

Injunction against Mingardi Medical Center s.r.l. - May 31, 2018

Register of measures

no. 368 of 31 May 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;

NOTING that, in the face of two reports received by the Authority in March 2017, in which the receipt of unwanted promotional calls from "Idea Sorriso" was complained about, the Office started a preliminary investigation aimed at verifying the facts of the reports. To this proposal, checks were carried out pursuant to articles 157 and 158 of the Personal Data Protection Code (Legislative Decree No. 196/2003, hereinafter the "Code"), initially at Idea Sorriso s.r.l. on 10, 11 and 12 April 2017, and then at Mingardi Medical Center s.r.l. (hereinafter "MMC") on 16 and 17 May 2017, in order to verify compliance with the provisions on the protection of personal data with regard to telemarketing activities;

CONSIDERING that, on the basis of the overall elements acquired during the investigations carried out at Idea Sorriso s.r.l. and MMC, it was found that, with reference to the processing of personal data carried out for telemarketing purposes, the two companies operated as joint data controllers, pursuant to art. 4, paragraph 1, lett. f), of the Code;

NOTING that the Authority has adopted the prohibition and prescriptive provision n. 268 of 15 June 2017 (in [www.garanteprivacy.it](http://www.garanteprivacy.it), web doc. n. 6629169), the reasons for which must be understood as fully referenced, with which it was ascertained that "the processing of personal data for the aforementioned marketing purposes, carried out by Idea Sorriso and MMC in a promiscuous manner and without any compartmentalization between the Companies (...), was created in failure to comply with the provisions contained in the personal data protection regulations" (point 7.1). In particular, it has been ascertained that the company has collected personal data through three distinct procurement channels, i.e. the compilation by the interested parties of an online form present on the website [www.ideasorriso.it](http://www.ideasorriso.it), the public telephone directories, in particular those present on the website [www.paginebianchi.it](http://www.paginebianchi.it) and, lastly, the lists of telephone numbers delivered on a USB flash drive from the Lugano branch of XX. In relation to the data in question, part of which is actually used to carry out promotional activities, it was possible to detect that:

- the information provided through the website [www.ideasorriso.it](http://www.ideasorriso.it), (is to) be considered unsuitable as (...) no reference is found to the scope of circulation (...) of the data collected through the aforementioned website" (point 9.1 of the provision);
- "(...) equally illicit is the provision of a single consent other than generic, pre-selected for the processing of data entered by users with respect to all the purposes referred to in the information. In particular, a further consent is required (...) for the pursuit of the purposes strictly connected to the provision of the service, however, the possibility of freely expressing consent for the purpose of sending newsletters with promotional content is missing (...) as instead required by the art. 23, ch. 3. of the Code" (point 9.2 of the provision);
- "the promotional activity (was carried out) in the period January-March 2017 on a sample of residential numbers taken from public telephone directories, in particular from the website [www.paginebianchi.it](http://www.paginebianchi.it) (...), (as well as , taken from) "lists of both fixed and mobile telephone numbers relating to about one million users, (...) delivered (...) to Idea Sorriso on USB support from the Lugano branch of XX (...)" (points 5.1 and 5.2 of the provision);
- "with regard to the treatments carried out for telemarketing purposes, the companies, operating as co-controllers, have unlawfully processed the data collected, given that, as stated, the same (...) have not been subject to verification at the Registry public [of the oppositions] (pursuant to articles 130, paragraph 3-bis of the Code and 5, Presidential Decree no. 178/2010), nor has the existence of any other legal basis for their use for the aforementioned purpose been proven (Articles 23, 24 and 130, c. 3, of the Code) [...]" (point 8 of the provision);

considering the above, the Authority ordered MMC to adopt organizational and technological measures, prohibited further unlawful processing and reserved the right to dispute with independent proceedings against MMC and Idea Sorriso s.r.l., as co-owners of the processing both of the data allegedly acquired through [www.paginebianche.it](http://www.paginebianche.it) and [www.ideasorriso.it](http://www.ideasorriso.it) and of those acquired by XX and used for telemarketing purposes, administrative violations concerning articles 13, 23 and 130, paragraphs 3 and 3-bis and the violation pursuant to art. 164-bis, paragraph 2, of the Code (point 12.1. of the provision);

NOTING that the party, not having challenged the aforementioned provision, has given acquiescence to what was ascertained by the same (Arezzo Court no. 607 of 05.12.2016 and Taranto Court no. 2348/2017);

HAVING REGARD to note no. 24239 dated 10 July 2017 of the Communications and Telematic Networks Department of this Authority, with which the documents were sent to the Department of Inspections and Sanctions competent for assessments regarding the existence of administrative violations;

CONSIDERING the report n. 25951/116588 of 25 July 2017, which is referred to in its entirety here, with which Mingardi Medical Center s.r.l., with registered office in Padua, via E. Filiberto di Savoia n. 47, P.I. 04550520284, in the person of the pro-tempore legal representative, the administrative violations envisaged:

- a) by art. 161 of the Code for the violation of art. 13 of the Code, in relation to the unsuitability of the information provided on the website;
- b) by art. 162, paragraph 2-bis, of the Code for the violation of art. 23 of the Code, in relation to the acquisition of a single, generic and pre-selected consent present on the website;
- c) by art. 162, paragraph 2-bis, of the Code for the violation of articles 23 and 130, paragraph 3, of the Code, as "it has not been able to provide any proof of the possible acquisition of the informed consent of the interested parties to whom the telephone numbers refer for carrying out the telemarketing activity";
- d) by art. 162, paragraph 2-quater, of the Code for the violation of art. 130, paragraph 3-bis, of the Code, in relation to the failure to verify the numbers contacted in the Public Opposition Register;
- e) by art. 164-bis, paragraph 2, of the Code in relation to the very significant number of personal data contained in the database (about 1,000,000 numbers), for which reduced payment is not permitted pursuant to art. 16 of the law n. 689/1981;

CONSIDERING that the case referred to in art. 164-bis, paragraph 2, of the Code is completely autonomous and distinct from the cases referred to therein, as reaffirmed both by the relevant jurisprudence and by the jurisprudence of legitimacy (Court of Milan 03.11.2014; Court of Cassation n. 17143 of 08/17/2016). Therefore, the configurability of the material accumulation follows, consequent to the abstract conceivability of the (non-formal) concurrence of administrative offenses among the cases referred to in Articles 161 and 162, paragraph 2-bis, in relation to that referred to in art. 164-bis, paragraph 2, of the Code, when the first violations (among the many possible according to the content of the provision examined) are committed with reference to a database of particular relevance and size (see annex 18);

NOTING that from the report prepared by the Office pursuant to art. 17 of the law n. 689/1981, the reduced payment does not appear to have been made, in relation to the violations referred to in articles 161, 162, paragraph 2-bis, and 162, paragraph 2-quater, of the Code;

NOTING that the offender does not appear to have made use of the faculties provided for by art. 18 of the law of 24 November 1981 n. 689 (by not sending the Authority written defenses and documents or asking to be heard);

NOTING, therefore, that MMC s.r.l., as data controller pursuant to articles 4, paragraph 1, lett. f) and 28 of the Code, has processed personal data through the website [www.ideasorriso.it](http://www.ideasorriso.it), making the information unsuitable and failing to acquire specific consent in relation to each purpose pursued, in violation of articles 13 and 23 of the same Code and carried out activities of a promotional nature on a sample of both fixed and mobile telephone numbers, failing to acquire the informed consent of the interested parties to whom the telephone numbers refer (acquired from the XX of Lugano), in violation of articles . 130, paragraph 3, and 23 of the Code, and failing to carry out the verification in the Public Opposition Register, in violation of art. 130, paragraph 3-bis, of the Code;

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;

CONSIDERING the art. 161 of the Code, which punishes the violation of art. 13 of the same Code with the administrative sanction of the payment of a sum from six thousand euros to thirty-six thousand euros;

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes the violation of the provisions indicated in art. 167 of the Code, including the one referred to in art. 23 of the same Code, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and twenty thousand euros;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violation of the provisions indicated in art. 167, which recalls the articles 23 and 130, with the administrative sanction of payment of a sum ranging from ten thousand to one hundred and twenty thousand euros;

CONSIDERING the art. 162, paragraph 2-quater, of the Code, which punishes the violation of the right to object pursuant to art. 130, paragraph 3-bis, of the same Code, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and twenty thousand euros;

CONSIDERING the art. 164-bis, paragraph 2 of the Code, which punishes the violation of a single or more provisions indicated in Chapter I of the Code, classified under Administrative Violations, also committed at different times in relation to databases of particular relevance or size, with the administrative fine from fifty thousand to three hundred thousand euros;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

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

- 6,000.00 (six thousand) euros for the violation pursuant to art. 161, in relation to the unsuitability of the information provided on the website (art. 13 of the Code);
- 10,000.00 (ten thousand) euros for the violation pursuant to art. 162, paragraph 2-bis in relation to the acquisition of a single, generic and pre-selected consent present on the website (art. 23 of the Code);
- 10,000.00 (ten thousand) euros for the violation pursuant to art. 162, paragraph 2-bis, as "it has not been able to provide any proof of the possible acquisition of the informed consent of the data subjects to whom the telephone numbers refer for carrying out the telemarketing activity" (articles 23 and 130 of the Code);
- 10,000.00 (ten thousand) euros for the violation pursuant to art. 162, paragraph 2-quater, in relation to the failure to verify the numbers contacted in the Public Opposition Register (art. 130 paragraph 3-bis of the Code);
- 50,000.00 (fifty thousand) euros for the violation pursuant to art. 164-bis, paragraph 2, of the Code, in relation to the extremely significant number of personal data contained in the database;

for a total amount of 86,000.00 (eighty-six thousand) euros;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981 n. 689, and subsequent modifications and additions;

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

SPEAKER Dr. Augusta Iannini;

ORDER

to Mingardi Medical Center s.r.l., with registered office in Padua, via E. Filiberto di Savoia n. 47, P.I. 04550520284, in the person of the pro-tempore legal representative, to pay the sum of 86,000.00 (eighty-six thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the same company to pay the sum of 86,000.00 (eighty-six thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive deeds 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, 31 May 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia