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Injunction order against Tempocasa S.p.A. - May 27, 2021

Record of measures

n. 217 of May 27, 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 the cons. Fabio Mattei, general secretary;

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 (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");

CONSIDERING, among the most relevant provisions of the Guarantor with general content, the Guidelines on promotional activities and the fight against spam - 4 July 2013;

GIVEN the overall 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;

Rapporteur Dr. Agostino Ghiglia;

WHEREAS

1. The report received, the investigation activity of the Office and the related results

With a report received by this Authority on 24 February 2020, Mr. XX complained of receiving unwanted phone calls aimed at promoting the Tempocasa brand and which took place in the absence of his consent and despite the registration of his telephone number in the public register of oppositions.

In this regard, the Office launched a specific investigation activity, on April 22, 2020, in order to acquire more elements of evaluation: this activity, which for the single grievance did not reveal any critical elements for Tempocasa S.p.A. (hereinafter

also referred to as "Tempocasa or" Company "), provided the opportunity to conduct more wide-ranging official investigations regarding the data processing carried out by the Company, also with reference to the website www.tempocasa. it and, in particular, to the texts of the privacy policy and the information relating to the newsletter.

Based on the overall documentation acquired, from which it emerged that the users registered on the aforementioned website can be quantified in about 600, the Office found that:

A) the privacy policy was lacking with regard to:

1. to the indication of the promotional contact methods, only the advertising purpose pursued being represented;

2. the identification of third parties and / or product categories of third party companies to whom the data is disclosed for promotional purposes;

3. the clear identification of the third-party companies for surveying the quality of the services to which Tempocasa communicates the personal data of the users;

4. the reference to the right to limitation (pursuant to Article 18 of the Regulation), as part of the list of rights exercisable by the interested party.

Furthermore, the information in question explicitly indicated that the registration "of the [...] name" of the interested party on the website entailed the 'automatic' acquisition of consent to the communication of data as well as to processing for promotional purposes also by the Company of the group or third-party companies: this consent, lacking the characteristics of freedom and specificity identified in art. 4, point 11, of the Regulation, does not seem to constitute an appropriate legal basis for the aforementioned treatments, pursuant to art. 6 of the same Regulation.

Finally, subscribing to the newsletter also entailed the acquisition of consent to receive e-mails concerning, without distinction: i) Tempocasa promotional offers; ii) update on the news of the website; iii) editorial news. Moreover, the same registration, in the setting declared by the Company, implied the acquisition of consent to profiling for marketing purposes. Therefore, with respect to these treatments, since no specific consent has been acquired by the interested parties for the aforementioned purposes, nor is any other legal basis applicable (see articles 6, paragraph 1, of the Regulation and 130 of the Code), the possible violation of the provisions of art. 6, 12 and 13 of the Regulations;

B) the information relating to the newsletter presented the following critical issues:

5. the inadequate identification of the joint owners, lacking the indication of the affiliated companies;

6. ambiguous with regard to the "Transfer of data abroad" referred to in point 7 of the information in question.

Consequently, also with reference to this second information, the possible violation of articles 12 and 13 of the Regulation.

Furthermore, the lacunae and generic nature of the two aforementioned disclosures have highlighted an incorrect and inadequate setting of the treatments in relief, integrating the violation of the privacy by design principle identified by art. 25, par. 1, of the Regulation.

Having considered this, with a note dated 10 February 2021, Tempocasa was notified of the initiation of the procedure for the adoption of corrective measures, as required by art. 166, paragraph 5, of the Code, contesting the alleged violation of arts. 6, 12, 13 and 25, par. 1, of the Regulation, consequently envisaging the applicability of the administrative sanctions provided for by art. 83 of the Regulation, as referred to in art. 166, paragraph 2, of the Code.

With the defense brief of 25 February 2021, the Company, in underlining that it had updated the information subject of the procedure in order to "quickly and collaboratively guarantee an ever greater level of protection of the interested parties", objected to the groundlessness of the complaints formulated by 'Authority.

In particular, with reference to the privacy policy, the owner argued that the information on the means used (telephone and e-mail) and on the third parties and / or product categories of the third-party companies to which the data is communicated for advertising purposes were known. by users through a graphic solution adopted by Tempocasa - by accessing the section of the website containing the data collection form - which consists of "specific pop-ups that are activated automatically as soon as the user places the mouse cursor over each collection flag box consent".

With regard to the failure to identify the third-party companies and the bodies for surveying the quality of the services that Tempocasa uses to pursue the purpose of communicating personal data, the Company rejected this complaint, deeming it sufficient to have indicated the reference product category (cit. "Companies or bodies for surveying the quality of services") as required by the "Guidelines on promotional activities and the fight against spam" of 4 July 2013.

Furthermore, in considering the right to limitation of processing (Article 18 of the Regulation) similar to the right to obtain "the blocking of data processed in violation of the law, including those no longer necessary for the pursuit of the purposes for which they were collected" (Article 7 of the Code), Tempocasa - following the complaint notified by the Office and with a view to "collaboration and propensity for constant improvement of privacy compliance" - claimed to have published a form for exercising the rights "which also indicate the right to limitation of processing".

With regard to the identification of the joint controllers in the newsletter information, the Company represented that it had provided the relevant information (company name and contact details) through the "Find agency" and "Complete list" links present in the footer of the website and in at the bottom of the information in question, as well as by accessing the data collection form in which "the data of the affiliate with whom the interested party comes into contact" are reported.

Moreover, on the same occasion, the Company claimed not to transfer data to non-EU countries but only "to countries of the European Union"; consequently he stated that he was exempt from the obligation to inform data subjects on this aspect as well as from the related fulfillment of free, specific and documented consent for the aforementioned transfer purpose.

More generally, with reference to the acquisition of a single consent for multiple heterogeneous purposes, the Company has represented that in the data collection form "separate and specific consents [...] were provided for the distinct purposes [of the processing] present in the text of the information [privacy] "and that did not use the personal data of users registered on the site and the newsletter to pursue marketing and profiling purposes. He also highlighted how "the type of commercial communications contested by this Authority would have concerned properties of interest to the" users who, therefore, would have had "the expectation of receiving them".

Tempocasa then clarified that it had "never subordinated the provision of its services to any consent for marketing, profiling, or any other type" and highlighted that it had intervened with corrective and improvement actions, starting "the reconstruction of its site in November 2020, therefore before the [...] proceeding [...] of the Authority "and having" rewritten the contested information taking into account the critical issues reported ".

During the hearing, held on 3 March 2021, the Company - in underlining that it has based its conduct on the principles of good faith, fairness and loyalty also in the context of the matter covered by the proceeding - represented that it had further increased its investments carried out for the digitization of business processes (for which approximately 300,000 euros were spent in the period February / December 2020) in order to ensure greater compliance with the legislation on the protection of personal data, "having particular regard to information and privacy consent "and with a view to privacy by design. Furthermore, he stated that "the website www.tempocasa.it is a mere showcase site [...] active since the summer of 2018" and reiterated that he has not processed the data of the users of the aforementioned site except for contractual reasons or for the provision of the services offered, for which it is not necessary to acquire a free and specific consent. The requests received through the contact form on the website, however, "were handled exclusively by the affiliates responsible for the area only to give [you] feedback

and [...] therefore, the email addresses, thus acquired, were not used for promotional purposes ".

2. Legal assessments

In light of the overall elements acquired, also based on the statements of the Company, for which the declarant may be called to respond criminally pursuant to art. 168 of the Code, the Authority's assessments are defined below.

It should be noted in advance that Tempocasa S.p.A. is to be considered the owner of the data processing carried out through its website, having established both the purposes and the methods of contact (see Article 28 of the Regulation); the same Company is therefore directly attributable to both the obligations set by the legislation on the protection of personal data and the responsibility for the violations detected.

Having said this, with reference to the critical issues that emerged in the texts of the privacy information and newslet-ter, the arguments put forward by the Company in relation to those indicated above with points 4 and 6 must first be accepted and therefore it is not considered that the details of the violations set out therein recur.

With regard to the additional elements raised (promotional contact methods; third parties to whom the personal data are communicated; joint controllers) and having acknowledged that the missing elements can be obtained from the data collection form, through the graphic solution described by the party, it must be observed that the lack of such information in the texts of the aforementioned information cannot be considered overcome by the fact that the data can be known aliunde, nor can a mechanism that forces the interested party to search the website be considered suitable, and therefore legitimate, to be able to acquire all the information required by art. 13 of the Regulation, thus also contravening the requirement of easy accessibility and usability of the information required by art. 12 of the Regulation, in the broader context of the basic principle of transparency. In this sense also the Working Group pursuant to Article 29 which, in the amended version of the Guidelines on transparency adopted on 11 April 2018 (in www.garanteprivacy.it, available at the link https://ec.europa.eu/newsroom/ article29 / item-detail.cfm? item_id = 622227), first clarified that "the element of easy accessibility implies that the interested party is not forced to search for information, but rather that it is immediately clear to him where and how it is accessible "And then, in promoting a layered approach to disclosure, he stressed that" the design and layout of the first layer of the privacy statement / disclosure should be such as to offer the data subject a clear overview of the information available to them on the processing of personal data and of the place and the way in which it can find them between the different layers. […]. This means that "the data controller must take action to provide the information in question to the data subject or to direct him to the point where

they are located (eg. Via direct link, use of a QR code, etc.). [...] the Group recommends that all information addressed to data subjects be made available to them in one place or in a single complete document (eg, in digital format on a website or on paper) which can be easy access to consult them in their entirety ". The layered approach of the information, therefore, cannot ignore its completeness, with regard to all the elements codified by art. 13 of the Regulation, favoring a level of intelligibility and transparency underlying the fundamental principle of self-determination of the interested party with regard to the processing of his personal data.

With regard to the automatic acquisition of consents for promotional, communication to third parties and profiling purposes, when registering on the website and the newsletter, the fact that Tempocasa has declared that it has not sent any promotional communication to the 600 users registered (and not having carried out further profiling and communication activities to third parties for promotional purposes) does not exclude the existence of the violation, given that the primary operations have already been carried out with the collection and registration of data in the Company's archives. of treatment related to the aforementioned purposes.

In observing that, in the overall setting of the treatments by Tempo-casa, there is a clear inconsistency between the treatments described in the information and the treatments actually carried out (see prov. January 15, 2020 n.85, doc . web n. 9256486 par. 3.5.), and the further inconsistency between the treatments described and the consents to be requested from the interested parties, it must be noted that, in the data collection form prepared by the Company, it is not required that users have the necessary free and specific consent to the processing of data for the purpose of profiling. Furthermore, it cannot be considered at all clear whether the consent requested therein ("consent for third-party marketing activities") refers to the marketing carried out by the Company on behalf of third parties or to the communication to such subjects for the conduct of their own promotional activities. . Therefore, the wording expressly indicated above cannot constitute an appropriate legal basis (see Article 6 of the Regulation, cit.) Neither for treatments that involve communication to third parties nor, much less, for processing for promotional purposes.

As mentioned, the fact that Tempocasa has stated that it has never carried out the declared promotional, profiling and communication purposes to third parties, does not matter for the purposes of the alleged violations, as, as required by the national and community legislator (art. 4, par.2, of the Regulation) and reaffirmed by the Guarantor in several circumstances, the collection and storage of data constitute processing of personal data that require specific guarantees regarding information

and consent. In this sense, the exception presented by the Company on the legitimate expectation accrued by the interested parties to receive promotional communications regarding the purchase and / or sale of a property, "in line with [one's] interests, must gni ", since in the information taken into consideration neither the modality, nor the frequency, nor the subject of the communications in question (necessary to delimit the possible scope of the promotional treatment) were distinguished and as it is not possible to recognize, in the case in point, a legitimate interest as a suitable legal basis for the marketing activity. In fact, as clarified also on the occasion of the aforementioned provision. January 15, 2020 (par. 3.1.), "The legal basis [...] cannot be invoked that of the 'legitimate interest' in marketing activities, perhaps together with the alleged interest of the 'referring' subject, which involves in the promotion the friend or relative. It should then be highlighted that the legitimate interest, pursuant to art. 6, par. 1, lett. f), of the Regulations - already provided for by both the repealed Directive 95/46 / EC, as well as by the Code prior to the amendments made by Legislative Decree no. 101/2018 (Legislative Decree no. 196/2003, Article 24, paragraph 1, letter g) - cannot - in general - subrogate the consent of the interested party as the legal basis for marketing. Indeed, the Regulation itself - as already Directive 95/46 / EC in art. 7, paragraph 1, lett. f) - only admits it 'on condition that the interests or fundamental rights and freedoms of the person concerned do not prevail'. The application of the legal basis of the legitimate interest therefore presupposes the prevalence in practice (based on a balance given to the owner, but always assessable by the Supervisory Authority) of the latter over the rights, freedoms and mere interests of the interested parties (specifically, the recipients of promotional communications not assisted by consent). In this comparison, it is necessary to carefully weigh the impact of the processing, which is intended to be carried out on these rights, freedoms and interests (among which, in the case of marketing, first of all the right to data protection and the right to peace of mind are recognizable. individual of the interested party). " Moreover, "the data controller cannot retroactively resort to the basis of the legitimate interest [...] Since he has the obligation to communicate [in the information issued to the interested party] the legitimate basis at the time of the collection of personal data, the holder of the processing must have decided on the legitimate basis before data collection "(see Group Guidelines Art. 29 on consent, 10 April 2018, WP 259).

Furthermore, in particular, for promotional communications with automated methods, such as e-mail, the general rule is the prior, free and specific consent of the recipients (Article 130, paragraphs 1 and 2, of the Code), without prejudice to the exception of CD. "Soft spam" (Article 130, paragraph 4, of the Code).

It should be reiterated that the users' self-determination capacity is not respected when the effective and conscious freedom of

choice regarding the processing of their data is not ensured, nor when, as proposed by the Company in both aforementioned information, it is conditioned adherence to a service for the automatic acceptance of the processing of personal data (see provision "Online services:" compulsory "consent request for promotional purposes" - 27 October 2016, web doc. no. 5687770).

In this context, the Company - although it has "committed" and "intervened with corrective and improvement actions" of the disputed treatments, "starting the reconstruction of its site in November 2020" and rewriting the information concerned on the basis "of the critical issues reported by [this] Authority "in the context of this proceeding - it appears to have put in place, since the collection of the data, an incorrect design of the same and of their presentation to the public, in clear violation of the principle of privacy by design identified by art. 25 of the Regulation. In fact, "taking into account the state of the art and the costs of implementation, as well as the nature, scope, context and purpose of the processing, as well as the risks with different probabilities and gravity for the rights and freedoms of natural persons ", Tempocasa does not appear to have implemented adequate" adequate technical and organizational measures [...] aimed at [...] integrating the necessary guarantees into the processing in order to [...] protect the rights of the data subjects "(see also the recitals 75 and 78 of the Regulation).

In light of the above, it is believed that the behaviors described have fully integrated the violation of Articles 6, 12, 13 and 25, par. 1, of the Regulation. Therefore, pursuant to art. 58, par. 2, lett. d) and f), of the Regulations, to have to adopt against Tempocasa the prohibition of the treatments described above, also ordering them to comply with the regulations in force.

3. Ordinance-injunction for the application of the pecuniary administrative sanction

The violations, as indicated above, also require the adoption of an injunction order, pursuant to Articles 166, paragraph 7, of the Code and 18 of law no. 689/1981, for the application to Tempocasa of the administrative pecuniary sanctions provided for by art. 83, paragraphs 4 and 5, of the Regulations (with the expected payment of a sum of up to € 20,000,000 or, for companies, up to 4% of the annual worldwide turnover of the previous year, whichever is higher).

These violations are integrated in relation to related processing carried out by Tempocasa, for which the more favorable provision provided for by art. 83, par. 3, of the Regulation, according to which if, in relation to the same treatment or related treatments, various provisions of the Regulation have been violated, with willful misconduct or negligence, the sanction imposed for the most serious violation (referred to in art.83 , paragraph 5, letters a and b, of the Regulation) can absorb the applicable one for the less serious violation (see Article 83, paragraph 4, letter a, of the Regulation).

To determine the amount of the sanction in the specific case, it is necessary to take into account the elements indicated in art. 83, par. 2, of the Regulation which, in this case, can be considered in the following terms. In particular, they can be considered as mitigating:

- the subjective dimension of the conduct, which must be considered more appropriately negligent, rather than malicious (art. 83, par. 2, lett. b);

- the circumstance that the treatments for the additional purposes indicated in the information (in particular, promotional or profiling ones) have not been fully carried out (Article 83, paragraph 2, letter a);

- the proactive behavior of the Company which appears to have changed the texts of the information and the formulas for acquiring consent, even if only after the start of the investigation with the aforementioned note of 22 April 2020 (art.83, par.2 , letter c);

- the absence of previous contested violations and Authority measures against the Company (Article 83, paragraph 2, letter e);

- prompt cooperation with the Authority during the overall investigation (Article 83, paragraph 2, letter f);

- the economic investments already made by the Company to improve the compliance of its instruments, such as in particular the website, as well as the situation of serious social and economic crisis linked to the pandemic in progress (Article 83, paragraph 2, lett. k).

What aggravating circumstances, however, emerge:

- first of all, the significant discrepancy of the action conducted with respect to the substantial provisional activity of the Guarantor, with which indications and clarifications were provided on the subject (see the aforementioned Guidelines and numerous inhibitory and prescriptive measures on specific cases) and which can reasonably lead to believe that all operators (including Tempo-casa) have reached a sufficient awareness of the provisions that must be unfailingly observed (Article 83, paragraph 2, letter k cit.). In fact, these are obligations, such as information and consent, clearly governed already in the first Italian privacy law, Law 675/96, and then by the Code, finally reaffirmed in the Regulations.

- secondly, the high level of revenues deriving from the activities carried out by the Company, as shown in the product financial statements, must be considered.

Based on the set of elements indicated above, in application of the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1, of the Regulation, taking into account the necessary balance between the rights of

the interested parties and freedom of enterprise, in the first application of the administrative pecuniary sanctions provided for by the Regulations, also in order to limit the economic impact of the sanction on organizational needs , functional and occupational of the Company, it is believed that the administrative sanction of the payment of a sum of 120,000.00 (one hundred and twenty thousand) euro equal to 0.6% of the maximum authorized amount should be applied to Tempocasa.

In the present case, it is believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7, of the Code and by art. 16 of the Guarantor Regulation n. 1/2019, taking into account the macro-scopic nature of the violations found with regard to legal principles now consolidated in the Authority's "jurisprudence" and the pervasiveness of the treatments examined.

Finally, 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.

Please note that, pursuant to art. 170 of the Code, anyone who, being required to do so, does not comply with this prohibition provision is punished with imprisonment from three months to two years and who, in the event of non-compliance with the same provision, is also applied in the administrative stage the sanction referred to to art. 83, par. 5, lett. e), of the Regulation.

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 unlawful and adopts the following corrective measures against Tempocasa S.p.A., based in Bresso (MI), via Carolina Romani n. 2, tax code: 02152730137, p. VAT number 11974070150:

a) pursuant to art. 58, par. 2, lett. f), of the Regulation, provides for the prohibition of the processing of personal data of interested parties, for whom he does not have an adequately informed, free and specific consent for each of the purposes indicated in the aforementioned information, additional and different from those strictly contractual or administrative - accounting or in the absence of another suitable and documented legal basis, pursuant to art. 6 and 7 of the Regulations;

b) pursuant to art. 58, par. 2, lett. d), of the Regulation, orders the implementation of technical and organizational measures such as to ensure that only the personal data for which has an adequately informed, free and specific consent or another suitable and documented legal basis (articles 6 and 7, cit.).

Pursuant to art. 58, paragraph 1, lett. a), of the Regulations as well as art. 157 of the Code, orders the same Company to provide, within 30 days of receipt of this provision, documented feedback with regard to the initiatives undertaken in order to

implement the provisions of letters a) and b). Failure to respond may result in the application of the pecuniary administrative sanction provided for by art. 83, par. 5, lett. e), of the Regulations;

ORDER

to Tempocasa S.p.A., in the person of the pro-tempore legal representative, to pay the sum of € 120,000.00 (one hundred and twenty thousand) as a fine for the violation indicated in the motivation, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within thirty days, 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 € 120,000.00 (one hundred and twenty 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 n. 689/1981;

HAS

as an ancillary sanction, pursuant to art. 166, paragraph 7, of the Code and art. 16 of the Guarantor Regulation n. 1/2019, the publication on the website of the Guarantor of this provision and, 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.

Pursuant to art. 78 of the Regulation, as well as art. 152 of the Code and 10 of the d. lg. 1 September 2011, n. 150, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed, alternatively, at the court of the place where the data controller resides or is based or at that of the place of residence of the interested party within term of thirty days from the date of communication of the provision itself or of sixty days if the applicant resides abroad.

Rome, May 27, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Ghiglia

THE SECRETARY GENERAL

Mattei