

Injunction against the Toscocountry real estate agency of Pizzi Claudia - 11 October 2018

Register of measures

no. 468 of 11 October 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant 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 Office of the Guarantor, with deed no. 19270/121919 of 26 June 2018 (notified on the same date by certified e-mail), which must be understood as fully reported here, contested the Toscocountry real estate agency of Pizzi Claudia (hereinafter "the Agency"), a sole proprietorship with registered office in Asciano (PI), via Barachini n. 11, tax code 01651790501, the violation provided for by articles 23, 162, paragraph 2-bis, and 167 of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196, hereinafter referred to as the "Code", in the formulation prior to the amendments introduced by the legislative decree . no. 4 September 2018, no. 101 in force since 19 September 2018);

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- on 13 November 2017, a complaint was received by the Authority, in which two natural persons complained of the illegal communication of their data by the Agency to a company of which one of the complainants is the director and legal representative;
- in particular, it was represented that the two complainants had gone to the Agency to view some properties with a view to a future purchase. The Agency had subsequently sent an e-mail, in which reference was made to the relationship and the properties visited, an e-mail which had been addressed not to the two people but to the certified e-mail address (PEC) of the company of which one of the complainants was the legal representative;
- in relation to the communication of the above data, the Agency represented that it had sent them to the PEC address of the company of which one of the complainants was the legal representative for the sole purpose of specifying the work carried out

up to that moment in the interest of the its customers and in the belief, induced by the declarations to that effect made during visits to the properties by the complainants themselves, that the certified e-mail box was in the full and exclusive availability of the latter;

- with note no. 13795/121919 of 11 May 2018, the Department of economic and productive realities of the Office of the Guarantor defined the procedure initiated with the complaint, highlighting that the complainants pointed out "that they did not authorize the forwarding of any communications to the Company, nor to the e-mail, nor to the pec"; "consent to the processing of personal data [...] must in any case be expressed and documented in writing (a circumstance which is not proven in the present case). [...] This also with regard to the communication of the data of the interested parties to third parties: communication which, in the absence of the authorization of the reporting parties, took place in the case in question following the sending by the Agency of the email, object of dispute, to the certified mail address registered to the company"

- on the basis of the procedural documents, the Office contested the Agency, as data controller, for the violation pursuant to articles 23 and 162, paragraph 2-bis, of the Code, for having made a communication of personal data in the absence of the consent of the interested party;

NOTING that with the aforementioned deed of 26 June 2018 the aforementioned violation was contested against the Agency;
HAVING ACKNOWLEDGED that the company has not made the reduced payment, as evidenced by the report drawn up pursuant to art. 17 of the law n. 689/1981;

READ the written defense of July 18, 2018, in which it is represented that:

- the Agency arranged for one of the complainants to sign a consent form for the processing of personal data, who then authorized the Agency itself to carry out processing also using electronic means;
- the Agency proceeded to send the disputed communication to the certified e-mail address of the company of which one of the complainants is the legal representative due to the impossibility of contacting the same complainants in any other way and did so in total good order faith, for the sole purpose of completing one's task and by virtue of the written consent obtained from one of the interested parties;
- the disputed violation can only occur if the presence of specific intent on the part of the offender is proven, in order to gain profit for himself or to cause damage to others;
- in the case in question, this intention has not been demonstrated by the Agency, on the contrary, from the literal content of

the communication sent to the company's PEC address, it is clear that it was a mere summary report of the visits made, the properties viewed and the relative prices in order to provide the requested service and that is to put the interested parties in the condition of having a complete view of the properties visited and of being able to freely choose whether or not to present a possible purchase proposal;

HAVING ACKNOWLEDGED that the arguments put forward by the Agency are not suitable for determining the closure of the sanctioning procedure started with the dispute of administrative violation for the following reasons:

- in relation to the circumstance that one of the complainants (moreover not the one who holds the position of director of the company from which the email was received) has given consent to the processing of their personal data with reference to the assignment conferred to the Agency, must note that the disclosure and consent acquisition form exhibited by the party contains only two contact channels, evidently indicated by the interested party, namely the mobile phone number and the personal e-mail address of the aforementioned;
- the Agency's contact needs for the complainants could be suitably met using the aforementioned contact channels, channels which, unlike the certified e-mail address of the company owned by one of the complainants, would have guaranteed confidentiality communications between the Agency and its customers;
- it must also be highlighted that the role of director and legal representative of a company cannot lead to an unjustified mix between the rights of a natural person and those of the legal entity he represents, in particular with reference to the confidentiality of communications and the use of certified email coordinates;
- as regards the absence of specific fraud in sending the communication in question, from which the non-existence of the unlawful conduct would derive, it should be noted that while art. 167 of the Code requires the recognition of a specific fraud in order for the hypothesis of the crime of illegal data processing to be configured, art. 162, paragraph 2-bis, of the same Code (in the formulation in force at the time of the facts) provides for the administrative sanctioning of violations in terms of consent "in any case", regardless of the purpose of the conduct or the malicious behaviour;
- for these reasons, the responsibility of the Agency for the disputed violation must be confirmed;

NOTING, therefore, that the Toscocountry real estate agency of Pizzi Claudia, on the basis of the above deeds and considerations, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code (in the formulation in force at the time of the events), the violation indicated in the notice of dispute no.

19270/121919 of 26 June 2018;

CONSIDERING the art. 162, paragraph 2-bis, of the Code (in the formulation in force at the material time) which punishes violations of the provisions indicated in art. 167 of the Code, which also includes art. 23, with the administrative sanction of the payment of a sum from Euro 10,000 to Euro 120,000;

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;
WHEREAS, in the present case:

to. with regard to the aspect of gravity, with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are not characterized by profiles of gravity;

b. for the purposes of evaluating the work performed by the agent, it must be noted that the conduct took place when the Agency sent the e-mail in question to the certified e-mail address of the company owned by one of the complainants, action by its nature irreversible in relation to which no subsequent measure could be adopted to eliminate or mitigate the consequences of the undue sending;

c. regarding the personality of the author of the violation, the circumstance that the Agency is not burdened by previous sanctioning proceedings defined briefly or following an injunction order must be considered;

d. with regard to the economic conditions of the agent, the income statements relating to the 2017 tax year were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 10,000 (ten thousand) euros for the violation pursuant to art. 162, paragraph 2-bis, of the Code and that, in the case in question, the reduction pursuant to art. 164-bis, paragraph 1, due to the minor extent of the violation, consisting of the single sending of an email;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, and subsequent modifications and additions;

GIVEN the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to the Toscocountry real estate agency of Pizzi Claudia, an individual company with registered office in Asciano (PI), via Barachini n. 11, tax code 01651790501, to pay the sum of 4,000 (four thousand) euros as an administrative fine for the violation indicated in the justification;

ENJOYS

to the aforementioned real estate agency to pay the sum of 4,000 (four thousand) euros, according to the methods indicated in the attachment, 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 of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, 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 data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 11 October 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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