GARANTE PER LA PROTEZIONE DEI DATI PERSONALI

In today's meeting, with the participation of Prof. [redacted], President; Prof. [redacted] Vice-President; [redacted] and [redacted] Members; and [redacted] Secretary-General;

Having regard to legislative decree No 196 of 30 June 2003 (Personal Data Protection Code, hereinafter 'Italian DP Code' or the 'Code') as amended by legislative decree No 101 of 10 August 2018 containing 'Provisions to adapt the national legal system to Regulation (EU) 2016/679 (GDPR)';

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter the 'Regulation');

Having regard to the complaint lodged by an UK national ([redacted]) with the UK data protection authority (ICO) regarding the alleged violation of his right of access under Article 15 of the Regulation;

Taking account of IMI Article 56 procedure No 47577 as uploaded by the ICO and notified to all EEA supervisory authorities on 17 August 2018;

Taking account of the comment whereby the Garante accepted to act as the lead supervisory authority in the said procedure since the controller has its main establishment in Italy;

Having regard to the letter by [redacted] of 17 April 2019 whereby the company sent the Garante the information that had been requested concerning the processing of the complainant's personal data as performed by the said company;

Having regard to the letter dated 25 October 2019 whereby the Garante notified the company under the terms of Section 166(5) of the Code of the alleged infringements it had found, with particular regard to Article 12(3) and (4) and Article 15 of the Regulation, and invited the said company to submit pleadings or documents or to request that it be heard by the Garante (pursuant to Section 166(6) and (7) of the Code and to Section 18(1) of Law No 689 of 24 November 1981);

Having regard to the letter received on 15 November 2019 whereby [redacted] requested to be heard by the Garante;

Having regard to the minutes of the said hearing, which took place on 5 October 2020 at the Garante's offices;

Having regard to the letter dated 2 October 2020 whereby [redacted] sent pleadings to the Garante;

Having regard to the Draft Decision approved by the Garante's Board of Commissioners at the meeting held on 11 March 2021;

Taking account of the Article 60 Draft Decision procedure that was opened by the Garante in the EDPB information system pursuant to the cooperation and consistency principles set out in Article 60 of the Regulation;

Taking account of the relevant and reasoned objections submitted pursuant to Article 60(4) of the Regulation by the Austrian supervisory authority, which found that [redacted] should have provided the data subject only with the personal data relating to the latter as contained in the documents held by the company (i.e., transcripts of phone conversations, internal case notes) without making available copies of the said documents;

Having regard to the Revised Draft Decision approved by the Garante's Board of Commissioners at the meeting held on 16 September 2021, whereby the Garante followed the relevant and reasoned objection raised by the Austrian supervisory authority;

Having regard to the Article 60 Revised Draft Decision procedure that was opened by the Garante in the EDPB information system pursuant to the cooperation and consistency principles set out in Article 60 of the Regulation;

Taking account that none of the supervisory authorities concerned raised additional objections to the revised draft decision under the terms of Article 60(6) of the Regulation;

Having considered the records on file;

Having regard to the considerations made by the Secretary General pursuant to Section 15 of the Garante's Rules of Procedure No 1/2000;

Acting on the report submitted by Prof. [redacted]

WHEREAS

1. Description of the complaint

The complainant is an English national. He lodged a complaint with the UK Information Commissioner's Office (ICO) where he alleged that he had requested [redacted], on 28 May 2018, to send him both the transcripts of the phone conversations between him and the customer support centre operated by [redacted] (hereinafter [redacted]) and the documents (so-called 'case notes') relating to the specific incident – as he had turned to [redacted] following a malfunctioning of his vehicle. Further to the said request, [redacted] had reportedly stated they were not in a position to grant the requests on account of unspecified Italian privacy rules and anyhow would not be able to reply until the ticket opened in connection with the malfunctioning of the vehicle was closed.

2. The investigations by the Garante

The Garante accepted it was the lead supervisory authority in the procedure at issue since the controller has its main establishment in Italy.

Further to the above complaint, the Garante requested the controller ( ), with registered office in , to submit their views as to the processing of the complainant's personal data.

By way of a letter dated 17 April 2019, sent the information the Garante had requested and declared the following: as part of the relevant call management policy, only records inbound calls and only for training and quality monitoring purposes (this being the so-called first-level help desk); calls are subsequently transferred to another operator dealing with the specific subject matter (this being the so-called second-level help desk) and are not recorded further – which also applies to outbound calls. In these cases, the operator takes 'notes' relating to the conversations with customers. As for the complainant's request to obtain the recordings of second-level calls, declared the request could not be granted since such calls are handled by the help desk and are not recorded.

As for the request to obtain copies of the 'case notes' relating to the calls in question, declared that such notes had not been provided to the data subject since they were considered 'internal confidential documents' that were helpful for case description and management activities.

Based on the findings of the investigation, the Garante's Office considered the complainant's data to have been processed by in breach of Articles 12(3) and (4) and 15 of the GDPR on the following grounds:

- The data subject has the right to obtain access to any information and personal data by which he/she is or can be identified (see Articles 15 and 4(1) GDPR); accordingly, should have provided the complainant both with the transcripts of phone calls, if recorded, and with the personal data relating to him as contained in the so-called 'internal case notes';
- The controller is required to provide the data subject with the requested information without undue delay and in any event within one month of receipt of the request, and to specify any reasons whereby disclosure of the requested documents is not possible (see Article 12(3) GDPR); accordingly, should have replied to the complainant by specifying the reasons for not taking action on his request in order to enable him to lodge a complaint with the supervisory authority if he was not satisfied with the reply, irrespective of whether the case relating to the malfunctioning of the vehicle had been settled or not;
- Article 23 of the GDPR empowers Member States to restrict, in specific cases, the exercise of data subjects' right of access providing that the data subjects' right to be informed about the restriction is ensured, among other things. Section 2-l of legislative decree No 196/2003 (as amended by legislative decree No 101/2018) lists accordingly the cases where exercise of the data subjects' rights may be restricted and provides that the data subject '*shall be informed*' by the controller '*of the relevant reasons without delay*'. In the case at issue, the information provided in this respect to the data subject was incomplete; indeed, only in the pleadings submitted of late to the Garante were the relevant restrictions mentioned without actually providing adequate arguments to support them as it was alleged that access was denied for as long as necessary to exercise legal claims.

In the light of the foregoing considerations, the Garante's Office found the processing by [redacted] to be unlawful and notified the company under Section 166(5) of the Italian DP Code of the infringements found with regard to Articles 12(3) and (4) and 15 of the GDPR; the company was called upon to submit pleadings or documents to the Garante or to request to be heard by the Garante (under Section 166(6) and (7) of the DP Code and in pursuance of Section 18(1) of Law No 689 of 24 November 1981).

By way of a letter received on 15 November 2019, [redacted] requested to be heard by the Garante. Such hearing took place on 5 October 2020, following a complex procedure relating to access to document requests and to the stay of the proceeding due to the health emergency. The company sent their pleadings by a letter dated 2 October 2020 where they alleged the following:

- [redacted] had not infringed personal data protection legislation as the company had replied to all the requests made by the data subject within the deadlines set out in the GDPR and the Italian DP Code; they had explained in those replies that they would not be in a position to provide him either with the recordings of the phone calls between him and the customer centre (which were not recorded) or with the so-called 'case notes'. Regarding the latter, the company had explained that – pursuant to Section 8(3), letter e) corresponding to Section 2-l, letter e) of the Italian DP Code – disclosing such notes would be prejudicial to the exercise of a legal claim by the company since the complainant had repeatedly indicated he was planning to apply to the Motor Ombudsman;
- As the complainant's request was dated 14 May 2018, i.e. it bore a date prior to the entry into force of the GDPR, the legislation previously in force as per legislative decree No 196/2003 was applicable to the case at issue;
- As the complainant had requested the imposition of corrective measures, not of sanctions, in his submission to ICO, the Garante was expected to only decide in respect of the former; in any case, the applicable fining regime was the one previously in force under legislative decree No 196/2003, which provided the regulatory framework applicable at the time the data subject had requested access.

During the hearing held at the Garante's premises on 5 October 2020, the company referenced their pleadings and declared the following:

- The company had replied to the complainant's request to access his personal data 'promptly', since the call centre operator had not rejected the access request but had postponed the reply until such time as the dispute would be settled;
- The applicable legislation was in any case the one in force at the time when the facts occurred, i.e. as of the date the complainant had requested access; accordingly, the regulatory framework provided for in legislative decree No 196/2003 was applicable;
- If legislative decree No 196/2003 was applicable, the alleged infringements would not exist as the right of access could be restricted by the company's right to exercise a legal claim under Section 8(2), letter e) of the Italian DP Code.

Furthermore, the company requested that the Garante would not publish its final decision, if any, and that account be taken of the more lenient approach envisaged in the so-called 'grace period' as for the initial application of the fining provisions laid down in the GDPR.

3. Assessment of the case by the Garante

In the light of the foregoing considerations, it should be pointed out that the controller's statements as made in the pleadings and in the course of the hearing – for whose truthfulness one is liable under Section 168 of the Italian DP Code – are relevant, however they do not override the allegations made by the Garante's office by way of the initial statement of claim and do not allow dismissing the case; in particular, none of the conditions is fulfilled as mentioned in Section 11 of the Garante's Rules of Procedure No 1/2019 on internal procedures having external impact.

More specifically, consideration should given to the following:

- Contrary to the allegations made by the company in their pleadings, the legislation applicable to the case at hand is Regulation (EU) 2016/679 along with the Italian DP Code as amended by legislative decree No 101/2018. Although the complainant's request was filed with [redacted] a few days in advance of the entry into force of the Regulation, the complaint as such was lodged with ICO thereafter – namely, on 31 May 2018; this circumstance entails per se that the complaint is to be handled in accordance with the supervening legislation. An even weightier argument supporting the applicability of the Regulation to the case at issue is that the failure to reply to the complainant's requests gave rise to an infringement of personal data protection law that started prior to 25 May 2018 but continued actually after the entry into force of the Regulation. Having received the complainant's request, the controller ought to have replied at the latest by 14 June 2018 – i.e., at a time when the Regulation was fully in force - in pursuance of Articles 15 and 12 of the Regulation. Since 'processing already under way on the date of application of (…) Regulation should be brought into conformity with (…) Regulation' (see Recital 171), the point in time determining the applicable law is the time of commission of the infringement by the controller. [redacted] failed to respond to the complainant's request also following the 14th of June, 2018; accordingly, the infringement continued until it was remedied by [redacted] Thus, one cannot but conclude that the infringement was committed by the company when the Regulation and the amended DP Code were in force; accordingly, the latter pieces of legislation are relevant for establishing which regulatory framework is applicable timewise by having regard to the infringement at issue;
- Therefore, the Regulation provides the reference legal framework also in order to establish the applicable sanctions;
- The Garante does not concur with the arguments put forward by the company whereby the complainant's requests were dealt with 'promptly' (either via emails or through the call centre), which arguments were also relied upon to account for the negated disclosure of the documents at issue. As already pointed out, Section 2-l of legislative decree No 196/2003 (as amended by legislative decree No 101/2018) is not applicable to the case at hand. That section enables the controller to restrict, in specific situations, the data subject's right of access; however, the data subject 'shall be informed of the relevant reasons without delay' in such cases. In the case at issue, the information provided to the data subject was proven to be inadequate as well as

incomplete: indeed, only in the pleadings submitted of late to the Garante were the relevant restrictions mentioned without actually providing adequate arguments to support them as it was alleged that access was denied for as long as necessary to exercise legal claims. Data subjects must be in a position to timely know about any restrictions on the exercise of a right such as the one set forth in Article 15 of the Regulation; accordingly, the reference made by the company to 'privacy law' may not be considered sufficiently exhaustive in that respect. By the same token, the detrimental effects allegedly caused to the controller's right of defence solely on account of the complainant's having indicated his intention to apply to the Motor Ombudsman are not such as to fulfil, per se, the conditions for restricting data subject rights which are set out in Section 2-l(1), letter e), of the Italian DP Code. Therefore, the decision to not disclose the requested information and to postpone such disclosure is not supported by adequate arguments and results as such into a breach of the aforementioned provisions.

Based on the foregoing considerations, the preliminary assessment by the Garante's Office is hereby confirmed to the effect that the company failed to comply with the obligation to reply to the data subject's access requests in pursuance of Article 12 of the Regulation, which provides that 'the controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request.'

The company's conduct was in breach accordingly of Article 12 et seq. of the Regulation.

4. Order to pay

Under Article 58(2)(i) of the Regulation and Section 166 of the Italian DP Code, the Garante is empowered to impose an administrative fine pursuant to Article 83(5) of the Regulation by adopting an order to pay (in accordance with Section 18 of Law No 689 of 24 November 1981) in respect of the processing of personal data relating to the complainant, as it was found that such processing was unlawful under the terms of Article 12 et seq. of the Regulation. The above order may be adopted upon conclusion of the proceeding referred to in Section 166(5) of the DP Code where the controller had the opportunity of being heard (see paragraphs 1.2, 1.3, and 1.4 hereof).

As for the items referred to in Article 83(2) of the Regulation with a view to imposing an administrative fine and determining the relevant amount, and taking into account that the imposition of an administrative fine shall 'in each individual case be effective, proportionate and dissuasive' pursuant to Article 83(1) of the Regulation, the Garante gave due regard to the following factors in the case at hand.

As for the nature, gravity and duration of the infringement, the latter was considered to be substantial by having regard to the provisions on the exercise of data subjects' rights and to the fact that the events at issue resulted mostly from the controller's failure to implement adequate measures to enable the data subject to access his personal data; it should be considered additionally that the infringement continued from the date by which the

controller was required to take action on the data subject's requests until now – since no reply has ever been provided.

Note is taken that no relevant previous infringements were committed by the controller, and no previous measures were ordered in pursuance of Article 58 of the Regulation, whilst the company can be said to have cooperated actively with the Garante throughout the proceeding.

In the light of the foregoing factors to be considered as a whole, the amount of the administrative fine is set hereby at EUR 20,000 (twenty thousand) on account of the infringement of Article 12 et seq. of the Regulation, whereby such amount is considered to be effective, proportionate and dissuasive in line with Article 83(1) of the Regulation.

Partly in light of the type of infringement that has been found, which concerns data subject rights, this Authority is of the view that the present decision should be published on the Garante's website in pursuance of Section 166(7) of the Italian DP Code and Section 16(1) of the Garante's Rules of Procedure No 1/2019.

Finally, reference is made to the fulfilment of the conditions mentioned in Section 17 of the Garante's Rules of Procedure No 1/2019.

BASED ON THE ABOVE PREMISES, THE GARANTE

Finds that the processing carried out by [redacted] is unlawful under the terms set out in the reasoning part hereof, in accordance with Article 57(1)(f) and Article 83 of the Regulation, on account of the infringement of Article 12 et seq. of the Regulation; and

ORDERS

The controller under the terms of Article 58(2)(c) of the Regulation to provide the data subject by 30 days of receipt hereof with the personal data relating to him as contained in the so-called 'case notes' concerning the case at issue; and

PROVIDES

Pursuant to Article 58(2)(i) of the Regulation that an administrative fine amounting to EUR 20,000 (twenty thousand) be paid by [redacted], with registered office in [redacted] by way of their interim legal representative, on account of the infringements referred to in the reasoning part hereof; and

ORDERS

The aforementioned company to pay EUR 20,000 (twenty thousand) in accordance with the arrangements set out in the attachment hereto within thirty days of being served with this decision, under penalty of application of the enforcement orders provided for by Section 27 of Law No 689/1981. Attention is drawn to the fact that Section 166(8) of the Italian DP Code allows the infringing party to settle the dispute by paying half the amount of the administrative fine –in accordance with the arrangements set out in the attachment hereto

- within the deadline for appealing this decision as referred to in Section 10(3) of legislative decree No 150 of 1 September 2011; and

PROVIDES

That this decision be published on the Garante's website pursuant to Section 166(7) of the Italian DP Code and Section 16(1) of the Garante's Rules of Procedure No 1/2019, and finds that the conditions mentioned in Section 17 of the Garante's Rules of Procedure No 1/2019 are fulfilled.

[redacted] is required hereby to communicate that it complied with the provisions made herein and to submit documentary proof thereof under the terms of Section 157 of the Italian DP Code by 90 days from the date of service. Failure to provide the aforementioned information may entail imposition of the administrative fine envisaged in Article 83(5)(e) of the Regulation.

In accordance with Article 78 of the Regulation, section 152 of the Italian DP Code, and Section 10 of legislative decree No 150 of 1 September 2011, this decision may be challenged by filing an appeal with the competent court within thirty days of the date when this decision is communicated, or within sixty days of the said date if the appellant is resident abroad, whereby an appeal filed past the said date shall be inadmissible.

Rome, 16 December 2021

THE PRESIDENT

[Signed]

THE RAPPORTEUR

[Signed]

THE SECRETARY GENERAL

[Signed]