

Injunction against Azienda Simple s.r.l. - June 21, 2018

Register of measures

no. 391 of 21 June 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;

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;

NOTING that the Office, with deed no. 28152/97907 of 12 October 2015 (notified on the same date by certified e-mail), which must be understood as fully reported here, contested the company Azienda Semplice s.r.l. (now Azienda Semplice s.r.l. in liquidation), in the person of its pro-tempore legal representative, with registered office in Portici (NA), via III Traversa Privata Sapio n. 14/E, tax code 06843991214, the violation of the provisions of articles 13, 23, 161, 162, paragraph 2-bis, of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196, hereinafter referred to as the "Code"); noting that with the same deed the Office identified the company Telecom Italia S.p.A. (hereinafter Tim), in the person of its pro-tempore legal representative, based in Milan, via Gaetano Negri n. 1, tax code 00488410010, as jointly liable party for the disputed violation, pursuant to art. 6, paragraph 2, of the law n. 689/1981;

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- the Guarantor has adopted a provision, no. 503 of 1 October 2015 (in www.gpdp.it, web doc. n. 4449190), against Azienda Semplice, at the conclusion of a proceeding initiated following a report in which an interested party complained of the unlawful processing of personal data in order to carry out promotional communications relating to Tim products and services to one's private residential telephone number;
- from the investigations carried out by the Office, it emerged that the unwanted calls had been made by users at the time registered to Azienda Semplice; however, in a note dated July 20, 2015, the aforesaid company, also showing a communication from Tim, had highlighted that, in the period indicated in the report, its telephone users had not generated

outgoing traffic;

- further investigations made it possible to ascertain that the calls referred to in the report were present in the incoming telephone traffic records of the reporting party's user and coming from Azienda Semplice; as for the calling user, Tim, with a note dated 17 September 2015, highlighted that the number indicated in the report "was the number through which the Customer [Simple Company] intended to appear externally (switchboard) [...]". The outgoing traffic of Azienda Semplice was regularly registered on a different telephone line, which did not correspond to the one shown to the signaling party at the time of the calls;

- with provision no. 503 of 1 October 2015, it was ascertained that the processing of personal data aimed at making promotional calls by Azienda Semplice had been carried out without having provided the reporting person with the information pursuant to art. 13 of the Code and without the same having given the required consent, pursuant to the following art. 23; in this regard it should be noted that, with a note dated July 21, 2015, Tim had declared that the whistleblower's telephone number was not "included in Telecom Italia's contact lists for commercial actions towards potential customers". The responsibility for the decision to contact the whistleblower should therefore be attributed to Azienda Semplice;

- the Office therefore took steps to challenge Azienda Semplice for the violations indicated above, with a deed dated 12 October 2015, notified on the same date;

- with reference to the aforementioned dispute, Azienda Semplice filed defense briefs, pursuant to art. 18 of the law n. 689/1981, dated 11 November 2015 and at the same time requested a hearing before the Guarantor;

- on 14 December 2015, Azienda Semplice also proceeded to pay a reduced amount of the penalties contested with the deed of 12 October 2015. The Office did not take this payment into account, because it was made outside the limitation period (expired on 11 December 2015) of sixty days from the notification of the notice of dispute, provided for by art. 16 of the law n. 689/1981 and because it is in contrast with the company's previous choice to continue the sanctioning procedure by presenting defense briefs and requesting to be heard by the Authority;

- on 5 December 2016, the hearing of the lawyer of Azienda Semplice took place, pursuant to art. 18 of the law n. 689/1981;

NOTING that with the aforementioned deed dated 12 October 2015, Azienda Semplice s.r.l. in liquidation:

a) pursuant to art. 161 of the Code, the violation of the provisions of art. 13, for having carried out treatments aimed at carrying out promotional telephone communications to the landline telephone number of the whistleblower, not present in the public

telephone directories, without having provided the necessary information;

b) pursuant to art. 162, paragraph 2-bis, of the Code, the violation of the provisions of art. 23 of the Code, for having carried out the aforementioned treatments without having acquired the consent of the interested party;

READ the written defense dated 11 November 2015 and the minutes of the hearing dated 5 December 2016, which are understood to be referred to in full here and which, in summary, represent that "the two phone calls charged to Azienda Semplice were made on the same day with a time interval seconds from each other, therefore, it is reasonable to assume that the first call made by mistake was lost due to technical interruption and the second - given the presence of the number in the memory - started automatically using the repeat key. Such considerations support the thesis of the guilty error on the fact, first of all, since the operator acted with the conscience and will to compose one of the numbers present in the list, therefore, with the conviction of keeping a lawful attitude so that the event occurred is attributable solely to excusable human error. Secondly, the characteristics of the described error reveal ex se the unpredictability of the same and consequently the non-attributability of the same to the appearing party due to omitted control and/or failure to prepare the minimum measures referred to above. On this point, it is considered appropriate to specify how the periodic checks which Azienda Semplice is subjected to by the principal concerning the correct performance of the activity in question have to date always had fully favorable feedback. In the light of what has been deduced, in the present case it seems that the positive elements appropriate to inducing in the perpetrator of the violation the conviction of the legitimacy of his conduct appear to have properly occurred. Consequently, the exemption of "good faith" can be configured, resulting, in fact, confirmed that the offender has done everything possible to comply with the precept of the law, so that no reproach can be leveled against him".

CONSIDERING that the arguments put forward are not suitable for determining the closure of the sanctioning procedure initiated with the above dispute, for the following reasons:

a) it emerged from the administrative procedure initiated following the report of unwanted calls promoting Tim services, that these communications were made by Azienda Semplice, which, while allowing the person called to view the caller's ID on its screen provided the same with incorrect information regarding the effective user from which the communication originated, due to the fact that the company used a switchboard that did not correspond to a physical user and therefore a "virtual" number;

b) the company, after denying, during the investigation, that it had made the aforementioned calls, subsequently essentially admitted the conduct, highlighting that the contacts would have been the result of errors in manually dialing the numbers to be

contacted, invoking the exemption of good faith;

c) with reference to this defensive observation, the exemption pursuant to art. 3 of the law n. 689/1981, which excludes the agent's liability when the violation is committed by mistake not caused by his fault. The error, in fact, can be considered as a cause of exclusion of administrative liability only when it is inevitable, and for this purpose a positive element is needed suitable for inducing such an error, which cannot be remedied by the interested party with ordinary diligence (Civil Cassation, section I, 06/05/2001, no. 7603). In the case in question, first of all, it does not appear to be proven that the contacts with the whistleblower took place instead of calls that should have been made to other users present in the lists provided by Tim to Azienda Semplice. Furthermore, it does not appear that Azienda Semplice has operated with the recommended diligence, since it has set up a contact system for telephone users which is based, according to the company's statements, on the manual dialing of numbers by the operator, a system which can generate, of all evidence, errors and unwanted calls;

d) the responsibility of Azienda Semplice must therefore be confirmed for the alleged violations and, in this regard, the reduced payment, made after the filing of the written defenses and to the request for a hearing and in any case beyond the deadline indicated by art. 16 of the law n. 689/1981;

NOTING, therefore, that Azienda Semplice s.r.l. in liquidation, on the basis of the considerations referred to above, appears to have committed, as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code:

a) the violation of the provisions of art. 13 of the Code, sanctioned by art. 161, for having carried out treatments aimed at carrying out promotional telephone communications to the whistleblower's fixed telephone number, not present in the public telephone directories, without having provided the necessary information;

b) the violation of the provisions of art. 23 of the Code, sanctioned by art. 162, paragraph 2-bis, for having carried out the aforementioned treatments without having acquired the consent of the interested party;

CONSIDERING the articles:

- 161 of the Code, which punishes the violation of the provisions of articles 13 with a fine ranging from 6,000 to 36,000 euros;
- 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167, which also includes those referred to in art. 23, with a fine ranging from 10,000 to 120,000 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;

WHEREAS, in the present case:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are characterized by specific elements, having regard to the attempt not to allow correct identification of the calling user and therefore to evade the responsibilities connected to the illicit treatment;

b) for the purpose of evaluating the work performed by the agent, it must be noted that the company has not changed its operating practices and, in particular, the methods of contacting the recipients of promotional calls, who, on the basis of what was declared by the company itself, would have generated errors and therefore unwanted phone calls;

c) regarding the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings defined briefly or following an injunction order must be considered;

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

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, to the extent of:

- 18,000 (eighteen thousand) euros, for the violation pursuant to art. 161 of the Code;
- 30,000 (thirty thousand) euros, for the violation pursuant to art. 162, paragraph 2-bis, of the Code;

CONSIDERED having to identify, pursuant to art. 6, paragraph 2, of the law n. 689/1981, Telecom Italia S.p.A. as liable jointly with the perpetrator of the violations to pay the sum owed by the latter;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, and subsequent modifications and additions;

GIVEN the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Augusta Iannini;

ORDER

to Simple Company s.r.l. in liquidation, in the person of its pro-tempore legal representative, with registered office in Portici (NA), via III Traversa Privata Sapio n. 14/E, tax code 06843991214, and to Telecom Italia S.p.A., in the person of its

pro-tempore legal representative, with registered office in Milan, via Gaetano Negri no. 1, tax code 00488410010, the latter as jointly liable, to pay the sum of 16,000.00 (sixteen thousand) euros as the residual amount of the sum of 48,000.00 (forty-eight thousand) euros, taking into account the sum of 32,000.00 (thirty-two thousand) euros already paid on 14 December 2015, as a pecuniary administrative sanction for the violations indicated in the justification, dividing it, upon acceptance of the installment request, into 16 (sixteen) monthly installments of the amount of Euro 1,000.00 (one thousand) each;

ENJOYS

to the same company to pay the sum of 16,000.00 (sixteen thousand) euros, according to the methods indicated in the attachment, the fractional payments of which will be made by the last day of the month following the one in which the notification of this order will take place, under penalty of adoption of the consequent executive acts 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 lg. 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, 21 June 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia