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Injunction order against Occhiali24.it S.r.l. - October 20, 2022

Register of measures

no. 349 of 20 October 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE (General Data Protection Regulation, hereinafter "Regulation");

HAVING REGARD TO the Personal Data Protection Code (Legislative Decree June 30, 2003, No. 196), as amended by Legislative Decree August 10, 2018, No. 101, containing provisions for the adaptation of the national legal system to the aforementioned Regulation (hereinafter the "Code");

HAVING REGARD to the documentation in the deeds;

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

SPEAKER Prof. Geneva Cerrina Feroni;

WHEREAS

1. THE INVESTIGATION ACTIVITY CARRIED OUT

1.1. Preliminary investigation

With the complaint of 10 August 2021, presented to this Authority pursuant to art. 77 of the Regulations, Mr XX complained of the receipt, on 23 June 2021, of an unwanted communication from the email address info@news.lapromessaterra.it and concerning the promotion of products offered by the company Occhiali24.it S.r.l. (hereinafter «Company»; «Occhiali24»).

The complainant declared that he had never given consent to receive the aforementioned promotional communication and complained of the failure to respond to the request to exercise the rights pursuant to articles 15, 17 and 21 of the Regulation, sent by e-mail on 28 June 2021 to the addresses indicated in the privacy information found on the Company's website.

On 2 September 2021, the Office formulated a request for information, pursuant to art. 157 of the Code, in order to acquire more evaluation elements. Since no reply was received within the terms indicated, on 22 September 2021, the Company was contacted at the telephone number on the specific page of the relevant website and the request was subsequently renewed, pursuant to art. 157 of the Code, with a note dated September 29, 2021. Only following the latter, with a communication dated September 30, 2021, retransmitted to this Office on October 4, 2021, did the Company declare its non-involvement in relation to the conduct complained of in the complaint , specifying that the data of the interested party are present in the contact lists of XX S.p.A. (hereinafter «XX») which it uses for marketing purposes.

The complainant, having taken note of the Company's reply after the transmission of the same by the Office, formulated notes in reply, also forwarded in copies to Occhiali24, with which he claimed to have sent, on 4 October 2021, a request to exercise the rights pursuant to articles 15, 17 and 21 of the Regulation against XX. The latter, in response to the aforementioned request, declared, with a communication dated 5 October 2021, that it did not hold the e-mail address of the interested party, and, consequently, that it had not used this data to send the communication promotion complained of in the complaint.

1.2. The dispute

In the light of what emerged from the preliminary investigation, on the basis of the overall documentation acquired, Occhiali24 was notified on 12 November 2021 of the communication of the initiation of the proceeding pursuant to art. 166, paragraph 5, of the Code. The Office, in particular, observed that the communication received from Mr. XX, although disowned by the Company, contains in content the promotion of products offered by Occhiali24 corroborated, moreover, by the possibility of obtaining a coupon which refers to the Company's website. The commercial communication denounced in the complaint, therefore, unequivocally associates the receipt of the promotional message to an initiative of the Company. Occhiali24, therefore, was unable to prove the adoption of adequate technical and organizational measures, as required by articles 5, par. 2, and 24 of the Regulation, taking into account that the feedback provided by the Company is to be considered indicative of the inability to effectively control the chain of partners who carry out promotional activities to its advantage. Consequently, the Company was charged with violating articles 5, par. 2, and 24 of the Regulation, which frame the skills of the owner in a perspective of responsibility (accountability) aimed at proving the obligations carried out regarding the protection of personal data, as well as of the articles 12, 15, 17 and 21 of the Regulation, since the request to exercise the rights formulated by the interested party on 28 June 2021 was not met within the required time limits.

Furthermore, the Company was charged with violating art. 6, par. 1, lit. a) of the Regulation and of the art. 130 of the Code, due to the sending of a promotional e-mail to XX in the absence of a free, specific, documented and unequivocal consent.

1.3. The defense of Occhiali24.it S.r.l.

With the written defence, forwarded on November 12, 2021, the Company asked this Authority "to suspend the proceedings in progress against [it]", attributing responsibility for the alleged conduct to XX. To confirm this, the Company has provided a copy of the communication dated October 13, 2021, forwarded to the complainant (and attached to the brief), with which XX declared that she was not the data controller and that she had been appointed by Occhiali24 to carry out of the promotional campaign subject of the complaint for which it made use of external collaborators, including XX (hereinafter «XX»), based in Spain, "who directly sent promotional messages including the one" received from XX .

1.4. The defense of XX S.p.A. and XX

On 10 November 2021, XX sent the complainant a note in which XX, in confirming the collaboration relationship with XX, declared that he had acted on the basis of a consent "to the processing and transfer of personal data aimed at sending of commercial communications" acquired on 7 April 2018 on the occasion of registration on a website managed by the company XX, with registered office in London. Finally, he assured that he had proceeded to cancel the data of the interested party from his own database "and from those held by companies" connected to it.

2. ASSESSMENTS CARRIED OUT BY THE OFFICE

The IT evidence produced by the complainant with a note dated 29 November 2021, following the aforementioned findings, was subject to verification by the Authority and made it possible to ascertain various critical issues regarding the aforementioned website and the demonstration of how it was acquired the consent of the interested party. In particular, it was possible to view the aforementioned site at the time of the alleged acquisition of the complainant's consent in 2018, by accessing the archive.org portal (http://wayback.archive.org) which preserves the snapshots of the home pages of websites and their structuring even in the past. In the present case, it emerged that, in the period concerned (2018), the site indicated as a source of data acquisition was in reality a mere showcase of a third party, without any information, data acquisition form or requests for consent to be selected for the distinct promotional purposes and for the transfer of data to third parties for advertising purposes. Furthermore, as per the checks carried out by the complainant, the XX was registered in the English register of companies from 2021, therefore three years after the alleged acquisition of the consent which would have

legitimized the complained promotional communication.

3. LEGAL ASSESSMENTS

With reference to the factual profiles highlighted above, also on the basis of the statements of the Company, for which the declarant is liable pursuant to art. 168 of the Code, the following legal assessments are formulated

3.1. On the qualification of roles in relation to the processing of personal data

As described above, all the subjects involved in the processing have qualified their role covered in the promotional activity in question as marginal, attributing the ownership solely to the XX based in England: within a complex chain of processing, the data of Mr. XX would appear to be present in the database of the aforementioned English company (but its exact origin is not known) and would have been processed by XX on behalf of XX which, in turn, would have acted in the interests of Occhiali24.

In this regard, the definition of "owner" pursuant to art. 4 of the Regulation, or the natural or legal person who, individually or together with others, determines the purposes and means of the processing. As better clarified in the EDPB Guidelines 7/2020, regardless of the contractual qualification of the roles, the subject who determines the purposes and means, i.e. the methods, of the treatment is the owner. The Guarantor in similar cases (see provision 26 October 2017, web doc. n. 7320903; provision 15 January 2020, web doc. n. 9256486; provision 25 November 2021, web doc. n. 9736961; provision 25 November 2021, web doc. n. 9737185; provision 2 December 2021, web doc. n. 9731682; provision 2 December 2021, web doc. n. 9731664; provision 16 December 2021, web doc. n. 9742704) has repeatedly affirmed that the client of a promotional campaign, regardless of the material data collection, must be considered the data controller having concretely determined - in the recurring practice relating to this sector - the decisions regarding the purposes and essential means of the treatment itself .

In the present case, Occhiali24 established the purpose for which the processing was carried out (the transmission of promotional messages), entrusting XX with the task of carrying out the advertising campaign of its brand. In turn, XX, for which an independent proceeding was initiated, obtained lists of e-mail addresses from the aforementioned third parties in order to carry out a promotional activity, while not acquiring their direct availability.

This said, in preparing standard responses in which it repeatedly invoked the qualification of mere client without a role in the treatment in question, Occhiali24, effectively exercising the prerogatives of owner in the terms clarified above, did not produce feedback on the criteria adopted for the selection of the partner who would have acted in his interest, nor on the instructions that would have been given for the realization of the promotional campaign in compliance with current legislation. Furthermore,

it has not provided information and presented documents from which it is possible to obtain elements on the existence of agreements or directives, even if not explicit in the contractual form, which would allow the reconstruction of the legal context in which the processing took place and to qualify, concretely, roles and responsibilities of the Company and of the entire supply chain.

Furthermore, it does not emerge that he has requested from the partner (nor, consequently, examined) the documentation proving the existence of the requirements for the lawfulness of the processing; for example, it does not appear that Occhiali24 has ever asked XX to document the origin of the data, nor the legal basis underlying their processing for marketing purposes.

In truth, this Authority believes that, from a check based on canons of ordinary diligence and prudence, it would have been possible to detect the lack of some important conditions for guaranteeing the lawfulness of the processing. In fact, the XX, at the time of the alleged acquisition of the appellant's consent, was not operational in the London economic panorama (as already verified by the appellant in the English company register - see paragraph 2 of this provision), but, more generally, the choice of a person not resident in the Italian territory, or at least in the territory of the European Union, does not guarantee the interested parties the right to assert their rights and, at the same time, hinders the investigation activities of the Guarantor, making it difficult to verify the lawfulness of such treatments. Problems of this type, which have already emerged during other investigations, have also found confirmation in the case that is the subject of this complaint (cit. provision 25 November 2021, web doc. no. 9737185 and provision 25 November 2021, web doc. no. 9736961).

Furthermore, it should be noted that the disputed conduct raises doubts regarding the management of all the additional e-mail addresses addressed to the Company's promotional activity since, after the notification of the notice of dispute, there has been an increase in documents (reports and complaints) presented to the Authority and relating to the treatments carried out by Occhiali24, such as to attribute the critical issues reported not so much to episodic situations but to anomalies of a systematic nature.

What has been described so far highlights a picture of poor control by the Company in the treatments aimed at carrying out the promotional campaign with consequent inability to comply with the obligation to demonstrate compliance with the rules (accountability of the owner), also with a view to correct privacy by design. Therefore, the violation of articles is considered integrated 5, par. 2, 24, 25, para. 1, of the Regulation, to be considered as systematic conduct and not limited to the single case referred to in the complaint.

In addition, it should be noted that the treatment described has given rise to the sending of promotional messages without the informed consent of the interested party since the Company has not produced probative evidence capable of documenting its acquisition and the checks conducted by the complainant have provided a very different picture from what is represented by the parties involved in the proceedings.

Therefore, the violation of art. 6, par. 1, lit. a) of the Regulation and of the art. 130 of the Code, not only in relation to the case referred to in the complaint, but in the complex of treatments carried out by Occhiali24.

3.2. On the adequacy of the feedback provided for the exercise of the right pursuant to articles 15, 17 and 21 of the Regulation

In recalling the foregoing, in paragraph 1, regarding the failure to respond to the request formulated by the complainant on 28 June 2021, it is stated that the Company has processed the request made only after being so requested by the Authority (with an initial information request of 2 September 2021, renewed, due to no response, on 22 September 2021, pursuant to Article 157 of the Code) and without providing explanations regarding the failure to respond.

Furthermore, from the overall examination of the documents, it emerges that Occhiali24 has not produced, in a collaborative and proactive perspective, adequate and transparent answers regarding the elements requested, i.e. such as to better understand the factual dynamics and its treatment policy, replying with generic and standardized formulas and preventing a more in-depth evaluation of the treatments by the Authority. This has led to an evident difficulty in tracing the treatment chain and therefore in knowing the origin of the complainant's personal data.

Moreover, in the incomplete representation provided, the Company limited itself to declaring itself extraneous to the alleged conduct, without however giving evidence of the actions undertaken, above all in a more articulated framework of measures and interventions (even subsequent to the notification of the start of the proceeding) which, company level, should be envisaged for the management of these problems (cited provision. December 16, 2021, web doc. n. 9735672). The negligent nature, to be considered grossly negligent, of the conduct with which the Company has not provided the requested information, reveals a serious flaw in the transparency obligations of Occhiali24 (articles 5, paragraph 1, letter a, 12, paragraph 1 and 3, and 15 of the Regulation) which appears to have violated the aforementioned fundamental guarantees provided by law.

In light of the above, pursuant to art. 58, par. 2, lit. f) of the Regulation, it is necessary to impose on Occhiali24 the prohibition of the processing of personal data collected without having acquired the aforementioned necessary prior informed, free, specific, unequivocal and documented consent of the interested parties in relation to the marketing activity, pursuant to of the

articles 6, 7 and 13 of the Regulation as well as 130 of the Code.

Furthermore, it is necessary to enjoin the Company, pursuant to art. 58, par. 2, lit. d) of the Regulation, if in the future it intends to make use of third parties for promotional activities, to adopt suitable procedures aimed at constantly verifying that personal data are processed in full compliance with the provisions on the matter and to acquire in advance a free, specific, unequivocal, documented consent , as well as informed, of the interested parties for the sending of commercial communications, in the terms indicated above. Furthermore, pursuant to art. 58, par. 2, lit. d) of the Regulation, to adopt suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights of the interested parties, pursuant to articles 15-22 of the Regulation.

Finally, with regard to the treatments already carried out and with dissuasive purposes, it is believed that the conditions exist for the application of a pecuniary administrative sanction pursuant to articles 58, par. 2, lit. i) and 83, par. 4 and 5, of the Regulation.

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

For the purpose of quantifying the administrative fine, the aforementioned art. 83, par. 5, in setting the statutory maximum in the sum of 20 million euros or, for companies, in 4% of the annual worldwide turnover of the previous year where higher, specifies the methods for quantifying the aforementioned fine, which must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), identifying, for this purpose, a series of elements listed in paragraph 2 of the art. 83 in question, to be evaluated when quantifying the relative amount.

Having established, in the light of the available budget data, the maximum statutory applicable amount at 20 million euros, the following circumstances to be taken into consideration in the present case must be considered, from the point of view of aggravating circumstances:

1. the increase, in the last year, even after the notification, of documents (reports and complaints) presented to the Authority against the Company and, therefore, an increase in the number of interested parties affected by the treatment in question (letter a);

2. the subjective dimension of the conduct, to be considered grossly negligent, with particular reference to the continuing substantial avoidance of the information requested by both the interested party and the Authority, as well as with reference to the inadequacy of the control over the processing chain (letters b and d);

3. the inadequate degree of cooperation shown in discussions with the Authority as the Company did not find the first request for information pursuant to art. 157 of the Code and in any case not having provided, not even following the second request from the Office, information necessary for an adequate evaluation of the treatments (letter f);

4. the non-conformity of the Company's conduct with respect to the consistent regulatory activity of the Authority in the field of marketing (letter k);

5. the overall assessment of the Company's economic capacity, with particular reference also to the latest available financial statements for the year 2021 (letter k).

As mitigating factors, it is believed that the following should be taken into account:

1. the nature of the data processed, of a common type (letters a, g);

2. the absence of previous proceedings initiated against the Company (letter e).

Based on the set of elements indicated above, in application of the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1 of the Regulation, taking into account the necessary balance between the rights of the interested parties and the freedom to do business, also in order to limit the economic impact of the sanction on the organisational, functional and employment needs of the Company, it is believed that it should be applied to Occhiali24 - also taking into account consideration of other similar cases - the administrative sanction of the payment of a sum of Euro 20,000.00 (twenty thousand/00), equal to 0.1% of the statutory maximum of Euro 20 million.

In the case in question, it is believed that the ancillary sanction of publication on the Guarantor's website of this provision should also be applied, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019, taking into account the subject matter of the preliminary investigation, namely the phenomenon of unwanted marketing, with respect to which this Authority has adopted numerous measures both of a general nature and aimed at specific data controllers and on which the attention of the 'user.

Please note that pursuant to art. 170 of the Code, anyone who fails to comply with this provision prohibiting processing is punished with imprisonment from three months to two years and, in the event of non-compliance with the same provision, the sanction referred to in to art. 83, par. 5, letter. e), of the Regulation.

Finally, the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor, for the annotation of the violations

detected here in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f) of the Regulation, declares the processing carried out by Occhiali24.it S.r.l., with registered office in Brunico (Bolzano), via dei Campi Della Rienza 30, VAT number 02934890217, described in the terms referred to in the justification, to be unlawful; therefore declares the complaint founded and, moreover, determines the following corrective measures against the same Company:

a) pursuant to art. 58, par. 2, lit. f) of the Regulation, prohibits any further processing without the necessary prior informed, free, specific, unequivocal and documented consent of the interested parties in relation to the marketing activity, pursuant to articles 6, 7 and 13 of the Regulation as well as 130 of the Code;

b) pursuant to art. 58, par. 2, lit. d) of the Regulation, if it intends to carry out promotional activities in the future, directly or through third parties, orders the adoption of suitable procedures aimed at constantly verifying that personal data are processed only in the presence of the necessary prior informed, free, specific, unequivocal and documented consent of referred to in letter a);

c) pursuant to art. 58, par. 2, lit. d) of the Regulation, orders the adoption of suitable procedures aimed at guaranteeing a full and effective response to the exercise of the rights pursuant to articles 15-22 of the Regulation;

d) pursuant to art. 58, par. 1, of Regulation (EU) 2016/679, also invites the data controller to communicate, within 30 days from the date of receipt of this provision, what initiatives have been undertaken in order to implement the provisions of this provision and to provide in any case adequately documented response. Please note that failure to respond to the request pursuant to art. 58 is punished with the administrative sanction pursuant to art. 83, par. 5, letter. e), of Regulation (EU) 2016/679;

ORDER

to Occhiali24 to pay the sum of Euro 20,000.00 (twenty thousand/00) as an administrative fine for the violations indicated in the justification, representing that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute, with the fulfillment of the instructions given and the payment, within the term of thirty days, of an amount equal to half of the fine imposed;

ENJOYS

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 Euro 20,000.00 (twenty thousand/00), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to the 'art. 27 of the law n. 689/1981;

HAS

as an accessory sanction, pursuant to art. 166, paragraph 7, of the Code and of the art. 16 of the Regulation of the Guarantor n. 1/2019, the publication on the Guarantor's website of this provision and, pursuant to art. 17 of the Regulation of the Guarantor n. 1/2019, the annotation in the internal register of the Authority, provided for by art. 57, par. 1, lit. u) of the Regulation, of the violations and of the measures adopted.

Pursuant to art. 78 of Regulation (EU) 2016/679, as well as articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, 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 owner of the processing of personal data has his residence, or, alternatively, with the court of the place of residence of the interested party. , within the term of thirty days from the date of communication of the provision itself, or sixty days if the appellant resides abroad.

Rome, 20 October 2022

PRESIDENT

station

THE SPEAKER

Cerrina Feroni

THE DEPUTY SECRETARY GENERAL

Philippi