

Corrective and sanctioning measure against Altroconsumo Edizioni S.r.l - 15 December 2022

Register of measures

no. 429 of 15 December 2022

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza (abstained), members, and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE (General Data Protection Regulation, hereinafter "Regulation");

HAVING REGARD TO 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 the national legal system to the aforementioned Regulation (hereinafter the "Code");

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Prof. Pasquale Stanzione;

WHEREAS

### 1. THE INVESTIGATION ACTIVITY CARRIED OUT

With the complaint of 16 July 2021, presented to this Authority pursuant to art. 77 of the Regulations, Ms XX complained of the receipt, on 25 September 2020, of an unwanted promotional phone call made on behalf of Altroconsumo Edizioni S.r.l.

(hereinafter «Company», «Altroconsumo») and coming from a telephone number (n. 0312270026) which was registered in the name of the company 8Mila S.r.l. Digital Contact Solutions. The latter, in response to the request made by the interested party on 28 September 2020, with a note dated 1 October 2020, confirmed that it had made the contact complained of in the complaint by virtue of the mandate conferred on it by Altroconsumo as data controller. Therefore, on October 6, 2020, Ms. XX

contacted the aforementioned Company which, with a note dated October 14, 2020, represented that the contact of the complainant would have been provided by Toleadoo GmbH, based in Germany of which Altroconsumo uses "to find lists of users towards which to direct one's promotions". In order to document what has been said, the Company has attached the note dated September 30, 2020 with which Toleadoo GmbH (hereinafter «Toleadoo»; «Partner»), in ensuring that it has deleted the personal data of the interested party from its databases, declared to have acquired the same "on 2016-09-08 23:34:41 on the occasion of the registration of the same in the competition [www.vincitore-selectato.it](http://www.vincitore-selectato.it)"; in this circumstance, Mrs. XX would have expressed her "consent for marketing purposes and for the transfer of data to third parties". Furthermore, to the acknowledgment note, Altroconsumo has attached the documentation relating to the aforementioned registration with the check boxes of the consents required at the end of the procedure.

In response to the observations raised by the complainant regarding the failure to acquire consent to the processing of personal data (since, from the screen shot of the competition registration sent by the counterparty, the boxes corresponding to the consents requested are not ticked), Altroconsumo, with notes dated 22 and 26 October 2020, stated that "consent for e-commerce purposes is proven by matching the IP address with the exact date and time in which the user completed the registration procedure (for example by clicking on the "confirm", "send" or similar button).

Based on what is represented in the documents, the Office, on 27 September 2021, formulated a request for information, pursuant to art. 157 of the Code, in order to acquire more elements of evaluation, with reference to the specific case but also and above all with regard to the generality of the treatments put in place by Altroconsumo, to verify, therefore, whether the critical issues reported can be attributed to episodic conduct or system anomalies.

With the reply dated 15 October 2021, Altroconsumo described the relationship with the subjects who intervene, for various reasons, in the creation of its advertising campaigns and, in representing the procedure adopted for the formation of lists of potentially contactable numbers, specified to carry out random checks of the telephone numbers provided by the Partner ("normally 5 numbers") and to proceed with the deduplication of these lists in order to exclude from these the numbers that cannot be contacted (for example, the numbers for which the interested party had expressed a opposition to processing for promotional purposes and users already used in the previous 6 months, as happened for Mrs. XX's telephone number). Furthermore, the Company specified that from January to December 2020 it managed "about 2,698,000 telephone contacts which resulted in 22,317 shareholders". Finally, in confirming what has already been communicated to the complainant

regarding the proof of consent acquired upon registration on the website [www.vincitore-selectato.it](http://www.vincitore-selectato.it) (IP address combined with the date and time of registration), Altroconsumo has attached the text of the privacy information (relating to the processing of personal data carried out by Toleadoo) and the call script used for promotional contacts.

## 2. NOTICE OF VIOLATIONS AND THE EXERCISE OF THE RIGHT OF DEFENSE

### 2.1. The dispute

In the light of what emerged in the preliminary investigation in the terms summarized above, and on the basis of the documentation in the documents, Altroconsumo was notified on 12 November 2021 of the communication of the initiation of the proceeding pursuant to art. 166, paragraph 5, of the Code, with which the Office contested the following violations:

- articles 12, 13 and 14 of the Regulation for not having provided the interested parties with suitable information on the processing of personal data carried out by Altroconsumo since, on the occasion of promotional telephone calls made on behalf of the Company, only the text of the information concerning Toleadoo treatments;
- articles 6, par. 1, lit. a) and 7 of the Regulations for not having in any way acquired specific and informed consent for the promotional purposes of Altroconsumo, nor does the screen shot of the registration of the complainant in the [www.vincitore-selectato.it](http://www.vincitore-selectato.it) competition contain elements capable of proving its suitability collection; furthermore, the wording used by the Partner to acquire consent "to the processing of [...] data for communication to third parties for direct marketing purposes" does not clarify whether the personal data thus collected can be used for promotional activities by Toleadoo itself or also from third parties (to whom the same are communicated), nor if Toleadoo can carry out advertising campaigns on behalf of third parties;
- of the art. 5 of the Regulation, for having carried out the aforementioned treatments and those of the same type (carried out towards potential customers of the Company through the acquisition of lists of personal data from third parties) in the absence of the conditions of lawfulness referred to in paragraph 1 of the same article or without have demonstrated the existence of these conditions pursuant to paragraph 2 below, with particular reference to the release of suitable information and the acquisition of free and specific consent.

### 2.2. The defense of Altroconsumo Edizioni S.r.l.

With the defense brief dated December 10, 2021, the Company provided clarifications regarding the critical issues raised in the notice of dispute adopted by the Office on November 12, 2021.

Firstly, it declared that the oral information provided to the interested party during the telephone contact complained of in the complaint is to be considered adequate as it contains the "essential elements inherent to the processing of data that Altroconsumo Edizioni S.r.l. performed by acting as independent data controller"; in particular, in the call script used to contact Ms. XX, it is specified that the phone call is made on behalf of Altroconsumo and that "Toleadoo GmbH collected the data of the interested party on the occasion of a competition in which she participated by providing a consent to receive promotional communications", indicating, therefore, in this circumstance, both the source of the data processed by the Company, and the purpose for which the same data are used. Furthermore, with reference to these data, Altroconsumo "can make only one useful contact (therefore only one phone call) except for the possibility of calling the same number two more times only in the event of no answer or busy signal".

With reference to the disputed formulation of the consent "to the processing of [...] data for communication to third parties for direct marketing purposes", referred to in point 2.1. of this provision, since the information provided by Toleadoo to Mrs. XX when registering on the site [www.vincitore-selectato.it](http://www.vincitore-selectato.it) indicated the product categories of the third parties receiving the personal data and the promotional purpose pursued by them (point 3 of the information cited - Further processing purposes: communication of data to the Data Controller's Partners), the interested party, by providing this consent, matured a legitimate expectation to be contacted by the aforementioned third parties "to receive their promotional offers".

The screen shot provided by the Company in the preliminary phase "re-proposes the image that the user sees on the screen before expressing his/her will", and therefore "the boxes placed in correspondence with the requested consents are not flagged [...]". However, the additional documentation produced makes it possible to verify that "the two consents (direct marketing and third-party marketing) are exploded into "consent 1 YES" and "consent 2 YES" respectively, unequivocally confirming that the interested party has given them both"; moreover, the string extracted from the management software used by Toleadoo "reports all the information provided by the interested party when giving her consent: personal data, IP address with exact date and time, municipality of residence, number telephone number and the two consents (direct marketing and third party marketing) marked with the wording "OK".

The Company has expressed its commitment to implement some corrective measures, such as for example significantly increasing the number of users to be verified for the marketing activity, accepting the Authority's dispute regarding the limited size of the verification sample ("normally 5 numbers"); has also listed a series of other obligations implemented (such as:

deduplication of the lists of numbers used; - verification of the information on the processing of personal data provided at the time of data collection; - verification of the web pages that contain the form of data collection; - complete cancellation of the numbering lists after six months from their acquisition; - the making of a single useful telephone call, net of two calls in the event of a busy line or no answer), asking the Guarantor to keep account as indicative of a conduct compliant with current legislation.

### 3. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also on the basis of the statements of the Company, for which the declarant is liable pursuant to art. 168 of the Code, the following assessments are made in relation to the profiles concerning the regulations on the protection of personal data.

#### 3.1. On the accountability of the holder

Recalling what is represented in point 1 above, it is first noted that Altroconsumo is to be considered the data controller, having the same Company established both the purposes and the methods of contact (see Article 4 of the Regulation). Toleadoo, as owner of the database, would have acted as an independent data controller since the processing carried out (data collection, storage and transmission to third parties) is prior to and completely independent of the processing carried out by Altroconsumo, to which I am therefore directly attributable to both the obligations imposed by the legislation on the protection of personal data and the responsibility for the violations detected.

In this regard, the Authority has repeatedly highlighted that the new principles dictated by the Regulation frame the responsibilities of the data controller in an accountability perspective and impose proactive and consistent behaviors with the aim of proving, at every stage, the legitimacy of the treatments. It is therefore up to the holder to adopt measures of particular guarantee in order to prove that the contracts and activations registered in their systems originate from contacts made in full compliance with the provisions on the protection of personal data (see provision n. 143 of 9 July 2020, web doc. n. 9435753). Given this, the reconstruction made by the Company regarding the process of forming the numbering lists and the related checks carried out, although presenting a margin of appreciation, cannot substitute for a lack of evidence which would have allowed an overall assessment of the treatments put in place and , consequently, of the level of guarantee ensured by the suppliers.

In fact - while acknowledging that the aforementioned verification activity, if carried out on significant samples, is potentially

suitable for preventing the circulation of personal data without the prescribed consent - it must be pointed out that, in concrete terms, the control of only five numbers (even if presumably repeated several times over the course of a year with different numbers) compared to the amount of users used for marketing purposes (as demonstrated by the declared 2,698,000 telephone contacts made), does not appear sufficient to guarantee an adequate level of protection, reducing control almost to a mere formalism. This circumstance raises doubts regarding the management of all additional users used in the Company's promotional activity. Altroconsumo, therefore, acting as owner with reference to the so-called first phase of the promotional campaign, which pertains to the correct acquisition of data, the release of suitable information and the acquisition of consent, should have verified that the procedures put in place were suitable for completing the aforementioned phases in full compliance with the provisions on the protection of personal data and in scrupulous observance of the necessary obligations so that the interested party can maintain, at any time, full control of their data.

At the state of the records, it is evident that these checks have not been carried out, thus subtracting the processing of personal data carried out by Altroconsumo with the use of personal data lists from third parties for marketing purposes under the conditions of lawfulness identified by the art. 5 of the Regulation.

In the light of the above, the violation of art. 5, par. 1 and 2, of the Regulation, to be considered as "system" conduct and not limited to the single case referred to in the complaint.

Consequently, it is necessary to enjoin the same, pursuant to art. 58, par. 2, lit. d), of the Regulation, if it intends to make use of third parties in the future to find the personal data of interested parties to whom it can send promotional messages, to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the relevant provisions.

Furthermore, although the Company has declared its commitment to "significantly increase the number of checks" and to improve the utility management system, with regard to the treatments already carried out, it is believed that the conditions exist for the application of an administrative fine pecuniary pursuant to articles 58, par. 2, lit. i) and 83, par. 5, letter. a) of the Regulation.

### 3.2. About transparency

The information provided to interested parties during promotional telephone calls made by Altroconsumo clarifies the origin of the data and the possibility of exercising the rights (access, rectification, cancellation, opposition, limitation, portability) vis-à-vis

Toleadoo but does not provide a complete picture of the processing of personal data carried out by the Company. In particular, no information is provided on the type of data processed and on the effective ownership of the treatment since Toleadoo is indicated as the subject to whom requests to exercise rights can be addressed, leaving a gap in the knowledge of the operations and methods adopted by the Company, also with reference to the retention of data and the recording of any refusal by the interested parties. Moreover, since there is no information to that effect in the deeds and in the call script used, it is not possible to be certain that the contact takes the form of a single call attempt, with an overall effect of inadequate transparency. Therefore, the violation of articles is considered integrated 12, 13 and 14 of the Regulation, the inadequacy of the information provided during promotional contacts emerges from the foregoing, not only in relation to the case referred to in the complaint but in the complex of treatments carried out by Altroconsumo.

It must also be noted that the Regulation, in art. 14, par. 3, letter. b), has introduced an extremely easy way for the owner to release the necessary information, giving concreteness to this fulfillment and clearly indicating within what time limit and actions the personal data acquired from third parties can legitimately enter the company databases. It follows that the data acquired by Altroconsumo and in relation to which suitable information has not been provided to the interested parties within the terms established by the aforementioned art. 14, par. 3, letter. b), of the Regulations, can no longer be used.

For these reasons, it is necessary to enjoin Altroconsumo, pursuant to art. 58, par. 2, lit. d) of the Regulation, for future data acquisitions, to provide suitable information to the interested parties, in the sense referred to above. With reference to the data already acquired and used for a first contact, the prohibition of further use must be established, pursuant to art. 58, par. 2, lit. f) of the Regulation.

### 3.3. On the proof of the acquisition of consent for telemarketing and communication activities to third parties for direct marketing purposes

With regard to the legitimacy of the consent expressed by the interested party when registering on the site [www.vincitore-selectato.it](http://www.vincitore-selectato.it), it is preliminarily stated that the belief that the IP address combined with the date and time of the user's registration at the website prove the expression of a will by the interested parties. The documentation of consent by indicating the IP address only is a method that the Guarantor has already deemed insufficient to certify the unequivocal will of the interested parties (see provision 26 October 2017, web doc. n. 7320903 and provision 25 November 2021, web doc. No. 9737185) since there are instead more suitable alternatives to guarantee a greater degree of certainty regarding the

genuineness of the consent (such as the practice of sending a confirmation message to the address indicated during registration).

Having said that, a complete documentation, for the purposes of probative evidence, was produced by the Company only subsequently, following the dispute procedure initiated pursuant to art. 166 of the Code, accompanying his defense brief. In particular, the complete record attributable to the complainant was provided, extracted from the management software of Toleadoo, from which it emerged that the consents expressed by the interested party when registering on the site [www.vincitore-selectato.it](http://www.vincitore-selectato.it) were acquired in a period dating back to and even prior to the full effectiveness of the Regulation (2016) without documenting the carrying out of checks aimed at assessing its suitability even after the change in the regulatory framework. It should be underlined that, in many cases reported to the Guarantor, the frequent unawareness of the alleged registrations was highlighted, some of which were disowned by the interested parties, as in the case in question, especially when the relative consents were provided in the past.

In light of this, it should be noted that, although the passage of time alone is not a sufficient parameter, in itself, to assess the suitability of the legal basis, consent to the processing of personal data for promotional purposes, as the maximum expression of the self-determination of the individual, must be considered valid, regardless of the time that has elapsed, until it is revoked by the interested party, provided that it was correctly acquired in origin and that it is still valid in the light of the rules applicable at the time of treatment as well as the times of conservation established by the owner and indicated in the information, in compliance with art. 5, par. 1, lit. e) of the Regulation (see provision of 15 October 2020, web doc. no. 9486485). That being said, the retention times indicated in the Toleadoo information notice at the time of registration on the website are not defined, referring only to "the times strictly necessary to carry out the purposes illustrated". The result is a processing of personal data potentially suitable for unfolding its effects for an indefinite time, significantly compressing the control of the interested party over the information concerning him. Therefore, the complained promotional contact must be considered devoid of a suitable legal basis, not only as it was carried out after four years, but rather as it lacks the aforementioned conditions of validity.

In this regard, it must be noted that the provisions of the Regulation (art. 4, point 11 and recital no. 32), in line with the previous regulatory framework, configure consent as a complex case in which the element of the expression of the will of the interested party must necessarily be related to the completeness of the information on the treatment provided by the owner. It follows that in the absence of suitable information on the treatment, as in the present case noted in paragraph 3.2., also the expression of



will of the interested party is irreparably flawed and unsuitable to constitute a condition of lawfulness for the treatment itself. Therefore Altroconsumo's responsibility must be confirmed for the violation pursuant to articles 6 and 7 of the Regulation and, due to the systematic nature of the conduct, there must also be a ban on the processing of the data in question, as already indicated in paragraph 3.2.

#### 4. INJUNCTION ORDER FOR THE APPLICATION OF THE PECUNIARY ADMINISTRATIVE SANCTION

On the basis of the foregoing, given the violations referred to, the sanction provided for by art. 83, par. 5, of the Regulation. For the purpose of quantifying the administrative fine, the aforementioned art. 83, par. 5, in setting the statutory maximum in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year where higher, specifies the methods for quantifying the aforementioned fine, which must "in any case [ be] effective, proportionate and dissuasive" (Article 83, paragraph 1, of the Regulation), identifying, for this purpose, a series of elements, listed in paragraph 2, to be evaluated when quantifying the relative amount.

In fulfillment of this provision, in the present case, the following aggravating circumstances must be considered:

1. the seriousness of the violation, given that the processing, although not supported by the necessary guarantees, involved a very large number of mobile users (2,698,000 telephone contacts which resulted in 22,317 members) (letter a);
2. the culpable nature of the violation considering that the data controller has implemented a limited control activity on the activity of the suppliers of numbering lists, despite having the possibility (letter d).

As mitigating elements, it is considered necessary to take into account:

1. the nature of the data processed, of a common type (letters a, g);
2. of the measures in any case adopted by Altroconsumo in order to contain the prejudice, including the fact that the reply given by the latter to the interested party, although originally unsatisfactory for the aforementioned reasons, was in any case timely and the Company demonstrated that it promptly took action to remedy the critical issues inherent in the treatments highlighted by the Authority (letter c);
3. the cooperation shown in discussions with the Authority (letter f);
4. the lack of previous sanctions (letter e);
5. of the overall assessment of the Company's economic capacity and of the need, in this sense, to also take into account the particular situation that has affected the country in relation to the pandemic emergency (letter k).

With an overall view of the necessary balance between the rights of the interested parties and the freedom to conduct a business, and in the initial application of the pecuniary administrative sanctions envisaged by the Regulation, it is necessary to evaluate the aforementioned criteria prudently, also in order to limit the economic impact of the sanction on the needs organisational, functional and occupational aspects of the Company.

Therefore, it is believed that, on the basis of all the elements indicated above, in comparing the level of seriousness of the conduct of the parties and the respective turnover, the administrative sanction of payment of a sum equal to Euro 100,000.00 (one hundred thousand /00), equal to 0.5% of the statutory maximum and, considering that these are violations of fundamental and consolidated obligations in the application practice of the legislation, such as the information, the ancillary sanction of the publication in full of this provision on the website of the Guarantor as required by art. 166, paragraph 7, of the Code and by art. 16 of the Guarantor's regulation n. 1/2019.

Finally, it is believed that the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations detected here in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f), of the Regulation, declares the processing described in the terms described in the justification to be unlawful by Altroconsumo Edizioni S.r.l., with registered office in Milan, Via Valassina 22, VAT no. 12581280158, and consequently:

- a) pursuant to art. 58, par. 2, lit. d) of the Regulation, enjoins the Company to integrate the information provided during the promotional contacts with the elements indicated by the articles 12, 13 and 14 of the aforementioned Regulation;
- b) pursuant to art. 58, par. 2, lit. d) of the Regulation, enjoins the Company, if it intends in the future to make use of third parties to find the personal data of interested parties to whom it can send promotional messages, to adopt suitable procedures (such as in particular checks on samples congruous with respect to the amount of data acquired) aimed at verifying constantly that personal data are processed in full compliance with the relevant provisions;
- c) pursuant to art. 58, par. 2, lit. f), of the Regulation, provides for the prohibition of the processing of data acquired by Toleadoo and other third-party suppliers, in relation to which suitable information has not been released to the interested parties by the owner and, as a result, consent has been acquired free from defects;

d) pursuant to art. 157 of the Code, enjoins the Company to communicate to the Authority, within thirty days of notification of this provision, the initiatives undertaken in order to implement the measures imposed; any failure to comply with the provisions of this point may result in the application of the administrative fine provided for by art. 83, paragraph 5, of the Regulation.

#### ORDER

to Altroconsumo Edizioni S.r.l., with headquarters in Milan, Via Valassina 22, VAT no. 12581280158, to pay the sum of Euro 100,000.00 (one hundred thousand/00) as an administrative fine for the violations indicated in the justification, 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 instructions given and the payment, within the term of thirty days, of an amount equal to half of the fine imposed.

#### ENJOYS

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 Euro 100,000.00 (one hundred thousand/00), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to the 'art. 27 of the law n. 689/1981.

#### HAS

a) pursuant to art. 17 of the Regulation of the Guarantor n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation, of the violations and of the measures adopted;

b) pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the Guarantor's website.

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, what initiatives have been undertaken in order to implement the provisions of this provision and to provide in any case adequately documented response. 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, letter. e), of Regulation (EU) 2016/679.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the owner of the processing of personal data has his residence, or, alternatively, with the court of the place of residence of the interested party. , within the term of thirty days from the date of communication of the

provision itself, or sixty days if the appellant resides abroad.

Rome, 15 December 2022

PRESIDENT

station

THE SPEAKER

station

THE SECRETARY GENERAL

Matthew