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Injunction order against Telecom Italia S.p.A. - January 18, 2018

Record of measures

n. 16 of January 18, 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

NOTING that the Office of the Guarantor, with act no. 25953/107139 of 8 September 2016 (notified on the same date by certified e-mail), which must be understood as fully reported here, contested the company Telecom Italia S.p.A. (hereinafter "Tim S.p.A."), in the person of the pro-tempore legal representative, with registered office in Milan, via Gaetano Negri n. 1, C.F. 00488410010, the violations provided for by art. 23, 130, 154, paragraph 1, lett. c), 162, paragraph 2-bis, 162, paragraph 2-ter and 164-bis, paragraph 2, and 167 of the Code regarding the protection of personal data (Legislative Decree 30 June 2003, no. 196, hereinafter called "Code");

NOTING that the examination of the acts of the sanctioning procedure initiated with the notification of administrative violation revealed, in summary, the following:

- the Guarantor adopted, on 22 June 2016, provision no. 275 (in www.gpdp.it, web doc. No. 5255159), to which full reference is made, upon the outcome of the investigation of an administrative procedure initiated against Tim S.p.A. ;
- the proceeding originated from numerous reports received by the Authority, with which unwanted telephone contacts for promotional purposes were reported by Tim S.p.A. towards subjects who had not given consent to the processing of data for this purpose;
- the investigation carried out by the Office made it possible to ascertain that Tim S.p.A. has planned and implemented, through partner companies designated as data processors, a telephone contact campaign called "consent recovery", which had the intention of acquiring consent to the processing of personal data for promotional purposes by those who did not have it never returned or that they had revoked it; the "consent recovery" campaign was conducted against all former customers of Tim S.p.A. who had not given consent to the use of their data for promotional purposes;

- the "consent recovery" campaign was carried out in 2015 and involved the use of the entire customer database.

"discontinued and not consented", equal to approximately 2,000,000 records;

- it was noted in the provision of the Guarantor that "the investigations carried out with regard to the entire Telecom" Retrieval Consent "campaign, which involved approximately 2,000,000 users (to be precise 1,976,266 [...]), made it possible to ascertain that the company has carried out processing operations [...] aimed at carrying out promotional activities in violation of the relevant legislation on the protection of personal data and with particular reference to the lack of consent of the interested parties [...]; Moreover, the company, in addition to to be the author of the violations of the law referred to above with respect to a very wide range of interested parties, at the same time it engaged in a conduct contrary to the prescription already given to it by the Guarantor with the provision of 30 May 2007 (web doc. no. 1412598) on the basis of it Telecom, in fact, was required to adopt «the necessary measures to make the processing of data compliant with the provisions in force as regards, specifically, the possibility of making advertising, promotional or commercial calls only to subjects for whom the prior informed consent with respect to telephone contact is adequately documented [...] ». Telecom has not concretely taken this prescription into account in relation to the users involved in the "Consent recovery" campaign ";

NOTING that with the aforementioned deed of 8 September 2016, Tim S.p.A was challenged:

- pursuant to art. 162, paragraph 2-bis, of the Code, the violation of the provisions of art. 23 and 130, paragraph 3, with reference to the failure to obtain consent in the processing of personal data carried out in relation to the "consent recovery" campaign;

- pursuant to art. 162, paragraph 2-ter, of the Code, the violation of art. 154, paragraph 1, lett. c), in relation to the non-observance of the provisions contained in the provision of the Guarantor of 30 May 2007 (in www.gpdp.it, web doc no. 1412598), with reference to the "possibility of making advertising, promotional or commercial calls only towards subjects for whom prior informed consent with respect to telephone contact is adequately documented ";

- the violation referred to in art. 164-bis, paragraph 2, of the Code, with reference to the fact that Tim S.p.A. has committed the above violations, in relation to databases of particular importance and size;

HAVING REGARD to the report relating to the aforementioned contestation deed, prepared by the Office pursuant to art. 17 of the law of 24 November 1981, n. 689, from which it appears that the reduced payment was not made in relation to the violation referred to in art. 162, paragraph 2-bis, of the Code, while the payment appears to have been made in relation to the violation

referred to in art. 162, paragraph 2-ter; also acknowledged that for the violation pursuant to art. 164-bis, paragraph 2, of the Code, the possibility of making a reduced payment is not envisaged;

READ the defensive writings of 23 November 2016, which are understood to be fully referred to here, in which, also attaching a copy of the appeal presented by Tim S.p.A. to the Judicial Authority (Civil Court of Milan) against provision no. 275 of 22 June 2016, the following is represented:

- "Telecom, during a campaign called " Consent Recovery ", contacted by telephone some of its former customers who had not given consent to be contacted in the future (or who had formally denied it), for the sole and exclusive purpose of verifying if they intended to "change their mind", and give their consent to be contacted to receive promotional information on the new offers: the logic and the declared purpose of the campaign, not surprisingly called "Consent Recovery" precisely because it relates to so-called subjects. " not consensed ", was therefore not that of placing a product (or carrying out promotional activities), but rather that, ontologically different, of verifying whether, in a time context other than that in which the former customer had not given consent or had expressed his will not to be contacted by telephone, he had the intention to change his choice. The final data of this campaign, which saw ca. 280,000 customers contacted (equal to almost 70% of the total) "change their mind" and give their consent, show how the same was not based on peregrine or instrumental assumptions, but instead encountered the possibility of a physiological change of opinion from part of those who had previously taken a different position. ";

- "The Guarantor, on the basis of a non-linear use at times of the results of the various inspections carried out, seems to have considered [...] that the aforementioned contact with former customers was on the contrary to be considered in itself as a communication of a promotional nature and therefore it can be carried out in the light of the reference standards [...] only in the presence of the prior consent of the subjects contacted ";

- "is the Privacy Code, in articles 130 and 23 improperly referred to by the Guarantor, which clearly qualifies those that can be defined as promotional activities or with promotional purposes, that is to say those put in place" for the sending of advertising or direct sales material or for carrying out market research or commercial communication (see Article 130, paragraph 1, referred to in Article 130, paragraph 3 - see also Article 7, paragraph 4, letter b) , and art. 140, all set to the same definition). Therefore, if an economic operator puts in place a contact activity with an interested party carried out through the call with an operator (case governed by art. 130, paragraph 3, by exclusion from those referred to in paragraphs 1 and 2 of the same

article), there is a substantial and formal prerequisite so that that call can be considered included in the scope of application of the rule which, through the reference to art. 23, prohibits its carrying out in the absence of consent (in fact, Article 130 paragraph 3), and this assumption is fully identified by the Legislator in the fact that that telephone call qualifies as a commercial communication, or, as the Guarantor defines it, communication promotional. Affirming, as in fact the Provision does, that a telephone contact activity aimed only at verifying the willingness of an interested party to change their mind is always prohibited, and expressing a consent that had previously been denied, therefore means extending the very concept of "promotional" or "promotional" activities well beyond its well-defined regulatory perimeter ";

- "we hereby inform you that the undersigned has made use of the faculty to pay a reduced amount only for the objection referred to in paragraph b) for an amount of 60,000 euros within the terms indicated by this Authority";

- "Given the above, to the extent that it may occur at this stage, and with specific regard to the determination of the amount of the administrative sanctions referred to in chapters a) and c) of the dispute in relation to the elements to be taken into consideration also pursuant to art . 11 of Law no. 689/1981, the following is highlighted: with regard to the aspect of the seriousness of the violation, it is emphasized that the conduct held by Telecom, where punishable, however, had a much more limited scope than that indicated in the dispute, given that the calls actually made did not concern 1,976,226 users, but, as also highlighted in the Provision, "useful contacts for about 400,000 subjects" (70% of whom then gave their consent), given that "about the 50% of the numbers present in the dowries base subject to contact would have been non-existent "[...]; with regard to the work carried out by Telecom, the full collaboration provided by the Company is highlighted à in the procedure that led to the adoption of the Provision, as well as the initiatives immediately taken by the Company, which have already been highlighted in previous communications; in relation to the agent's economic conditions, it should also be noted that Telecom in the last year and in line with previous years has suffered a substantial loss for the year [...]. The elements highlighted above are provided in order to determine the possible sanction also in consideration of the criteria already followed by this Authority in the application of sanctions to other suppliers of electronic communication services in the face of certainly more relevant conduct, such as eg. in the injunction order no. 300 of 18 October 2012 (web doc. 2368171), in the context of which, or in the face of illegitimate contacts with over 9 million interested parties by an electronic communications service provider already the recipient of substantial injunctive measures, the ´ amount of the pecuniary sanction imposed pursuant to art. 164-bis, paragraph 2 of the Code was determined in the amount of Euro 150,000.00 (one hundred and fifty thousand), then increased

up to Euro 300,000.00 (three hundred thousand) pursuant to art. 164-bis, paragraph 4, of the Code ";

CONSIDERING that the arguments put forward are not suitable for determining the dismissal of the sanctioning procedure initiated with the above dispute:

- in the first place, it must be highlighted that the appeal against the Provision of the Guarantor no. 275 on 22 June 2016, was rejected by the Court of Milan, first civil section in monochromatic composition, with sentence no. 5022/2017 of 5 May 2017;
- in the aforementioned sentence it is stated that "although the opponent conceived the campaign as not aimed at the immediate conclusion of contracts and not even at the formulation of proposals, the promotional nature is ontologically connected to it. First of all, right from the script delivered to the service providers, the new Telecom offers, to the communication of which the user is invited to give consent, are immediately qualified as "more interesting than when he was our customer", a statement of evident promotional content, even if not specifically argued in relation to the content of the various contracts promoted. But above all, Telecom has carried out the processing of a data (the telephone user) that had been inhibited by the will, explicit or implicit, of the owner to obtain a direct, univocal and exclusive finalized rethinking to a promotional and telephone sales campaign, not by chance, albeit upon explicit request of the contacted person, and after the formulation of the consent, Telecom had foreseen the modalities of contextual promotion of the single contracts and also the possibility of immediate conclusion of the contractual relationship, which occurred in about 5,000 cases ";
- more generally, the sentence recalls that "the central role of the data subject's consent in legitimizing the processing is evident, in all cases in which there is no explicit legislative provision that legitimizes its acquisition, however, the right of Interested in the full knowledge, rectification or cancellation of data that do not comply with the principles of the directive (and national implementation regulations) for particular pre-eminent and legitimate reasons (art. 14 Dir. 95/46 and 7 Legislative Decree 196/03) " and that "the principle on which the guarantee of the owner is based with respect to the processing of his personal data by private subjects (or public economic bodies) is the expression of an explicit consent pursuant to art. 23 of the Privacy Code (subject to the exceptions of referred to in the following art. 24) ";
- therefore, while Tim S.p.A., in its defensive arguments, focuses on the profile of the legal qualification of the contact activity of the so-called subjects. "ceased not consented", the same does not take into account that any processing of personal data, regardless of its promotional nature or not, carried out by private parties, must be carried out after obtaining a valid consent pursuant to art. 23 of the Code or in the presence of one of the conditions under which consent may not be acquired, indicated

in the following art. 24;

- having qualified the subjects who had to be contacted as part of the "recovery consent" campaign as "discontinued and not consented" is proof that Tim S.p.A. has intended to carry out the processing of personal data towards interested parties who had not given the consent required by art. 23 of the Code and against which the company could not oppose any of the conditions under which consent may not be acquired, in particular that indicated in art. 24, paragraph 1, lett. b), of the Code (treatments carried out for the execution of a contract of which the interested party is a party);

- moreover, in the case in question, as also underlined by the Court of Milan, the promotional purpose of telephone contacts appears indisputable, both due to the characteristics of the calls made by the commercial partners of Tim S.p.A. (as described in provision no. 275/2016), fully comparable to those carried out in the course of an ordinary advertising campaign, both due to the fact that Tim S.p.A. did not highlight any other processing purpose for which it would have been necessary to request the consent of the interested parties. Indeed, the company represented that the telephone contacts were aimed at verifying whether the interested parties intended to "change their mind" with respect to previous denials of consent for promotional or advertising treatments, so that the contact activity is directly functional to the creation of advertising campaigns for the products and the services of Tim S.p.A;

- moreover, reasoning a the contrary and admitting that it is to be considered fully possible by each private subject the contact of those who have expressed the denial to the processing of their data for promotional and advertising purposes, with the aim of verifying the existence of a possible rethinking, it should be concluded that as soon as an interested party exercises the right provided for by art. 7, paragraph 4, lett. b), of the Code, by opposing the aforementioned treatments, the immediate consequence would be that of being constantly exposed to telephone contacts of the data controller aimed at obtaining the revocation of this opposition. It is quite clear that such an interpretation betrays the spirit of the law which aims instead to protect the right of the interested party not to become the target, without their prior consent, of advertising activities and all related prodromal and preparatory activities that they consist in unsolicited telephone contacts and therefore unwanted or disturbing;

- for the above reasons, therefore, the responsibility of Tim S.p.A. for the alleged violation pursuant to art. 162, paragraph 2-bis;

- the responsibility of Tim S.p.A. must be considered to exist in relation to the violation referred to in art. 164-bis, paragraph 2,

of the Code since the violation referred to in the previous point and that referred to in art. 162, paragraph 2-ter, of the Code (for which the company paid the penalty at a reduced rate), were created in relation to a database of particular importance and size, as confirmed by the Company itself;

NOTING, therefore, that Tim S.p.A, on the basis of the aforementioned considerations, appears to have committed, as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code:

a) the violation envisaged by art. 162, paragraph 2-bis, of the Code, for having carried out processing of personal data aimed at making telephone contacts of a promotional nature, without having acquired the required consent from the interested parties pursuant to art. 23 and 130 of the Code;

b) the violation foreseen by art. 162, paragraph 2-ter, of the Code, for failing to comply with the requirements of the Guarantor, issued pursuant to art. 154, paragraph 1, lett. c), of the Code, with the provision of May 30, 2007 (violation for which the company paid a reduced penalty);

c) the violation envisaged by art. 164-bis, paragraph 2, for having committed the violations referred to in points a) and b) in relation to a database of particular importance and size;

GIVEN art. 162, paragraph 2-bis, which punishes the violation of the provisions indicated in art. 167, which include arts. 23 and 130, with the administrative sanction of the payment of a sum from € 10,000 to € 120,000; art. 162, paragraph 2-ter, of the Code which punishes non-compliance with the statute of limitations adopted by the Guarantor with the administrative sanction of the payment of a sum from thirty thousand euros to one hundred and eighty thousand euros (sanction for which the payment of a reduced penalty has been made by Tim S.p.A.); art. 164-bis, paragraph 2, of the Code which punishes the violations of a single or more provisions indicated in part III, title III, chapter I of the Code (with the exception of those provided for by articles 162, paragraph 2, 162-bis and 164), orders in relation to a data bank of particular importance and size, with the administrative sanction of the payment of a sum from € 50,000 to € 300,000;

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;

CONSIDERING that, in the case in question:

a) 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 characterized by serious specific elements since Tim S.p.A. has undertaken a telephone contact activity aimed at subjects who had expressed a clear intention to the contrary, reaching them with unwanted or disturbing communications. Tim S.p.A. carried out the aforementioned activity on the basis of a conscious choice and not mere negligence, having acquired, over the years, through constant dialogue with the Guarantor, all the interpretative elements that should have allowed it to take decisions in line with the system in force and with the guidelines of the Authority, expressed in multiple provisions, including that addressed to Tim S.p.A. itself. of 30 May 2007;

b) for the purposes of evaluating the work carried out by the agent, it must be considered that the company has, within the terms established by the Guarantor with provision no. 275 of 22 June 2016, proceeded to enter the entire database of the so-called customers. "ceased not consented", in a black-list in order to avoid future contacts, and to cancel the consents collected during the "consent recovery" campaign;

c) with regard to the personality of the perpetrator of the violation, the circumstance that the company is burdened by numerous previous sanctioning proceedings defined briefly or following an injunction order (among which the one defined with order-injunction no. 433 is highlighted) of 3 October 2013, in www.gdpd.it, web doc. no. 2726332, concerning the same matter as the contact, for promotional purposes, of subjects who had revoked their consent, exercising the rights provided for by art. 7, paragraph 4, letter b), of the Code);

d) with regard to the economic conditions of the agent, the financial statements for the year 2016 were taken into consideration;

CONSIDERING, therefore, to have 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, to the extent of:

- € 60,000 (sixty thousand) for the violation pursuant to art. 162, paragraph 2-bis, of the Code;
- Euro 150,000 (one hundred and fifty thousand) for the violation pursuant to art. 164-bis, paragraph 2, of the Code.

CONSIDERING also that, in relation to the economic conditions of the offender, having regard in particular to the data relating to the shareholders' equity, the total profit for the year and the amount of operating revenues and income, as well as the fact that Tim S.p.A. as far as the total number of fixed and mobile telephone lines is concerned, it is still the leading company in the telecommunications sector in Italy, the aforementioned financial penalties are ineffective and must therefore be increased by four times, as required by art. 164-bis, paragraph 4, of the Code (sanction pursuant to art. 162, paragraph 2-bis, from € 60,000

to € 240,000; sanction pursuant to art. 164-bis, paragraph 2, from € 150,000 to € 600,000);

HAVING REGARD to the documentation on file;

GIVEN the law n. 689/1981, 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;

Rapporteur Dr. Antonello Soro;

ORDER

to Telecom Italia S.p.A., in the person of the pro-tempore legal representative, with registered office in Milan, via Gaetano Negri n. 1, C.F. 00488410010, to pay the sum of € 840,000 (eight hundred and forty thousand) as a pecuniary administrative sanction for the violations indicated in the motivation;

INJUNCES

the aforementioned company to pay the sum of € 840,000.00 (eight hundred and forty thousand), 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 of 24 November 1981, n. 689.

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, January 18, 2018

PRESIDENT

Soro

THE RAPPORTEUR

Soro

THE SECRETARY GENERAL

Busia