

[doc. web no. 9038386]

Injunction against IDEASORRISO S.R.L. - May 31, 2018

Register of measures

no. 369 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, complaining of the receipt of unwanted promotional calls from the "IDEASORRISO S.R.L." on the mobile users of the reporting persons and despite the absence of any consent in this regard, the Office has launched an investigation aimed at verifying the facts covered by the reports and, more generally, compliance with the provisions on data protection personal data with regard to telemarketing activities and carried out checks pursuant to articles 157 and 158 of the Code on 10, 11 and 12 April 2017 at IDEASORRISO S.R.L.

(hereinafter "Company"), and on 16 and 17 May 2017 at MINGARDI MEDICAL CENTER S.R.L. (hereinafter "MMC"), during which it was found, among other things, that: - the corporate object of the Company consists in marketing activities in the health sector (in particular with regard to dental services), which is carried out exclusively in the interest of MMC, sharing its headquarters in Padua, by virtue of a specific service contract stipulated between the parties (dr. report 10.4.2017, attachment 1); - the promotional activity was carried out by the Company both through the personal data acquired through the Company's website (points 4.1 ss.), and (in particular in relation to the facts to be reported) through telemarketing activities (points 5.1 ss.);

NOTING that the Authority has adopted the prohibition and prescriptive provision n. 268 of 15 June 2017 [doc. web no. 6629169], the reasons for which must be understood as fully referenced, by means of which, having examined the reports, as well as the declarations made by the Company and the results of the checks carried out by accessing the Company's information systems during the aforementioned investigations, it was ascertained that " ... the processing of personal data for the aforementioned marketing purposes, carried out by Idea Sorriso and MMC in a promiscuous way and without any compartmentalization between the Companies ..., has been carried out in failure to comply with the provisions contained in the personal data protection regulations" (point 7.1. of the aforementioned Provision). 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, the public telephone directories, in particular those present on the website 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 (on the website www.ideasorriso.it) pursuant to art. 13 of the Code, (is) to be considered unsuitable as [...] no reference is found to the sphere of circulation [...] of the data collected through the aforementioned website [...]" (point 9.1 of the Provision cit.);
- "[...] equally illicit is the provision of a single consent (on the website www.ideasorriso.it) as well as generic, pre-selected for the processing of data entered by users with respect to all the purposes referred to in the information. In particular, 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 is lacking for the purpose of sending newsletters with promotional content [...] which for another it is not known that they were actually sent [...] as instead required by art. 23, ch. 3. of the Code (see provisions of 9 October 2014, n. 447, web doc. n. 3568046; 20 November 2014, n. 532, web doc. n. 3657934; 18 November 2015, n. 605, doc. web no. 4487559) [...]" (point 9.2 of the cited 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 [...] (as well as, taken from [...] lists of both fixed and mobile telephone numbers relating to about one million (1,000,000) users, [...] delivered [...] to IdeaSorriso on support USE from the Lugano branch of XX Llc [...]" (points 5.1 and 5.2 of the aforementioned Provision);
- "[...] (the processed data) have not been subject to verification in the public register [of oppositions] (pursuant to article 130, paragraph 3-bis of the Code and 5, Presidential Decree no. 178/2010), nor was it proven the existence of any other legal basis for their use for the aforementioned purpose (articles 23, 24 and 130, paragraph 3, of the Code) [...]" (point 8 of the aforementioned Provision).

In view of the above, the Authority has prescribed a series of measures for the Company, as well as for MMC, has prohibited further unlawful processing and has reserved the right to challenge with independent proceedings against the Company, as well as for MMC, as co- data controllers both of the data allegedly acquired through www.paginebianche.it and

www.ideasorriso.it and of those purchased by XX and used for telemarketing purposes, administrative violations concerning articles 13, 23 and 130, paragraphs 3 and 3-bis (articles 161, 162, paragraph 2-bis, and 2-quater, 167, paragraph 1, of the Code) and the violation pursuant to art. 164-bis paragraph 2 of the Code (point 12.1. of the aforementioned Provision);

NOTING that the party, not having challenged the aforementioned Provision, has given acquiescence to what was ascertained by the same (see Court of Arezzo 12.5.2016 n. 607 and Court of Taranto n. 2384/2017);

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 by the Company;

CONSIDERING the report n. 25950/116588 of 25 July 2017, which is referred to in its entirety here, with which the Company "IDEASORRISO S.R.L.", with registered office in Padua, via E. Filiberto di Savoia n. 47, P.I. 04606380287, in the person of the pro-tempore legal representative, the administrative violations envisaged:

a) by art. 161 for the violation of the 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 independent and distinct from the cases referred to therein, as reaffirmed both by the relevant jurisprudence and by the jurisprudence of legitimacy (Court of Milan 11.3.2014, Court of Cassation of 17.8.2016 n. 17143). 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 of 24 November 1981 n. 689 it does not appear that payments have been made to a reduced extent in relation to the articles 161, 162 paragraph 2-bis, 162 paragraph 2-quater;

CONSIDERING that the Company has not made use of the rights provided for by art. 18 of the law n. 689/1981, by not sending the Authority written defenses or asking to be heard;

NOTING, therefore, that "IDEASORRISO 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, 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 €10,000.00 to €120,000.00;

CONSIDERING the art. 162, paragraph 2-quater of the Code, which punishes the violation of the provisions indicated in art.

130 paragraph 3-bis, which refers to paragraph 2-bis of article 162, with the administrative sanction of the payment of a sum from 10,000.00 to 120,000.00 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 sanction administration of the payment of a sum ranging from 50,000.00 (fifty thousand) to 300,000.00 (three hundred thousand) euros, for which reduced payments are not permitted;

CONSIDERING that, for the purpose 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 performed 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 interested parties to whom the telephone numbers for carrying out the telemarketing activity refer" (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 in relation to the very significant number of personal data contained in the database (art. 130 paragraph 3-bis);

for the 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 "IDEASORRISO S.R.L.", with registered office in Padua, via E. Filiberto di Savoia n. 47, P.I. 04606380287, 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 Euro 86,000.00 (eighty-six thousand) 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