. What has been said does not allow to detect the constitutive elements of the excusable error referred to in art. 3 of the law n. 689/1981. This is because the principle laid down by art. 3 of the law n. 689/1981 according to which for the violations affected by an administrative sanction, the conscience and will of the active or omissive conduct, whether intentional or negligent, is required, must be understood in the sense of the sufficiency of the aforementioned extremes, without the need for concrete demonstration of willful misconduct or of guilt, given that "the law places a presumption of guilt in relation to the prohibited fact against the person who committed it, reserving the burden of proving that he acted innocently" (among others, Cass. Civil Section I n. 2406 of 8/2/2016, Civil Cass. Section II no. 27432 of 12/9/2013, Civil Cass. Section working, no. 19242 of 7/9 / 2006, Court of Bergamo, no. 2339 of 14/9/2017). As proof of the contrary, it should be noted that, in the aforementioned supply contract, LOJACK has undertaken: a) to promptly notify the Customer of all "modifications" that entail the need to proceed with the "prior notification to the Guarantor for the protection of the personal data of new treatments or of the changes in the treatments, pursuant to art. 37 of the Privacy Code, so that the Customer can proceed in the sense deemed appropriate; b) provide every broader collaboration with regard to the notifications referred to in the previous letter a)

"(Article 18 of the aforementioned contract). From this contractual provision, referring to the new treatments or changes in the treatments, it is inferred that the Company, already at the time of the stipulation of the aforementioned supply contract, had undertaken to notify the Guarantor of the treatments subject to supply and, in this case , to make a new notification pursuant to art. 38, paragraph 4, of the Code, having changed the supplier company;

HAVING SEEN, regarding the alleged violation pursuant to art. 162 paragraph 2 bis of the Code, the aforementioned note of February 17, 2016 as well as the defensive letter of March 14, 2016 in which the Company represented that the Company does not carry out a specific "profiling" activity on customer or user data as "the processing of data relating to" consumption habits "is (...) in fact (...) exclusively limited to" rental preferences "" (note dated 17 February 2016). The Company also represented not to carry out any collection and processing of data on the data of its customers that would allow monitoring of their behavior as a consumer in order to define targeted and timely advertising offers, but to acquire customer data (in terms of "customer card") aimed at "facilitating, in the event of a new resolution (by the customer) regarding a new" active "rental request, the booking procedure" (defensive letter dated 14 March 2016). According to the Company, this treatment becomes an integral part of the marketing purposes, with respect to which it is sufficient to request a single consent, as clarified by the Guarantor with provision of 4 July 2013, point 2.6.1., In www.gpdp.it doc. web n. 2542348 (written defense of 14 March 2016);

GIVEN the minutes of the hearing of the parties of 14 March 2017 in which the Company stated that "it does not carry out customer profiling aimed at defining, for example, its consumption habits, but is simply aimed at guaranteeing the best service to the customer by understanding their specific needs and maintaining constant attention of the same on its products and on the service offered in order to maintain the fiduciary relationship ";

CONSIDERING that during the hearing, the Company reserved the right to present adequate documentation on the matters reported, which, however, was never produced;

CONSIDERING that the arguments put forward do not allow to exclude the responsibility of the party in relation to what is disputed. The following is noted.

• In the rental contract submitted by the Company to customers, the following wording was reported: "pursuant to and for the purposes of art. 23 of the Privacy Code, by ticking the box below, I express my preference regarding the processing of personal data for sending, also by means of electronic communication tools, advertising information and commercial communications relating to Avis services, as well as for the analysis of customer satisfaction and consumption habits. YES ()

NO () ". From reading the contract, it is therefore clear that the consent was acquired, as well as for promotional purposes, also for profiling purposes. In fact, the data processing consisting in the drafting of a "customer card" (see defensive letter of March 14, 2016) for the analysis of customer consumption habits aimed at identifying "rental preferences" (see note of February 17 2016) represents, to all intents and purposes, profiling activities.

• Moreover, "the analysis of customer satisfaction and consumption habits" cannot be included in the marketing purpose, as it cannot be associated with the purpose of sending advertising material, nor with direct sales, carrying out research market or commercial communication. As stated by the Company itself, the data is collected and used for the analysis and processing of information relating to customers, thus divided by increasingly specific behaviors or characteristics, in order to make available to the same services increasingly targeted and conforming to the their specific needs and preferences. This activity falls within the definition of "profiling", which results not only from the provision of the Guarantor no. 161 of 19 March 2015 in www.gpdp.it doc. web n. 3881513, but also by the current European regulation on data protection 2016/679 (art.4, point 4), whose application was established starting from 25 May 2018;

CONSIDERING, also, that even in the hypothesis in which the "profiling" activity is not actually pursued by the Company, the information provided indicates in any case different purposes for which specific consent is required, as required by art. 23, paragraph 3, of the Code for which consent is validly given "only if it is expressed freely and specifically with reference to a clearly identified treatment (...)". In this regard, the Guarantor has already had the opportunity to clarify on other occasions (recently, with provision no. 288 of 22 June 2017, in www.gpdp.it, web doc. No. 6689610) that, where the purposes indicated in the information are different from each other, as occurred in the case in point, beyond the circumstance if they are actually carried out by the owner, it is however necessary that distinct and specific consents be acquired for each of these;

HEREBY DETECTED that Avis Budget Italia s.p.a. as data controller, pursuant to art. 28 of the Code, has carried out a processing of personal data by failing to make a new notification to the Guarantor and to acquire a specific consent in relation to each purpose pursued, in violation of art. 38 paragraphs 4 and 23 of the Code;

GIVEN art. 163 of the Code which punishes the violation of the provision 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;

GIVEN art. 162, paragraph 2-bis of the Code which punishes the violation of the provisions indicated in art. 167 of the Code including art. 23, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and 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 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. With particular reference to the violation of art. 162 paragraph 2-bis of the Code, in relation to art. 23 of the Code, it is not reported that the Company has modified the rental agreement with reference to the acquisition of the consent of the interested parties, in compliance with art. 23 of the Code;

CONSIDERING, therefore, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, to the extent of:

• € 40,000.00 (forty thousand) for the violation pursuant to art. 163 of the Code;

• € 20,000.00 (twenty thousand) for the violation pursuant to art. 162 paragraph 2-bis of the Code;

GIVEN the documentation in the deeds;

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 Prof. Licia Califano;

ORDER

to Avis Budget Italia s.p.a., VAT number: 00886991009, with registered office in Bolzano in via Roma n. 96, in the person of the owner, to pay the total sum of € 60,000.00 (sixty thousand) as a pecuniary administrative sanction for the violations envisaged by Articles 162, paragraph 2-bis, and 163 of the Code as indicated in the motivation;

INJUNCES

to the same Company to pay the sum of 60,000.00 (sixty thousand) euros, 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 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, 25 January 2018

PRESIDENT

Soro

THE RAPPORTEUR

Califano

THE SECRETARY GENERAL

Busia