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Order injunction against FCA Italy s.p.a. - December 16, 2021

Record of measures

n. 439 of December 16, 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Prof. Pasquale Stanzione, president, Prof. Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members, and dr. Claudio Filippi, deputy secretary general;

GIVEN the legislative decree 30 June 2003, n. 196 (Code regarding the protection of personal data, hereinafter the "Code") as amended by Legislative Decree 10 August 2018, n. 101 on "Provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679";

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter the "Regulation");

HAVING REGARD to the complaint presented by an English citizen (Mr. XX) to the English Supervisory Authority (ICO) with which he complained of the violation of his right of access pursuant to Article 15 of the European Regulation 2016/679;

CONSIDERING the IMI procedure art. 56 (no. 47577) uploaded by the English supervisory authority (ICO) and communicated to all other European supervisory authorities on 17 August 2018;

CONSIDERING the observation with which the Guarantor declared to be the lead Authority in the procedure as the data controller has the main establishment in Italy;

GIVEN the note from FCA Italy s.p.a. of 17 April 2019, with which the Company sent the requested information to the Guarantor relating to the processing, carried out by the same, of the complainant's personal data;

GIVEN the note of 25 October 2019, with which the Guarantor notified the Company, pursuant to art. 166, paragraph 5, of the Code, the alleged violations found, with specific reference to art. 12, par. 3 and 4, and 15 of the Regulation, inviting you to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, law no. . 689 of November 24, 1981);

GIVEN the note received on November 15, 2019, with which FCA Italy s.p.a. requested a formal hearing from the Guarantor;

GIVEN the minutes of the hearing held on 5 October 2020 at the Guarantor's Offices;

GIVEN the note of 2 October 2020 with which FCA Italy s.p.a. has sent its defense writings to the Guarantor;

GIVEN the draft decision ("Draft Decision") approved by the Board of the Guarantor in the meeting of 11 March 2021;

CONSIDERING the procedure “art. 60 Draft Decision "opened by the Guarantor in the IMI IT system in compliance with the principles of cooperation and consistency established by art. 60 of the Regulation;

CONSIDERING the relevant and justified objections presented, pursuant to art. 60, paragraph 4, of the Regulations, by the Austrian supervisory authority, which found that FCA Italy s.p.a. should have provided the interested party only with the personal data relating to the same contained in the documentation in his possession (telephone transcripts, internal notes of the case) and not a copy of the aforementioned documents;

GIVEN the revised draft decision ("Revised Draft Decision") approved by the Supervisory Board at the meeting of 16 September 2021 with which the Guarantor followed up the relevant and reasoned objection raised by the Austrian supervisory authority;

GIVEN the procedure “art. 60 Revised Draft Decision "opened by the Guarantor in the IMI IT system in compliance with the principles of cooperation and consistency established by art. 60 of the Regulation;

CONSIDERING that none of the supervisory authorities concerned raised further objections to the revised draft decision pursuant to art. 60, paragraph 6, of the Regulations;

EXAMINED the documentation in deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

Rapporteur Prof. Ginevra Cerrina Feroni;

WHEREAS

1. Summary of the complaint

The complainant, an English citizen, filed a complaint with the English Supervisory Authority (ICO) claiming that on May 28, 2018 he had requested FCA Italy s.p.a. sending both transcripts of telephone conversations between the same and the customer service center managed by the company FCA Customer Services Center s.r.l. (hereinafter "CSC") - to which he had previously addressed as a result of the malfunction of the instrumentation of his vehicle - and of the documentation relating to the matter ("so-called case notes"). Following this request, FCA would have declared, by telephone, that it could not comply

with the aforementioned requests due to some unspecified Italian privacy regulations and that in any case it could not have provided an answer as long as the incident relating to the malfunction of the vehicle had not ended.

2. Preliminary activity carried out by the Guarantor

The Guarantor declared to be the lead Authority in the procedure in question as the data controller has the main establishment in Italy.

On the basis of this complaint, the Guarantor requested the data controller (FCA Italy s.p.a.) based in Turin, to provide his observations regarding the processing of the complainant's personal data.

With a note dated 17 April 2019, FCA Italy s.p.a. sent the information requested by the Guarantor and stated that the CSC, within the scope of the call management policy, provides for the recording of calls only in the incoming phase (so-called inbound) and only for training and quality monitoring purposes (so-called first level); subsequently the call is transferred to another operator competent for the subject (so-called second level help desk) whose registration, as well as for so-called calls outbound is not expected. In such cases, the operators make notes ("notes") referring to the conversation with the customer. In relation to the request made by Mr. XX to obtain the recordings of second-level phone calls, FCA stated that since they were entrusted to the help desk and not subject to registration, this request could not be accepted.

As regards the request to obtain a copy of the "notes" of the cases deriving from the aforementioned telephone calls, FCA stated that the same would not have been provided to the interested party as they constitute "internal and confidential documents" useful for the the reconstruction of the events that occurred and the management of the cases.

In light of the preliminary findings, the Office found that the complainant's data had been processed by FCA Italy s.p.a. in violation of art. 12, par. 3 and 4, and 15 of the GDPR for the following reasons:

having the interested party the right to obtain access to all information and personal data that identify him or make him identifiable (Articles 15 and 4 (1) of the RGPD), FCA Italy s.p.a. should have provided, to the complainant, both the transcript of the telephone calls, if recorded, and the personal data referable to the same contained in the so-called "Notes for internal use";

being the data controller required to provide the data subject with the requested information, without undue delay or at the latest within one month of the request, specifying any reasons that prevent the display of the requested documents (Article 12 (3) of the RGPD), FCA Italy s.p.a. should have provided an answer to the complainant, specifying the reasons for the refusal in

order to allow the interested party to make a complaint to the supervisory authority, if he / she was not satisfied, regardless of whether or not the event relating to the malfunction of the vehicle was resolved;

art. 23 of the Regulation, which recalls the possibility for Member States to limit, in certain circumscribed cases, the exercise of the data subject's right of access, conditions this possibility, inter alia, to safeguarding the corresponding right of the data subject to be informed of this limitation. Art. 2-undecies of Legislative Decree 196/2003 (as amended by Legislative Decree 101/2018) has, then, expressly provided for the hypotheses in which the exercise of the rights of the interested party may be limited, provided that, it is said, the latter is informed by the owner with "motivated communication and made without delay". In the present case, the information provided to the interested party in this regard was incomplete and partial and, only in the most recent phase of feedback to the Authority, reservations were made, however not adequately motivated, invoking the temporary denial of access for the purpose to the protection of rights in the judicial phase.

Therefore, in light of the above reasons, the Office deemed the processing carried out by FCA Italy s.p.a. unlawful. and, with a note dated 25 October 2019, notified the company, pursuant to art. 166, paragraph 5 of the Code, the alleged violations found, with reference to arts. 12, par. 3 and 4, and 15 of the Regulation, inviting you to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, law no. . 689 of November 24, 1981).

FCA Italia s.p.a., with a note received on November 15, 2019, requested a formal hearing with the Guarantor (held on October 5, 2020, following a complex phase of requesting access to documents and the suspension of terms caused by the health emergency) and , with a note dated 2 October 2020, he sent his defense writings; with this last communication, the company argued that:

- FCA has not violated the regulations on the protection of personal data, as the company would have provided feedback, within the times established by the Regulations and the Code, to every request of the interested party, clarifying, however, that it could not have provided instant nor the recordings of the phone calls between the same and the Customer center service (as not subject to registration) nor the so-called "Case notes" as, referring to art. 8, paragraph 3, lett. e) - coinciding with art. 2-undecies, lett. e) of the Code - the exposition of the same would have been prejudicial to the exercise of the right of defense of the company in court (having repeatedly expressed the intention to contact the Motor Ombudsman);

- being the request dated 14 May 2018 (date prior to the entry into force of the Regulation), the legislation provided for by the

previous legislative decree no. 196 of 2003;

- since the applicant, in the complaint presented to the ICO, would have required the application of corrective measures and not sanctions, the Guarantor should limit himself to pronouncing only on the first and that, in any case, the applicable sanctioning regime would be that of the previous legislative decree n. 196 of 2003, the latter being the regulatory regime in force at the time of the request for access by the interested party.

At the hearing, held on 5 October 2020 at the Guarantor's Offices, the company, in referring to its defense writings, represented that:

- the response provided by the company to the complainant's request for access to their personal data would have been "timely" as the call center operator would not have refused access, but would have postponed the response to a later time, after the conclusion of the dispute;

- in any case, the applicable legislation should be the one in force at the time the fact occurred, i.e. the date of the request for access by the complainant; therefore the regulatory regime provided for by Legislative Decree 196/2003 would be applicable;

- in the hypothesis of applicability of Legislative Decree 196/2003, the alleged violations would not exist since, on the basis of the application of art. 8, paragraph 2, lett. e) of the Code, the right of access would be limited in the possibility for the company to exercise the right of defense.

The company also requested the Guarantor not to publish any final provision of the procedure and to take into account, from a sanctioning point of view, the period of first application of the sanctioning provisions of the Regulation, benefiting from the so-called "Grace period".

3. Authority assessments

In light of the foregoing assessments, it is noted that the statements made by the data controller in the defensive writings and at the hearing whose veracity may be called to respond pursuant to art. 168 of the Code although deserving of consideratio they do not allow the findings notified by the Office to be overcome with the act of initiating the procedure and are insufficient to allow them to be archived, however, none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019, concerning the internal procedures of the Authority having external relevance.

In particular, it is represented that:

- Contrary to what the company argues in its defense writings, the discipline applicable to the present case is that of

Regulation (EU) 679/2016 as well as of the Code, as amended by Legislative Decree 101/2018. In fact, although the complainant's request was addressed to FCA a few days before the Regulation came into force, the complaint was submitted to the ICO subsequently, i.e. on May 31, 2018, determining, for this alone, the processing of the same according to the legislation just intervened. Furthermore, even more relevant for the purposes of the applicability of the Regulation to the case in question, is the fact that the failure to respond to the complainant's requests resulted in a violation of the regulations on the protection of personal data which, although started before 25 May 2018 , also continued after the Regulation came into force. The owner, once the complainant's request has been received, should have provided feedback, based on the provisions of Articles 15 and 12 of the Regulations, at the latest by 14 June 2018 (in full force of the Regulations). Since "the processing already in progress at the date of application of the (...) Regulation should be made compliant with the (...) Regulation" (Recital 171), the moment of determination of the applicable legislation is the moment of the committed violation by the owner; since FCA failed to meet the data subject's request, not even after 14 June 2018, the violation was continued until FCA remedied it. Therefore, it must be considered that the violation by the company occurred in the validity of the provisions of the Regulation and the Code - as amended by Legislative Decree 101/2018 - and that, therefore, for the purposes of determining the applicable regulatory framework, in terms of time, these constitute the reference provisions regarding the violation;

- consequently, also for the purposes of determining the applicable sanctioning discipline, the reference legislation is the Regulation;

- The arguments of the company relating to the "timely" response provided instantly (by e-mail or by telephone via the call center), with which the same would also have motivated the refusal to exhibit the requested documents, cannot be accepted either. As mentioned above, art. 2-undecies of Legislative Decree 196/2003 (as amended by Legislative Decree 101/2018) - which provides for the possibility for the owner to limit, in certain circumscribed cases, to limit the exercise of the right of access to the interested party - subject to a "motivated communication made without delay". In the present case, the information provided to the interested party in this regard was incomplete and partial and only in the most recent phase of feedback to the Authority, reservations were made, however not adequately motivated, invoking the temporary denial of access for the purpose the protection of rights in the judicial phase. Given that the interested party, in the face of the exercise of a right, such as that recognized by art. 15 of the Regulation, must be put in a position to promptly know the possible existence of limitations to the exercise of one's right, the generic reference to the "privacy law" indicated by the company

cannot be considered sufficiently exhaustive. Similarly, the prejudice to the exercise of the right of defense that the holder fears to suffer, only in the face of the expressed intention of the applicant to contact the Motor Ombudsman, is not suitable for integrating in itself the case of limitation to the rights of the 'interested party provided for by art. 2-undecies, paragraph 1, lett. e) of the Code. Consequently, the decision not to communicate the requested data instantly, postponing it to a later time, is not supported by suitable elements and, as such, leads to the violation of the aforementioned provisions.

For the above reasons, the preliminary assessments of the Office are confirmed on the basis of which the company has not complied with the obligation to provide feedback to requests for access to data made by the interested party, as required by art. 12 of the Regulation according to which "the data controller provides the data subject with information relating to the action taken regarding a request pursuant to articles 15 to 22 without undue delay and, in any case, at the latest within one month of receipt of the request itself ".

This therefore occurred in violation of Articles 12 and ss. of the Regulation.

4. Order of injunction

The Guarantor, pursuant to art. 58, par. 2, lett. i) of the Regulations and art. 166 of the Code, has the power to impose a pecuniary administrative sanction provided for by art. 83, par. 5 of the Regulation, through the adoption of an injunction order (Article 18. Law no. 689 of 24 November 1981), in relation to the processing of personal data referring to the complainant, whose unlawfulness has been ascertained, in the terms above exposed, of the articles 12 and ss. of the Regulations, at the outcome of the procedure referred to in art. 166, paragraph 5 carried out in contradiction with the data controller (see points 1.2., 1.3, 1.4 of the present).

With reference to the elements listed in art. 83, par. 2, of the Regulation for the purpose of applying the pecuniary administrative sanction and its quantification, taking into account that the sanctions must be "in each individual case effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), that, in the present case, the circumstances listed below were taken into consideration.

With regard to the nature, gravity and duration, the violation was considered relevant regarding the provisions on the exercise of the rights of the data subjects and the fact that what happened was, in large part, caused by the failure of the data controller to implement it, appropriate measures aimed at guaranteeing the data subject access to personal data; as well as the circumstance that the violation continued from the date by which the owner had to fulfill the requests made by the interested

party to date (since no response was ever provided).

It is acknowledged that there are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulations and that the Company has actively and comprehensively cooperated with the Authority during the procedure.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the financial penalty in the amount of 20,000 (twenty thousand) euros for the violation of Articles 12 and ss. of the Regulation deemed, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

In this context, also in consideration of the type of violation ascertained, which concerned the rights of the interested party, it is believed that, pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the regulation of the Guarantor n. 1/2019, this provision should be published on the Guarantor's website.

Finally, it is noted that 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.

WHEREAS, THE GUARANTOR

declares, pursuant to art. 57, par. 1, lett. f) and 83 of the Regulations, the unlawfulness of the processing carried out, in the terms set out in the motivation, by FCA Italy s.p.a., for the violation of Articles 12 and ss. of the Regulations;

INJUNCES

pursuant to art. 58, par. 2, lett. c), to communicate to the interested party, within 30 days of receipt of this provision, the personal data referred to him contained in the so-called "Case notes" relating to the matter in question;

ORDER

pursuant to art. 58, par. 2, lett. i), of the Regulations, to FCA Italy s.p.a., in the person of the pro-tempore legal representative, with registered office in Turin, C.so G. Agnelli 200, C.F. and VAT no. 07973780013, to pay the sum of 20,000 euros (twenty thousand euros) as a pecuniary administrative sanction for the violations indicated in the motivation;

INJUNCES

then to the same company to pay the sum of € 20,000 (twenty thousand euros), 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. It is represented that pursuant to art. 166, paragraph 8 of the Code, the offender has the right

to settle the dispute by paying - again in the manner indicated in the annex - of an amount equal to half of the sanction imposed within the term referred to in art. 10, paragraph 3, of d. lgs. n. 150 of 1 September 2011 envisaged for the submission of the appeal as indicated below;

HAS

pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the regulation of the Guarantor n. 1/2019, the publication of this provision on the website of the Guarantor and believes that the conditions set out in art. 17 of regulation no. 1/2019.

Requires FCA Italy s.p.a. to communicate the fulfillment of the provisions of this provision and to provide feedback, adequately documented, pursuant to art. 157 of the Code, within 90 days from the date of notification of this provision; any non-response may result in the application of the administrative sanction provided for by art. 83, par. 5, lett. e) of the Regulations.

Pursuant to art. 78 of the Regulation, of art. 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, against this provision, it is possible to appeal before the ordinary judicial authority, under penalty of inadmissibility, within thirty days from the date of communication of the provision itself or within sixty days if the applicant resides abroad.

Rome, December 16, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE DEPUTY SECRETARY GENERAL

Philippi