

Injunction order against Dental Leader S.p.A. - January 27, 2021

Record of measures

n. 119 of January 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 (General Data Protection Regulation, 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");

GIVEN the documentation in the 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. THE INVESTIGATION ACTIVITY CARRIED OUT

With a complaint of 17 March 2020, submitted to this Authority pursuant to art. 77 of the Regulation, dr. XX complained that, in order to complete an order on the website www.dental-leader.it, attributable to the company Dental Leader S.p.A. (hereinafter "Dental Leader" or "Company"), it was mandatory to give consent to the processing of data for promotional purposes.

The screenshot attached to the complaint shows the following:

a) you are asked to provide first consent "... for the purpose of concluding and executing the contract, for the purpose of fulfilling the order placed and for accounting and billing purposes";

b) another (single) consent is requested for promotional, profiling and market research purposes.

Both consents are marked with an asterisk indicating them as mandatory and, in fact, as demonstrated by the screenshot produced by the complainant, by selecting the "I deny consent" option for point b), it is not possible to complete the procedure and the notice "Attention, you must accept the privacy for commercial purposes".

With a note dated 21 April 2020, dr. XX, in addition to the original complaint, specified that within your personal profile on the Dental Leader website there is no functionality that allows you to verify the consents provided or, much less, to revoke them independently. The complainant has also attached the screenshot of his customer area in which there are no references to the consents given or to the possibility of modifying them.

With a note dated 30 April 2020, sent in response to the Office's request for information, the Dental Leader, specifying that the website is aimed at the sale of dental products directly to professionals, confirmed the approach described, considering it compliant with the dictates of the Regulation and justifying the obligation to give consent as a business choice. In particular, the Company stated that "... it is the same company Dental Leader S.p.A. who assumes the risk, through this system, of losing, on a commercial level and therefore in the number of contracts concluded, possible orders, leaving the customer the freedom of choice not to provide consent for marketing purposes "adding that" the possibility for the customer to subsequently modify, ie after placing the order, the consent for marketing purposes ". Finally, the Company has in any case assured that it has registered the opposition of dr. XX to processing for promotional purposes.

From the examination of the information published at <https://www.dental-leader.it/Privacy>, it emerges that the Company processes the data collected, indicating, as the legal basis of the processing for marketing purposes, both consent and legitimate interest , while the legal basis of consent is indicated for profiling.

Therefore, on 15 October 2020, Dental Leader was notified of the initiation of the procedure for the adoption of corrective and sanctioning measures pursuant to art. 166, paragraph 5 of the Code following which the Company sent a defense brief, on November 13, 2020, representing that the methods of collecting the consents subject of the complaint were the result of a choice "based on a specific company policy related in particular to the fact that the activity carried out consists in the sale and supply of services and products that cannot be considered essential, being rather services of a fungible and certainly renounceable nature, such that the user / customer has a wide alternative available to which one to orient one's will to purchase ".

With regard to the inconsistencies found in the information, relating to the simultaneous mention of consent and the legitimate

interest for the same treatment, the Company declared that it had added the consent because it was considered more protective for the interested party than the legitimate interest, acting in absolute good wedding ring. However, the same has represented that it has modified the information on the site and has attached a copy to the defense statement from which it appears that - for registration on the site and online purchases, for telephone purchases, for the request of the catalog and for sending newsletters with promotional offers - consent is indicated as the only legal basis for marketing purposes; instead, as regards potential customers, in the information it is indicated that Dental Leader may acquire some personal data (name, e-mail and physical address, telephone number, professional information) to propose products and services strictly related to the activity professional turning point. These data will be extracted from public registers and professional directories, directories present online and through the purchase of databases from third parties. For this type of processing, the Company indicates the legitimate interest of the owner as the legal basis, specifying however that, in the event of telephone contact, a prior check will be carried out with the Register of oppositions referred to in the Presidential Decree 7 September 2010, n. 178. As regards the collection of personal data for the request for information on products, in the information presented it is indicated that the data will be used only for sending the information requested on the basis of the expression of a specific consent, in the absence of which it will not be possible to follow up on the service.

With regard to the disputed acquisition of a single consent for different purposes (marketing, market research and profiling), the Company stated that profiling, although mentioned in the previous information and in the request for consent, was never actually carried out, given that also the limited type of data acquired (in fact, only personal data). In the new version of the information, neither profiling nor market research are mentioned anymore among the listed treatments and, at the end of the purchase process, it is required to express consent for marketing purposes with the possibility of consenting specific manner to the receipt of paper mail and / or to the receipt by e-mail; these consents are no longer binding for the conclusion of the purchase and consent is no longer required for contractual purposes.

Finally, the Company - clarified that the revocation of consents has always been possible by sending a specific request to the contacts indicated in the information - declared that it had in any case also changed the layout of the personal area of the customers, by inserting a section "privacy and treatment data "which indicates the consents granted with the possibility of making changes by selecting / deselecting the boxes.

2. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also based on the statements of the Company to which the declarant responds pursuant to art. 168 of the Code, the following assessments are formulated in relation to the profiles concerning the regulations on the subject of personal data protection.

2.1 On transparency.

The wording used in the previous version of the information provided to the data subjects was not suitable for clearly representing the legal basis adopted, which must be unique for each purpose of the processing. Therefore, this does not appear to have been carried out in a lawful, correct and transparent manner since the interested parties were not provided with clear information regarding the legal bases relating to the different purposes of the processing: the privacy information, in fact, referred to both the consent that the legitimate interest even if, in fact, it was required to express consent; in addition, consent was also requested for the purposes related to the execution of the contract (whose legal basis is instead that indicated in Article 6, paragraph 1, letter b) of the Regulation).

Therefore - the violations of art. 5, par. 1, lett. a), of art. 12 and art. 13 of the Regulations - it is considered necessary to issue a warning to Dental Leader pursuant to art. 58, par. 2, lett. b) of the Regulation on the need to provide interested parties with clear and consistent information regarding the processing carried out and the related legal basis. Furthermore, in addition to this measure, it is deemed necessary to inflict a pecuniary administrative sanction on the holder pursuant to art. 58, par. 2, lett. i) of the Regulations.

In the new formulation of the information, however, there are two types of processing: acquisition of new customers and requests for information on products, for which doubts remain regarding the suitability of the legal basis chosen by the owner. In particular, with regard to the acquisition of potential customers, it is indicated that the processing will be based on the legitimate interest of the owner for carrying out direct marketing campaigns. However, the data acquired for this type of activity relates to the telephone number, e-mail address and physical address. It should be remembered that the conduct of promotional activities on these communication channels is specifically regulated by art. 130 of the Code, supplemented with regard to telephone and paper mail promotion by the Presidential Decree 7 September 2010, n. 178 (which in any case the information provided by Dental Leader refers) as amended by Presidential Decree 8 November 2018, n. 149. On the basis of these provisions, the promotional activity carried out using automated methods (e-mails, text messages and pre-recorded calls) can only be carried out in relation to subjects who have given free, specific and informed consent; as regards, however,

the promotional activity carried out by telephone with operator and paper mail, pending the revision of the Presidential Decree 7 September 2010, n. 178, the provisions relating to the public register of oppositions will apply for subjects whose data are present in the public lists, while the acquisition of consent will be required for subjects not on the list. In this context, the origin of the data is not relevant (acquisition from third parties or use of data in public registers), nor is the fact that the recipients are professionals or legal entities relevant, since art. 130 of the Code, being placed to protect the contractor or user, does not limit its subjective scope to the interested individual. The acquisition of free, specific and informed consent is always required and, therefore, a different legal basis, such as legitimate interest, may be admissible only outside the cases considered here. With regard, however, to the indication in the information of the need to give specific consent to receive information on the products, it is noted that this type of treatment seems rather attributable to a contractual or pre-contractual phase of the relationship with the interested party, limited to the request for information, also given the declared limitation of storage to the time strictly necessary to process the request, not being able to recognize a promotional nature (which, moreover, is already contemplated in the other types of processing described). Furthermore, as expressed in the same information, failure to provide consent will make it impossible to obtain the requested information; therefore such consent could certainly not be defined as free.

2.2. On the methods of acquiring consent.

Before the changes made following the dispute of the Guarantor, the registration on the Dental Leader website and the related purchase procedures were subject to the release of a single consent for different purposes (marketing, profiling, market research) and a possible denial it was rejected by the system. Therefore it was not possible to express a free and specific will of the interested party. However, it must be taken into account that, on the basis of what has been declared, the profiling, although mentioned in the consent formula, has never been carried out. Therefore, in fact, the collection of consent was substantiated only in the acquisition of consent to receive promotional messages.

Furthermore, the consent acquisition formula, as well as the information, referred to the possibility of sending promotional communications by post or by automated methods (e-mail, text message, etc.); this type of treatment is governed solely by art. 130 of the Code, which incorporates art. 13 of Directive 2002/58 / EC and which, as a special rule, provides consent as the only valid legal basis. The validity requirements of this consent, in addition to the provision just mentioned, should instead be sought in art. 4, par. 1, no. 11 and in art. 7 of the Regulation, of which recital 32 (1) is also referred to; in this regulatory

framework, consent is understood as any manifestation of free, specific, informed and unequivocal will, not detecting the (obvious) possibility of carrying out a subsequent revocation, and it can be derogated, in the cases provided for, only under the conditions set out in art . 130, paragraph 4 of the Code (2). In the present case, however, the release of consent was binding for the conclusion of the purchase process.

The Company, which has already corrected the settings described, justified the previous choice, representing that the service offered is to be considered fungible, since the interested party can alternatively contact other resellers, and therefore, in his opinion, could well be subordinated to the compulsory granting of consent for promotional purposes with the risk, accepted by the data controller, of losing a potential contract in case of refusal by the user.

According to the Company, therefore, the fungible nature of the service alone would have been sufficient to make the compulsory acquisition of consent lawful.

On the other hand, this Authority believes that the reasons given by Dental Leader are unfounded, as an asserted and generic qualification of the service as "fungible" is not sufficient for the owner to automatically influence the consent and why, in the present case, conditionality is not absolutely necessary for the execution of the contract.

In fact, it is necessary first of all to recall the provisions of art. 7, par. 4 of the Regulation, according to which, in assessing whether consent has been freely given, it is necessary to consider the possibility that the use of the good or service is subject to the provision of consent not necessary for the execution of the contract. This conditionality / necessity relationship has been clarified, by way of interpretation, admitting its applicability in the case of fungible services, that is, easily renounced without particular prejudice.

A first ruling in this sense is contained in sentence no. 17278 of 11 May - 2 July 2018 of the Court of Cassation, section I Civil, in which it was found that the operator of a website can make the provision of a service subject to the acquisition of consent for promotional purposes provided that this service is fungible and, therefore, easily renounced by the user or replaceable with others similar services on the market, even for a fee, so that the prejudice for the interested party, who is forced to renounce it, is canceled by the presence of suitable alternatives to satisfy his needs in any case. In fact, the Court considers that "the conditioning cannot always and in any case be taken for granted and must instead be considered as subsisting, the more the service offered by the website operator is at the same time infungible and indispensable for the interested party" .

However, it should be borne in mind that the Supreme Court's express ruling in 2018 had regard to the specific case of a

newsletter service remunerated solely with the possibility of conveying third party promotional messages to users. Therefore, the conditionality of consent was considered admissible considering that the waiver by the interested party would not have resulted in actual prejudice.

Subsequently, and in more general terms, the European Data Protection Committee also expressed itself in this regard, which, in point 35 et seq. of the aforementioned guidelines on consent, does not exclude a priori a conditionality of the latter and, while highlighting that the burden of proof lies with the holder, clarifies that "Since article 7, paragraph 4, is not formulated in an absolute manner, in a very small number of cases, this conditionality may not render the consent invalid. However, the word 'presumed' in recital 43 clearly indicates that such cases will be extremely exceptional".

Furthermore, the same Committee clarifies that "the regulation establishes that if the interested party does not have an effective choice or feels obliged to consent or will suffer negative consequences if he does not consent, the consent will not be valid. [...] Consequently, consent will not be considered free if the interested party cannot refuse or revoke it without suffering prejudice" and adds that, in the presence of truly equivalent services made available to the interested party by the same owner, the provision of consent cannot be considered conditional. However, the case in which these presumably equivalent services are to be sought from other data controllers is different. In this case, the Committee believes that the consent cannot be considered freely given because the freedom of choice would depend on the other market operators, with all the variables connected to the performance of the offer, and on the fact that the interested party considers that the services offered by the other data controller are effectively equivalent.

The foregoing therefore makes it possible to exclude that the Company could avail itself of the right to condition consent because this obligation would have resulted in prejudice to the interested parties that has no justification. It should in fact be remembered that the service offered by Dental Leader consists in the sale of products for the dental activity; sale for which the buyer pays a sum of money by completing a relationship with corresponding services; the granting of consent for marketing purposes, therefore, appears completely unrelated to the synallagmatic relationship in question since the payment of the sale price is a sufficient condition to conclude the contract. The possibility of sending promotional messages to customers, subject to obtaining the aforementioned consent, would be aimed solely at attributing an additional right to the data controller which, therefore, would not be necessary for the execution of the contract, given the completely independent nature of the treatment. for promotional purposes with respect to a bond relationship that can already be perfected with the payment of the sale price,

in contrast with the provisions of art. 7, par. 4 of the Regulation.

All the more if you keep in mind that the law already confers the right to the owner, in derogation from the obligation to acquire consent, to use the e-mail coordinates provided by the interested party in the context of the sale of a product or service for promote products or services similar to those sold, provided that the interested party, duly informed, does not refuse such use initially or on the occasion of subsequent communications (see Article 130, paragraph 4 of the Code).

The violations of art. 6, par. 1, lett. a) and art. 7, par. 4 of the Regulations as well as art. 130 of the Code and it is necessary, pursuant to art. 58, par. 2, lett. b) of the Regulations, warn on the need to previously acquire a free, specific and informed consent of the interested parties for sending promotional communications; pursuant to art. 58, par. 2, lett. f), it is necessary to impose on Dental Leader the prohibition of processing for promotional purposes of personal data collected in the manner described. Furthermore, in addition to these measures, it is deemed necessary to inflict a pecuniary administrative sanction on the holder pursuant to art. 58, par. 2, letter i) of the Regulation.

3. INJUNCTION ORDER FOR THE APPLICATION OF THE ADMINISTRATIVE PECUNIARY SANCTION

With regard to the above, it is deemed necessary to adopt an injunction order pursuant to art. 166, paragraph 7 of the Code for the application to Dental Leader of the pecuniary administrative sanction provided for by art. 83, par. 5, lett. a) and b) of the Regulations for violations referred to in the aforementioned articles 5, par. 1, lett. a) - 6, par. 1, lett. a) - 7, par. 4 - 12 and 13 of the Regulations as well as by art. 130 of the Code.

The art. 83, par. 3, of the Regulation, according to which, if, in relation to the same treatment or related treatments, a data controller violates, with willful misconduct or negligence, various provisions of the Regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation with consequent application of the only sanction provided for by art. 83, par. 5 of the Regulation.

In particular, for the purposes of quantifying the administrative sanction, for the violations mentioned, the aforementioned art. 83, par. 5, in setting the maximum legal limit in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year, whichever is higher, specifies the methods of quantifying the aforementioned sanction, which must "in any case [be] effective, proportionate and dissuasive "(art. 83, par. 1 of Regulation (EU) 2016/679), identifying, for this purpose, a series of elements, listed in par. 2, to be assessed when quantifying the relative amount.

In fulfillment of this provision, in the present case, the following circumstances must be considered:

1. the wide scope of the treatments which, on the basis of the elements provided and in the absence of other specifications in this regard, can be considered of a systemic nature and therefore extended to the generality of customers or potential customers (Article 83, paragraph 2, letter a) of the Regulation);
2. the seriousness of the violations detected, due to the fact that the expression of consent to the processing for promotional purposes was strongly conditioned by the methods adopted for the conclusion of the contract, moreover on the basis of an information containing incorrect information on the matter the legal bases of the processing (Article 83, paragraph 2, letter a) of the Regulation);

As mitigating elements, it is believed that we must take into account:

1. the nature of the data subject to violation, falling within the common data;
2. the measures taken by Dental Leader to change the information, the personal area of the customers and the methods of acquiring consent;
3. the degree of cooperation with the supervisory authority;
4. the absence of previous relevant violations committed by the data controller;
5. the non-intentional nature of the violation.

In an overall perspective of the necessary balancing between the rights of the interested parties and freedom of enterprise, and in the first application of the administrative pecuniary sanctions provided for by the Regulation, it is necessary to prudently evaluate the aforementioned criteria, also in order to limit the economic impact of the sanction on the needs. organizational, functional and occupational of the Company.

Therefore it is believed that - based on the set of elements indicated above, the administrative sanction of the payment of a sum equal to 0.05% of the maximum legal sanction of 20 million euros, corresponding to 10,000.00 euros (ten thousand). The maximum legal sanction is identified with reference to the provisions of art. 83, paragraph 5, taking into account that 4% of Dental Leader's turnover is less than 20 million euros.

In this context, it is also believed - in consideration of the invasiveness of the unlawful processing disputed with respect to the fundamental rights of the interested parties and the high number of subjects potentially involved - that, pursuant to art. 166, paragraph 7, of the Code, and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, it is necessary to proceed with the publication of this provision on the website of the Guarantor, as an ancillary sanction.

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.

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, the sanction referred to in the 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 Dental Leader S.p.A., with registered office in Milan, viale Monza 259, VAT number 06448560968:

- a) pursuant to art. 58, par. 2, lett. f) of the Regulations, prohibits any further processing of the acquired data for promotional purposes, in the manner described, without guaranteeing the expression of a free and specific consent;
- b) pursuant to art. 58, par. 2, lett. b) of the Regulations, warns on the need to previously acquire a free, specific and informed consent of the interested parties for sending promotional communications as well as on the need to provide the interested parties with clear and consistent information regarding the processing carried out and the related legal basis;
- c) pursuant to art. 17 of the Guarantor Regulation n. 1/2019, provides for 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.

ORDER

- d) pursuant to art. 58, par. 2, lett. i), of the Regulations, to the aforementioned Dental Leader S.p.A., in the person of its legal representative, to pay the sum of € 10,000.00 (ten thousand) as a pecuniary administrative sanction for the violations indicated in the motivation; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the sanction imposed;

INJUNCES

- e) 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 € 10,000.00 (ten 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

f) pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the website of the Guarantor.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as art. 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, opposition to this provision may be filed with the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller is resident, or, alternatively, to the court of the place of residence of the person concerned. , within thirty days from the date of communication of the provision itself, or sixty days if the applicant resides abroad.

Rome, January 27, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei

(1) In this regard, see the clarification of the European Data Protection Committee in the Guidelines on consent - Guidelines 05/2020 on consent under Regulation 2016/679, adopted on 4 May 2020: "the requirements for consent under the general data protection regulation they are not considered an "additional obligation", but preconditions for the lawfulness of the processing. Therefore, these requirements are applicable to situations falling within the scope of the Directive on privacy and electronic communications ”.

(2) If the data controller uses the e-mail coordinates provided by the data subject in the context of the sale of a product or service for the direct sale of his products or services, he may not request the consent of the data subject. , provided that these are services similar to those being sold and the interested party, adequately informed, does not refuse such use, initially or on the occasion of subsequent communications.