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GARANTE PER LA PROTEZIONE DEI DATI PERSONALI

AT today's meeting, which was attended by Prof. Pasquale Stanzione, president, Prof. Ginevra Cerrina Feroni, vice-president, Dr. Agostino Ghiglia and Mr. Guido Scorza, members, and Cons. Fabio Mattei, 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 and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter "GDPR");

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

HAVING REGARD TO THE documentation on file;

HAVING REGARD TO THE observations made by the Secretary-General pursuant to Section 15 of the Garante's Regulations No. 1/2000, adopted by resolution of 28 June 2000;

Acting on the report submitted by Prof. Pasquale Stanzione;

PREAMBLE

1. THE INVESTIGATION

1.1. <u>Introductory Remarks</u>

By decision No. 18752/21 of 8 April 2021 (notified on the same day by certified e-mail), which shall be deemed to be reproduced herein in its entirety, the Office initiated, pursuant to Section 166(5) of the Code, proceedings for the adoption of the measures referred to in Article 58, para. 2, of the GDPR against Hoda s.r.l. (hereinafter "Hoda" or "the Company"), by the agency of its *interim* legal representative, with registered office in Milan, Piazza Ernesto De Angelis 13, Tax ID 10160470968.

The proceedings originate from an investigation started by the Authority, following the receipt of several reports and complaints coming mainly from large-scale retail distribution (GDO) companies.

The inspections were documented in the minutes of the operations carried out in which the documentation acquired was also acknowledged.

In addition to the statements made and the documents produced during the inspection, the Office examined the documents on the Weople platform as available until 2 July 2024 to the data subjects prior to registration, along with similar documents of the LifeKosmos application.

1.2. <u>Notification of administrative infringements</u>

Whilst the considerations contained in the notification of initiation of administrative proceeding (doc. no. 18752/21 of 8 April 2021) shall be referenced in full for the purposes hereof, it should be

noted that, upon completion of the preliminary investigation activity, the Office notified Hoda s.r.l. of the following alleged infringements:

a) Infringement of Articles 5, 6(1)(b), 9 and 20 of the GDPR, having carried out processing operations aimed at the acquisition of data following portability (including special category data referred to in Article 9) as well as at profiling Weople users, in the absence of an appropriate legal basis and in breach of the principles of data minimization and purpose limitation and accordingly of the exercise of the right to portability;
b) Infringement of Articles 5 and 6(1)(b) of the GDPR, having carried out processing aimed at profiling LifeKosmos users in the absence of an appropriate legal basis;
c) Infringement of Articles 5 and 6(1)(b) and 20 of the GDPR, having processed data for the purpose of forwarding requests for the exercise of rights and declarations of users' consent withdrawal without being legitimated to carry out such activities in the name and on behalf of those users - on account of the unsuitability of the act of delegation of powers, with reference to the requests for the exercise of rights, and of the impossibility to delegate the power to withdraw one's consent, respectively;
d) Infringement of Articles 5 and 8 of the GDPR, having processed personal data relating to children in the absence of an appropriate legal basis - since the legal basis under Article 6(1)(b) of the GDPR is not applicable to children pursuant to Sections 2 and 1425 of the Italian Civil Code, which set out children's lack of contractual capacity;
e) Infringement of Articles 12 and 13 of the GDPR, with reference to the information provided on the nature of the data, the purposes and the legal basis of the processing, which did not meet the requirements of straightforwardness and clarity, as well as to the information relating to the processing aimed at profiling data subjects and the processing related to requests to exercise the right to data portability, where information on the '*logic used and the importance and the expected consequences of such processing for the data subject*' was found to be missing.

2. THE COMPANY'S DEFENCE AND THE ASSESSMENT BY THE AUTHORITY

2.1 The company's pleadings and hearing

On 24 May 2021, Hoda sent the Authority the statement of defense provided for in Section 166(6) of the Code. Pursuant to the latter provision, the hearing requested by the party under investigation took place on 4 June 2021 by videoconference, of which minutes were drawn up. Both documents shall be considered to be fully referenced and reproduced herein, for the protection of the party under investigation.

The company first of all gave a general overview of its processing of personal data and of Hoda's entrepreneurial rationale, representing that its business is carried out through its main assets as consisting in the Weople service, the LifeKosmos platform and the technological-statistical engine called ' DOTCONN Engine'.

In particular, DOTCONN Engine processes the data collected by Hoda through users' interactions with the Weople service and the LifeKosmos platform, obtaining probabilistic models that client companies can apply to their own *databases*. This operation is therefore alleged to not entail the communication of Hoda's data to other controllers, since what is exported outside the Company's perimeter consists allegedly in statistical algorithms that are said to be unrelated to the database that enabled their processing.

Starting from the consideration that the processing of personal data can generate economic value, Hoda has implemented a business model that envisages not only the return of a significant part (around

90%) of this value to data subjects, but also data subjects’ participation s in the data acquisition and marketing processes such as to give rise to a sort of 're-appropriation' of their data; in this activity Hoda takes on the role of an intermediary [broker] and facilitator.

In its statement, Hoda draws attention to the circumstance that the data through which its processing tools are fed cannot be limited to those recorded in the systems of the original data controller, as they must also consist of the additional data that are generated by interactions between the data subject and other data controllers, and that it was precisely in the acquisition of such data that the company encountered significant resistance.

In the light of the call made repeatedly, also at European level, for data subjects to have full knowledge of the data processed by the multiple data controllers to whom such data have been provided, Hoda has therefore set its role as that of an aggregator that can carry out, on behalf of the data subjects, the complex operations entailed by the collection of such data (on the basis of the right to portability as set out in Art. 20 of the GDPR), by means of specific functionalities of the Weople platform. Those functionalities allow the creation of "safe-deposit boxes" which represent both the main way to grant Hoda the power to exercise that right and the virtual place where the data are stored, as well as being the "reservoir" to allow Hoda itself to process the data acquired in the manner described above.

As far as data processing is concerned, Hoda represented that it differs substantially from that performed by other enrichment providers, since the final product of such processing are statistical algorithms generated from the pseudonymized data. The statistical patterns obtained in this manner are made available to corporate clients, who can apply them to their own databases to outline marketing strategies and campaigns. However, these statistical patterns are never applied to Weople users, who are said accordingly to take on the role of 'matrices' with respect to subsequent processing. Hoda further argues that the processes described in this way cannot even be considered as profiling, since they entail no assessment of a natural person's characteristics.

Hoda therefore pointed out that it did not start an actual profiling activity, since the one also mentioned in the privacy policy, consisting in the analysis and evaluation of the habits and consumption choices of Weople users and in the consequent offer of products and services in line with these interests, has not yet been undertaken due to the low number of users registered on the Weople platform.

Lastly, Hoda argued that the activity of ‘enhancement’ of users' personal data differs from 'monetization', since the latter is allegedly focused on the acquisition and also the reselling of large quantities of data to other entities; conversely, the purposes sought by the Company are allegedly intended to facilitate the re-appropriation of data by the data subjects and to consistently develop the exercise of the right to portability through the creation of open-source IT interfaces that can foster the free circulation of personal data, in line with the principles underpinning the GDPR.

As to the specific notified infringements, Hoda submitted the following:

- With reference to the alleged infringement under point (a), Hoda premised that Article 6(1)(*b)* of the GDPR (relating to the contractual legal basis for processing) is intended to support the freedom to conduct a business guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union and thus to allow the proper performance of contractual obligations through the provision and processing of personal data where such processing is '*an integral part of the provision of the service requested*' and as such it is carried out in the interest of all contractual parties. The assessment as to the necessity of the processing must be conducted on a case-by-case basis, taking into account the specific purpose, aims and objectives of the service.

  In the case of the contract concluded between Hoda and Weople users, it includes a main service, consisting of the personal data investment functionality, as well as additional ancillary services. In the document 'Terms and Conditions' as made available to users, Hoda specified 'Logic and

operation of personal data' under Article 4. In particular, it clarified that the service '*allows you to reap an economic benefit from the controlled and secure use of your personal data*' and described the stages and operations of the enhancement mechanism, consisting of the provision of data through safe deposit boxes, the processing of the deposited personal data through analysis tools and profiling algorithms, and the provision of services to corporate clients in order to obtain the consideration to be returned to the user. In the statement it is said that '*the contract for access to the Weople service [...] is predicated upon the enhancement of the personal data deposited in the safe-deposit boxes in order to redistribute the proceeds from the Investment Activity to the user'*.

According to Hoda, therefore, it can be easily appreciated that the rationale of the Weople service is precisely that of a contract for data analysis and profiling. Profiling, being the only means that allows users' data to be assigned a value, is therefore '*intrinsically necessary*' for contractual performance and for obtaining of the economic benefit sought by users.

With regard to the failure to refer, in the privacy policy, to the necessity of providing the data, the obligation, if any, on the user to provide them, and the possible consequences of not providing them (which information is required if communication of the data is envisaged as a contractual obligation), Hoda represents that providing the data is optional, however "*without providing the data, the profiling mechanism that is the object of the contract is not activated*" and that, to date, no Weople user has challenged the contract before any judicial authority or lodged any complaint – which is said to "*indirectly confirm that the processing outlined is clear and corresponds to the instructions garnered from the Weoplers following registration to the service*".

With regard to the alleged infringement concerning the possible use of special category data under Article 9 of the GDPR, Hoda reiterated that the Company has no interest in processing special category data or data relating to criminal convictions and offences under Article 10 of the GDPR. Therefore, should such additional data be acquired "*in accordance with the user's wishes*", Hoda would provide for their automatic deletion following non-importation into its database. In this regard, the Company set specific fields on the platform to import users' personal data, which is why excess data are bound to be cancelled – in that they have no target field;

- With reference to the alleged infringement under subheading b), the Company first described the LifeKosmos service by representing that it '*is a separate service from Weople*' and it is activated by signing a specific contract.

  By signing the contract, the user undertakes to participate regularly in the surveys administered to him/her and to activate a Weople account within 5 days in order to start using the safe deposit boxes relating to the digital accounts as previously declared when completing the questionnaires. The contract also provides for the LifeKosmos user to be equipped with a "Meter" to detect radio and/or television broadcasts listened to during the day. For each questionnaire answered by the user, the user receives a virtual score, which is converted into rewards according to a special catalogue.

  According to Hoda, therefore, the LifeKosmos user activation contract is not a mere *addendum* to the Weople contract; it is actually a separate contract the user can activate in order to accumulate points to be converted into rewards by providing information that can be used to enrich the database covered by the Weople services. This information, however, is not pooled into Weople since it is used as a separate basis for statistical analysis, or as an element of stabilization of the data that are extrapolated from Weople and intended to feed a database shared by the Weople and LifeKosmos services, called Wekosmos, which feeds the DOTCONN Engine in turn;

- with reference to the alleged infringement under section c), Hoda points out that the Italian legal system allows performing legal acts through a representative (Section 1387 et seq. of the Italian Civil Code) and this must be considered to be also applicable, in the absence of legal provisions prohibiting

it, to the exercise of the rights under Articles 15-22 of the GDPR. This is in pursuance of the principle of freedom, which is inherent in every democratic state and is set out in Article 23 of the Italian Constitution, as well as being in line with an approach promoting the full exercise of individual freedoms as per the Latin brocardo (maxim) "*ubi lex voluit dixit, ubi noluit tacuit*" (i.e., where the law required it, it mentioned it; where it did not require it, it kept silent). The delegation for the exercise of rights must not, therefore, be considered as granting of powers, which would be subject to formal and substantive constraints; rather, it should be possible to exercise such delegation freely and fully within the remit in whose respect it was conferred, which is specified and circumscribed in the case at hand, and it may be reiterated according to the needs connected with execution of the contract.

With regard to the formation and signing of the instrument of delegation, Hoda considers it fully legitimate that it may be formed through conclusive conduct, or as it defines it, "*the effect of a positive action*" that the user freely puts in place in accordance with what is specified (and accepted) in the "Terms and Conditions" document.

Furthermore, according to Hoda, the set of information and elements the user uses to identify him/herself in Weople's systems must be considered for all intents and purposes as a digital signature, which is therefore suitable for the finalisation of the delegation instrument.

The same considerations apply to the power to delegate withdrawal of the consent given by a data subject to the initial data controller, since this act of withdrawal must be included among the rights of the data subjects, even if it is provided for and placed in a different section of the GDPR. Moreover, '*the fact that the data protection framework does not expressly provide for the possibility of giving (and withdrawing) one's consent to processing by way of an agent delegated for that purpose does not mean that it is prohibited*'. Hoda also draws attention to the 'draft recommendation' drawn up by the French DP authority (CNIL) on the exercise of rights, which was submitted for public consultation and also contains a reference to the right to withdraw consent. On the basis of these elements, Hoda considers that the processing related to the delegation to withdraw consent is legally sound and is therefore fully legitimate;

- with reference to the alleged infringement under point d), there is no breach of Article 8 of the GDPR in the case of processing operations involving children, since that provision applies only to processing operations whose legal basis is consent (Article 6(1)(a) of the GDPR), which is not the case here. The legal basis identified in the present case is in fact the contractual one provided for by Article 6(1)(b) of the GDPR and in this regard the Company argues that contracts entered into by children must be considered valid until the finalisation of any action for annulment precisely on the basis of Sections 2 and 1425 of the Civil Code as referred to in the notification; therefore, the contractual legal basis set out in the privacy policy must be considered legitimate until that time;
- with reference to the alleged infringement under point e), Hoda rejects the considerations set out in the notification of commencement of administrative proceeding whereby the requirements of simplicity and clarity are not met in the privacy policy provided pursuant to Article 13 of the GDPR; it points out that any user accessing the Weople website is guided through the services by a series of explanatory pages, with very clear language and images and detailed video-tutorials. It is also clear from using the Weople platform that the latter has been designed having the user in mind, to whom the privacy policy and "Terms and Conditions" documents in summary and extended format are submitted prior to registration. Once registration has been completed, the user is provided with information regarding the upload of his or her identity document, how to acquire/submit his or her data, delegation, the right to withdraw consent, and the different methods of remuneration.

  Hoda argues that "*the privacy policy document contains all the elements required by Article 13 of the*

GDPR; moreover, the statement that a privacy policy in which recourse is made to cross-referencing is bound to be not straightforward and unclear needs being substantiated", since simplicity and clarity pertain to the language used.

In any case, Hoda, '*always with a view to maximum transparency in communication, has decided to take a step further* [...] *and provide a new document in which the wording is accompanied by a series of easy-to-understand icons*'.

With regard to the description of the logic used for profiling activities and the consequences for the data subjects, Hoda recalls that it has provided detailed information in point 4 of the 'terms and conditions' document, in which the modalities of profile creation, the categories of data that are used, the purpose and the effects are described, with an explanatory example. In addition, Article 7 of the 'terms and conditions' document specifies that the data contained in the safe-deposit boxes are processed for profiling purposes through variables, multivariate statistical technical characterizations, and artificial intelligence algorithms that allow the value of the deposited personal data to be enhanced. In addition, the Company pointed out that the provision of meaningful information on the logic used does not involve the disclosure of the complete algorithm or the drafting of complex explanations, but rather indications that are sufficiently complete for the data subject to understand the reasons underlying the decision.

2.2 The facts and the law

Assessment of the arguments put forward by the controller

As mentioned above, it was found during the investigation that Hoda offered its customers an 'investment service' involving their personal data.

In particular, the company collected the personal data of its customers both directly and through the exercise of the right to portability on behalf of its customers based on a wide-ranging delegation of powers granted by those customers. In essence, Hoda requested several controllers on behalf of its customers to transmit all the personal data such controllers held regarding those customers to itself.

Once such personal data had been collected, the company used proprietary algorithms to develop consumption profiles of the data subjects, which it used to convey advertisements from third-party companies, as well as - completely anonymous - algorithmic patterns which it sold to third parties.

Hoda then distributed a percentage of the revenues obtained in this manner to its customers.

All the activities and processing of personal data carried out by the company as addressed in the present proceedings can therefore be traced back to a single contractual agreement whereby Hoda collected personal data - including special category personal data - of its users from different sources and in different ways for the purpose of 'enhancing' their value, i.e., investing them in the advertising market, by means of different solutions, and paying 'interest income' to the data subjects.

As to the alleged infringements under (a) and (b).

By way of the notification of the alleged infringements under (a) and (b), the Office first of all raised to Hoda that the legal basis of contractual performance (Article 6(1)(b) of the GDPR) was inadequate for the purpose of carrying out the processing of personal data in the context of the 'Weople safe-deposit-boxes' main service and the 'Life-Kosmos' ancillary service.

In relation to both services, the Office moreover notified Hoda of having carried out the processing in breach of the principles set out in Article 5 of the GDPR and, in particular, the principles of

minimization, proportionality, privacy by design and by default.

Finally, the Office charged Hoda, under (a), with having processed special categories of personal data still by relying on contractual performance as the relevant legal basis.

The first two alleged infringements, under (a) and (b), can be addressed jointly. Indeed, both services - the one called 'safe-deposit boxes' and the one called Life-Kosmos - provided by the company to its customers have as their object Hoda's undertaking to process personal data as directly received from the data subjects and collected, on their behalf, from third-party data controllers in order to exploit them commercially in different manners, whilst affording users an unspecified economic return to be calculated as a percentage of the revenue earned by the company exactly through the commercial exploitation of personal data.

As mentioned above, such processing is alleged by Hoda to be underpinned by Article 6(1)(b) of the GDPR, according to which the processing of personal data is lawful if it is necessary for the performance of a contract to which the data subject is a party. Therefore, according to this rationale, two distinct elements (the contract and the data processing) are closely linked by a relationship of necessity such that the contract cannot be performed without processing the data.

This requirement of 'necessity for the performance of the contract' has been interpreted several times by the Article 29 Data Protection Working Party (WP 29), today's European Data Protection Board (EDPB). In particular, in the "Guidelines on automated decision-making relating to natural persons and profiling for the purposes of GDPR 2016/679" adopted on 3 October 2017 (amended version adopted on 6 February 2018) by WP 29 and in the Opinion rendered by the WP on 9 April 2014 on the legal basis for processing, it is reiterated that the provision concerning the contractual legal basis "*must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller. Also the fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance*.' Again with reference to Article 6(1)(b) of the GDPR it is noted that "*the processing must be necessary for the performance of the contract to which the data subject is a party. This may include, for example, processing the address of the data subject so that goods purchased online can be delivered, or processing credit card details in order to effect payment. In the employment context this ground may allow, for example, processing salary information and bank account details so that salaries could be paid*."

On the basis of the guidance provided by WP 29, as well as of the rationale of the relevant legislation, it appears that the requirement of 'necessity for the performance of the contract' must be understood in respect of the processing of personal data as instrumental in nature rather than as an item of negotiation. The emphasis is actually on data processing that is indispensable precisely for the performance of the contract concluded between the controller and the data subject. Thus, the requirement of 'necessity for the performance of the contract' does not apply to the processing of personal data that is made specifically necessary by controller as the object or cause of the contract. Otherwise, one would end up mistakenly considering the contract to be an appropriate legal basis whenever a controller, following its own unilateral assessment, sets the processing of personal data as the necessary object of a contractual agreement. Indeed, Article 6(1)(b) of the GDPR was not designed to include also those situations where the processing of personal data is itself the object of the contract. Rather, as set out in EDPB Guidelines 2/2019 with regard to the contractual legal basis**,** this provision is intended to cover those situations where personal data are necessary for the fulfilment of a contractual obligation other than the

processing of personal data - as is the case, for example, typically with the processing of a customer's address in order to fulfil the contractual obligation to deliver a purchased good.

In the case at issue, the processing (in particular, that relating to the acquisition of data for the purpose of profiling and enrichment) is necessary because it is set out by the company as one of the services covered by the contract with a view to the expected gain in exchange for the data subject's authorization to process his/her personal data. From this perspective, Article 6(1)(b) of the GDPR cannot constitute a valid legal basis for the processing of personal data, contrary to what was argued by Hoda, since the processing of personal data would not be instrumental to the performance of a contract having a different object, being itself the object of the contract as explained in the foregoing paragraphs.

In order for the legal basis provided for in Article 6(1)(b) GDPR to be lawfully relied upon, validity of the contract must be demonstrated along with the objective necessity of the processing for the performance of the contract at issue. Indeed, as set out by the EDPB in the aforementioned Guidelines 2/2019, "*A controller can rely on the first option of Article 6(1)(b) to process personal data when it can, in line with its accountability obligations under Article 5(2), establish both that the processing takes place in the context of a valid contract with the data subject and that processing is necessary in order that the particular contract with the data subject can be performed. Where controllers cannot demonstrate that (a) a contract exists, (b) the contract is valid pursuant to applicable national contract laws, and (c) that the processing is objectively necessary for the performance of the contract, the controller should consider another legal basis for processing*." In this sense, *"contracts and contractual terms must comply with the requirements of contract laws and, as the case may be for consumer contracts, consumer protection laws in order for processing based on those terms to be considered fair and lawful"*.

Whilst the finding of the unsuitability of the contract as a legal basis on account of non-compliance with the requirement of necessity would make it unnecessary for this Authority to establish the possible invalidity of such contract, it is however worth noting in the present case that the indefinite duration of the contract, the vagueness of the forms of exploitation covered by the contract - and therefore of the modalities of processing - as for the users' personal data, the Company's right to unilaterally modify contractual contents as well as the substantially blanket nature of the delegation Hoda requests from its users for the exercise of rights, a delegation that is linked in a contractual way to the contract itself - as will be clarified further on - are elements that raise serious doubts as to the validity of the contract drafted by Hoda and, as a consequence, as to its compliance with civil and consumer law.

In this context and, in particular, when the processing is not 'necessary for the performance of a contract', a different legal basis may be applicable. In particular, consent is considered more appropriate for that purpose within the meaning of Articles 6(1)(a) and 9(2)(a) of the GDPR, provided that its essential requirements are met. Indeed, where the applicable legal basis is consent, the controller must ensure that it is specific, unambiguous, based on adequate information ('informed'), 'freely given' and always revocable without prejudice to the data subject.

In identifying whether consent can be considered as freely given, special consideration must be given to the concept of 'vulnerability of the individual'. More precisely, as set out in the WP 29 Guidelines on Data Protection Impact Assessment of 4 April 2017 (version amended and adopted on 4 October 2017) - vulnerability is a general and evolving concept and can be found where an imbalance can be identified in the relationship between the position of the data subject and that of the controller (by way

of example, in the cases of employees or patients). Moreover, data subjects may also belong to a population cohort that, by definition, is more vulnerable, as is the case with ethnic, religious or linguistic minorities or, as will be analyzed in detail below, children. Vulnerabilities in data subjects can entail different levels of awareness and capacity to make decisions, resulting in greater risks to their fundamental rights and freedoms. Vulnerability also decreases decision-making capacity in terms of awareness of the possible impact of personal data processing (and of how to mitigate this impact by exercising one's rights as a data subject).

Moreover, a model in which data subjects may obtain remuneration and, in return, the controller or its partners may process their personal data entails, in particular, the risk that only individuals with substantial economic resources may choose to reject such processing. Conversely, the vulnerability of some individuals may induce them to provide their personal data for financial gain, thereby altering the free nature of consent. Therefore, for processing to be lawful, it must not be designed in such a way as to exploit the needs or vulnerabilities of data subjects; consequently, the impact assessment carried out pursuant to Article 35 of the GDPR must contain, among other things, a specific analysis to that effect as well as the relevant risk mitigation measures to protect the rights and freedoms of those data subjects.

The Office, as mentioned above, also notified Hoda, under (a), of having processed special categories of data by relying on contractual performance as the relevant legal basis.

Once again, with regard to this alleged infringement, contract does not constitute a suitable legal basis for the processing of personal data in the case at hand. It is undisputed that Hoda collects, stores - at least until their precise classification as special category data - and, therefore, processes special categories of personal data on the basis of a contract, which is clearly in breach of Article 9 GDPR. As is well known, Article 9 GDPR does not envisage, unlike other conditions of lawfulness, a contract as a possible legal basis for the processing of special category data; therefore, the relevant processing carried out by the company is unlawful, and the considerations put forward by the latter in relation, essentially, to the unintentional nature of such processing and to the difficulty of eliminating that category of data also on account of third parties' obstructive conduct are not sufficient to override this conclusion.

In its statement of defence, Hoda outlines a more articulated reconstruction of the contractual situation underpinning its commercial activity, whereby the object of its contracts is said to include a service for the investment or exploitation (enhancement) of users' personal data (Weople) and a service offering a survey and monitoring activity of users' 'media diet' (LifeKosmos). The reconstruction submitted by Hoda appears to be essentially coincident with the one set out by the Office in the commencement of proceedings instrument albeit from a different perspective, given the narrow, almost imperceptible, gap between setting - as the object of the given contract - a service for the exploitation of personal data or for the survey and monitoring of consumption habits concerning audiovisual contents and, on the other hand, directly the processing of personal data. Even if one were to follow the approach proposed by Hoda, therefore, the legal basis under Article 6(1)(b) of the GDPR does not appear appropriate.

In relation to the aforementioned LifeKosmos ancillary contract, it does not seem possible to accept Hoda's submissions - not even in the abstract. Indeed, the object of the contract in this case, however it may be described, consists in the supply of personal data by the data subject to Hoda in return for

financial consideration; therefore, the arguments already made as to the inapplicability of the legal basis under Article 6(1)(b) of the GDPR apply.

For the reasons set out above, the findings of alleged infringements notified by the Office to the Company under (a) and (b) as for the violation of Article 6(1)(b) of the GDPR are therefore found to be substantiated and to also take care of the alleged violation of Article 5 of the GDPR. In the absence of a suitable legal basis for the processing of personal data carried out by the controller, this Authority considers it appropriate not to dwell on the assessment of the limits and methods the controller ought to have implemented in a series of processing operations which were in any event unlawful.

As to the alleged violation under (c).

Based on the preliminary investigation carried out by the Office, it has been ascertained that Hoda has devised a delegation mechanism in order to forward portability requests on behalf of data subjects directly to the original data controllers (i.e., to major retail companies, e-commerce companies and social media that hold the data subjects' information by reason of their membership of a loyalty program or a social network, or of the purchase of goods or services). This is allegedly intended to facilitate the exercise of rights by Weople users, in particular the right to data portability under Article 20 GDPR.

With reference to the delegation concerning the exercise of data subject rights and, in particular, the right to portability, this Authority pointed out in the commencement of administrative proceeding instrument that such delegation should at least meet the requirements of the actions that are intended to be performed on behalf of the data subject; accordingly, it should reflect the data subject's specific, unambiguous intention and lay down limitations regarding both the object and the timing of the delegated entity's activity .

Conversely, it has been found that the delegation Hoda acquires from its users is essentially based on the data subjects' conclusive conduct (namely, the activation of a 'safe deposit box' where the data acquired from the original data controller following the exercise of the right to portability are placed); nor does it refer to a single instance - or a pre-determined set of multiple instances - of exercising the rights vis-à-vis the original data controller, since it can be relied on by Hoda indefinitely and until 'revocation' on account of the requirements linked to the commercial exploitation of the data subject's personal data.

In the case in point, moreover, the requirement that the delegation for the exercise of the right to portability should take on the characteristics of the delegated activity (i.e., that it should be contained in a document referring to one or more specific activities in respect of a clearly defined subject-matter and providing that such activities may only be repeated if this repetition is expressly mentioned) is in itself, on account of the high-ranking rights to be protected, a minimum requirement both to afford data subjects the genuine, effective control over the processing of their personal data and to enable the original data controller to demonstrate the unambiguous intention harboured by the persons intending to exercise their rights.

With regard to the possibility to delegate withdrawal of consent, on the other hand, this Authority takes note of the arguments whereby this action falls allegedly within the scope of the rights under Articles 15-22 of the GDPR and may be delegated. Nonetheless, this Authority cannot but confirm the findings

set out in the notice of initiation of the administrative proceeding - namely, that the placement of the provision on the right to withdraw consent within the framework of Article 7 GDPR stems from a very clear systematic perspective, which is that of equating the features and effects of the manifestation of one's consent with those relating to non-consent. From this point of view, giving (or withdrawing) one's consent is a very personal act as well as being the instrument for guaranteeing implementation of the right to informational self-determination - Article 8 of the Charter of Fundamental Rights of the European Union turns it de facto into a statutory requirement. For all of the above reasons, giving one's consent cannot be downsized to the performance of an activity that can be delegated like any other, since this is liable to nullify the very essence of the right that consent is meant to safeguard. Placing withdrawal of consent under the umbrella of the exercise of data subject rights is not supported by the regulatory framework and would additionally deprive the data subject of the power to directly, possibly simply express their intention to terminate the processing forthwith, in the same manner as when their consent was initially acquired; in turn, this would result into an unjustified imbalance between provision and withdrawal of one's consent, to the detriment of the data subject.

Accordingly, it is considered that the investigation confirmed the violations found under (c).

As to the alleged violation under (d).

It was found, at the time of the Authority's inspection, that Hoda was processing personal data relating to 1,031 children.

It could also be ascertained regarding these 1,031 children that Hoda did not request, either from them or from those exercising parental authority, the consent referred to in Articles 6(1)(a) and 8 of the GDPR, whereas the legal basis of the processing of children's personal data was traced back to what is indicated in the information notice for all the other data subjects (i.e., performance of a contract for the purposes of exercising rights and for profiling; legitimate interest for the purposes of sending promotional messages and newsletters on the operation of Weople).

In the notice of initiation of proceedings, Hoda was accordingly also notified of having processed, in the absence of an appropriate legal basis, the personal data of underage users who were unable to conclude a contract with the company.

In addition to the unsuitability of the legal basis under Article 6(1)(b) of the GDPR that has been highlighted above, irrespective of the data subject's age, since the processing is not necessary for the performance of the contract, it should be noted that the GDPR (Recital 71) specifically excludes the lawfulness of profiling activities in respect of children. Indeed, as indicated in notice of initiation of proceedings, the legal basis of contractual performance is also incompatible with Sections 2 and 1425 of the Italian Civil Code as far as children are concerned. In this regard, the company's submissions whereby it is precisely Section 1425 of the Civil Code that underpins the legitimacy of such legal basis also for children, at least until voidance and annulment of the contract signed by them, are irrelevant.

In fact, pursuant to the civil law provisions just referred to, it must be ruled out that a child in our legal system has the required capacity to act in order to enter into a contract through which he transfers - albeit within the limits and under the conditions outlined in the foregoing paragraphs hereof - part of the exercise of a very personal and fundamental right with a view to a gainful benefit of which he or she is clearly not in a position to assess the appropriateness - as compared to the value of the portions of his or her personal identity that have been made available to the service provider. Indeed, as also recalled in the WP 29 Guidelines on Automated Individual Decision Making and Profiling adopted on 3

October 2017 (version amended and adopted on 6 February 2018), children may be particularly susceptible, especially in the online environment, and more easily influenced by the incentive of monetary consideration, which would undermine their ability to understand the underlying motivations and/or the consequences of the relevant processing of personal data.
In this regard, it must be observed, in response to the submissions put forward by Hoda in its brief, that Article 8(1) of the GDPR envisages the ability of a child (if aged above 14 years, under Italian law) to give consent to the processing of his or her personal data only in the limited context of the direct offer of information society services.

However, para. (3) of Article 8 provides that "*Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child*", precisely in order to avoid misunderstandings to the effect that the age of majority derogation set out para. 1 of that Article may also apply to the contractual legal basis. This accordingly emphasizes that the recognition of a limited capacity to act in giving one's consent for the processing of personal data does not alter what is set forth in national law concerning the capacity of a child to undertake obligations by entering into a contract.

Such capacity must be considered to be unquestionably excluded with reference to the Italian legal system given that the "*capacity to perform all acts for which a different age is not established*" is acquired upon turning 18 under Section 2 of the Italian Civil Code; moreover, Section 1425 of the latter envisages a specific consequence (voidability) if a contract is signed by a party that is "*legally incapable of entering into a contract*" such as a child.

The fact that the effects of a contract continue to be produced until such contract is found to be null and void by a court does not alter the general principle of the child's incapacity to enter into a contract; this entails, in the field of personal data protection, that contractual performance is not a suitable legal basis for any processing resulting from contracts that are entered into by children.

Indeed, *a contrario*, no age limitation might ever be imposed on the legal basis of contractual performance, since a judicial ruling on the possible annulment of the contract would have to be awaited in order to put an end to the specific processing - including with reference to infants.

This would render the provision in Article 8(1) GDPR substantially meaningless, since the limitations placed on a child's capability to consent to the processing of their personal data could easily be circumvented by resorting to the unlawful signing of a contract that would allow processing to be carried out for a period of time that would certainly be far from limited – i.e., processing would continue until the court's annulment of the given contract.

Accordingly, this Authority finds that there was a breach of Articles 5 and 8 of the GDPR in the present case.

As to the alleged infringement under (e)

Having read the statement of defence, one must acknowledge that the effort made by Hoda to illustrate the multiple processing operations envisaged by joining the Weople service, not only through the text of the information notice but also through the use of IT techniques, provides a set of cognitive elements capable of sufficiently guiding the data subject. This was also noted during the inspection, when the Company responded to the Authority's requests for information by providing explanatory documents of considerable clarity. Precisely in line with this approach, this Authority would suggest that the Company provide for a more effective tools in order to make Articles 2, 3 and 4 of the information

notice more comprehensible. All of the above, of course, is without prejudice to the assessment made by the Garante as to the unlawfulness of the basic choices underlying the breaches notified under heads a), b), c) and d).

Accordingly, this Authority finds that there is no infringement as notified under (e) and terminates the relevant proceeding.

3. CONCLUSIONS

In view of the foregoing considerations, this Authority finds that Hoda is liable for the infringements of:

a) Articles 6(1)(b), 9 and 20 of the GDPR, for having carried out processing operations related to the acquisition of data through portability (including the special categories of data referred to in Article 9), as well as processing aimed at the profiling of Weople users, in the absence of a suitable legal basis;

b) Article 6(1)(b) of the GDPR, for having carried out processing for the purpose of profiling LifeKosmos users, in the absence of a suitable legal basis;

c) Articles 5 and 6(1)(b) and 20 of the GDPR, for having processed data for the purpose of forwarding users' requests to exercise their rights and declarations of withdrawal of consent, without being entitled to carry out such activities in the name and on behalf of those users;

d) Articles 5 and 8 of the GDPR, for having processed personal data relating to children in the absence of a suitable legal basis.

Having also ascertained the unlawfulness of the Company's conduct with regard to the processing operations at issue, this Authority finds it necessary to impose, pursuant to Article 58(2)(f) GDPR, the prohibition on Hoda to carry out any further processing of the data acquired by virtue of the contracts and delegation instruments that are the subject of this decision, in the manner and in the form set out in the preamble.

The Authority is aware of the complexity of the issues at hand and welcomes the fully cooperative conduct held by the Company throughout the proceeding, which also mirrors the Company's good faith in the conception and management of its business initiative. For these reasons, this Authority finds that it can dispense with the imposition of an administrative fine and that addressing a reprimand to Hoda, pursuant to Article 58, paragraph 2, letter b) GDPR, is sufficient in relation to the infringements mentioned above, so that any future processing is brought fully into compliance with the above requirements.

BASED ON THE FOREGOING PREMISES, THE GARANTE

a) imposes on Hoda, pursuant to Article 58(2)(f) GDPR, a ban on any further processing of data acquired through the contracts and the delegation instruments considered in this decision, in the manner and form set out in the preamble hereof;

b) issues a reprimand to Hoda, pursuant to Article 58(2)(b) GDPR, by having regard to the above-mentioned infringements;

c) orders Hoda, pursuant to Section 157 of the Code, to inform this Authority of any steps taken in order to implement the ban in question; any failure to comply with the measure set out herein may result in the imposition of the administrative fine provided for by Article 83, paragraph 5, of the GDPR.

Pursuant to Section 152 of the Code and Section 10 of Legislative Decree no. 150/2011, this decision may be challenged before the judicial authority by lodging an appeal with the court of the place where the controller has its registered office within thirty days from the date of communication hereof.

Rome, 14 November 2024

THE PRESIDENT

THE RAPPORTEUR

THE SECRETARY-GENERAL