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Injunction order against Mapei S.p.A. - July 2, 2020

Register of measures

no. 115 of 2 July 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Giovanna Bianchi Clerici and Prof. Licia Califano, members, and Dr. Giuseppe Busia, general secretary;

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 Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to regulation (EU) 2016/679 (legislative decree 30 June 2003, n. 196, as amended by legislative decree 10 August 2018, n. 101, hereinafter "Code");

HAVING REGARD to the "Guidelines for e-mail and the Internet", adopted with provision no. 13 of 1 March 2007 (published in the Official Journal of 10 March 2007, n. 58);

HAVING REGARD to the complaint presented to the Guarantor pursuant to article 77 of Regulation da XX concerning the processing of personal data relating to the interested party carried out by Mapei S.p.A.;

HAVING EXAMINED 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 Dr. Antonello Soro;

WHEREAS

1. The complaint against the company and the preliminary investigation.

1.1. With a complaint dated 3 August 2018, Mr. XX (represented and defended by lawyers XX and XX) complained of alleged violations of the Regulation by Mapei S.p.A. (hereinafter, the company), with particular reference to the failure to respond to the request for access to the content of the communications received on the individualized type e-mail account (XX), kept active and functioning even after the interruption of the employment relationship (occurred on 07.31.2017), as well as the

request to obtain the cancellation of the account itself, a request formulated in a specific formal notice sent to the company with communication dated 06.04.2018 repeated on 07.27.2018, to which the company would not provided no feedback. In particular, the complainant complains that he learned that the aforesaid account was still active and the messages received there were read and verified by the company, only after carrying out a specific test (on 21.2.2018) and after sending a communication (on 27.2 .20218) on the complained account using a third party account. It was also complained that the company would have activated "an e-mail box [...], called "mapeicopy", kept hidden from employees [...] but available to the General Management and related secretariat [...] which collects [...] the entire […] incoming and outgoing correspondence". With the request, the Guarantor was therefore asked to declare the illegality of the treatments carried out in violation of the Regulation as well as to order the company to cease the same treatments and to satisfy all the requests to exercise the rights that remained unsatisfied.

With reference to the alleged violation of certain penal provisions, it appears from the documents that a complaint has been filed with the competent judicial authority, with consequent application, in this respect, of art. 140-bis of the Code.

1.2. The company, in response to the request for elements (of 10.12.2018) formulated by the Office, with a note dated 11.29.2018 stated that:

to. at the time of termination of the employment relationship between the company and the complainant "it became necessary to entrust all the activities followed up to then [by the complainant]" to the hierarchical superior of the complainant himself, in his capacity as "head of the MAPEI UTT division" (note 29.11.2018, p. 2);

b. on 31.7.2017 (date of termination of the relationship) "the IT systems [of the company] started the activities of recovering the IT equipment and disabling the user with the only survival of the forwarding [...] of the incoming messages. That is, for [...] reasons of need to ensure business continuity in relation to the construction sites and projects that [the complainant] was following [...] we proceeded with the "forward" of the incoming messages in the XX e-mail box to the mailbox [...] of the hierarchical superior [...] with effect from 1.8.2017" (cited note, p. 4);

c. in order to "protect its business continuity using a tool of its property (email)" the company, in response to a message received (on 27.2.2018) on the account already assigned to the complainant "expressly specified that [the complainant] no longer worked" with the company (note cit., p. 5);

d. "following receipt of the formal notice [from the complainant] dated 4.6.2018, the mailbox [...] was definitively destroyed"

(note cit., p. 5);

And. "Complete copy" of the messages (238 in number) received "following an automatic «forward» from the e-mail box [referring to the complainant] was sent to the complainant's lawyers by PEC dated 27 November 2018 [...]. These are [...] messages [...] all connected to work activity: therefore, no personal data of the [complainant] has ever been known or acquired by the company" (note cit., p. 5);

f. the company "is codifying" an "operating practice currently already applied", which provides that "upon termination of the employment relationship, the accounts attributable to the employee are removed after deactivation, with the simultaneous activation of automatic systems aimed at informing third parties and providing addresses alternatives to be used for the continuation of professional relationships with the company" (note cit., p. 6);

g. "the «mapeicopy» mailbox does not exist to date and has not been used since 2016" (note cit., p. 9).

The company has also attached a copy of the document "Security and correct use of information systems" dated 20.2.2017 (cited note, Doc. 2).

1.3. With a reply note dated 23 April 2019, the complainant - in confirming his requests to the Authority - also complained that:

to. only on 11.27.2018 did the company provide a copy of the personal data object of the access request (submitted on 6.4.2018), however the response is partial "in the absence of transmission of paper correspondence, allegedly not received, and noting a conspicuous how inexplicable hole [...] in the electronic one" given that "between 13 March 2018 and 4 June 2018 (date of alleged deactivation of the email [...]) there was a total [...] absence of incoming communications" (cit note ., p. 5);

b. the company has not provided evidence as to whether the company regulation dated 02.20.2017 has been brought to the attention of the complainant and in any case "in no point of the company policy produced is there a provision that informs the employee of the "freedom" of the employer to keep the account active [...] once the employment relationship has ceased and to have indiscriminate access [...] to future incoming communications" (note cit., p. 6).

1.4. On 10 September 2019, the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification to the company of the alleged violations of the Regulation found, with reference to articles 5, par. 1, lit. a), c) and e), 12, 13 and 15 of the Regulation. With a note dated 10 October 2019, the company, represented and defended by the lawyer Luigi Neirotti, declared that:

to. at the time of termination of the employment relationship with the complainant, the company had to entrust all the activities

followed by the latter to his hierarchical superior, "this not only for the management of the current relationship but also to guarantee the availability of the company and in any case the maintenance of the contacts followed [by the complainant] in the interest of the company" (note 10.10.2019, p. 2);

b. the document "Security and correct use of IT systems - Procedure" adopted on 1 July 2012 and "last revised on 20.2.2017" was made known to the complainant and all employees, as well as being available on the company intranet (note cit., p. 3 and Annex 5, containing a dispatch note to all Mapei users dated 9.7.2017);

c. within the document referred to in the previous letter it was specified that "e-mail is the exclusive property of the company and is a work tool that must be used by workers exclusively for professional purposes in relation to the specific tasks assigned to them" ; moreover, the company clarified that "at any time, in response to a declared, motivated and documented need/request (e.g. guaranteeing business continuity, preventing and combating unlawful conduct or abuse), it reserves the right to access any mailbox electronic mail through the Company Information Systems" (note cit., p. 3);

d. consistently with these procedures, at the time of the termination of the employment relationship, precisely on 1 August 2017, the company "started the activities of recovering the IT equipment and disabling the user with the only survival of the forwarding of the messages in entrance" (note cit., p. 4).

1.5. At the hearing held on 3 December 2019, the company reiterated, under its own responsibility, that it had sent the complainant a certified email copy of all the correspondence received on the account subject to the complaint during the period in which forwarding was activated on the account of the complainant's former line manager. The company also stated that no correspondence addressed to the complainant was received by postal mail. It was also represented that the company acted in good faith, considering that the document "Security and correct use of IT systems - Procedure" of 2012 provided for the possibility of re-submitting the account in the event of the worker's prolonged absence. Lastly, the company represented that it had started the review of internal procedures as part of the application of the accountability process envisaged by the Regulation. In particular, starting from 2018, a "review of company practice" procedure was launched (completed on 24 September 2019) according to which individualized e-mail accounts, no longer in use, are immediately disabled upon termination of the relationship work".

2. The outcome of the investigation and of the procedure for the adoption of corrective and sanctioning measures.

As a result of the examination of the declarations made to the Authority during the proceeding as well as of the documentation

acquired, it appears that the company, as owner, has carried out some operations of processing of personal data referring to the complainant which are not compliant with the regulations in matter of personal data protection.

With reference to the alleged non-existence of processing of the complainant's personal data carried out during the management of messages contained in the individualized e-mail account assigned during the employment relationship, it should be noted first of all that, in accordance with the constant orientation of the European Court of Human Rights man, the protection of private life also extends to the workplace, considering that it is precisely during the performance of work and/or professional activities that relationships develop where the personality of the worker is expressed (see articles 2 and 41, paragraph 2, Cost). Also taking into account that the dividing line between the working/professional sphere and the strictly private sphere cannot always be drawn clearly, the Court considers art. 8 of the European Convention on Human Rights aimed at protecting private life without distinguishing between the private sphere and the professional sphere (see Niemietz v. Allemagne, 12.16.1992 (rec. n. 13710/88), spec. par. 29; Copland v. UK, 04.03.2007 (rec. n. 62617/00), spec. para. 41; Bărbulescu v. Romania [GC], 09.05.2017 (rec. n. 61496/08), spec. par. 70 -73; Antović and Mirković v. Montenegro, 11.28. 2017 (rec. n. 70838/13), specific par. 41-42). Therefore, the processing of data carried out using information technology in the context of the employment relationship must comply with respect for fundamental rights and freedoms as well as the dignity of the data subject, for the protection of workers and third parties (see Recommendation CM/Rec(2015) 5 of the Committee of Ministers to the Member States on the processing of personal data in the employment context, spec. point 3).]

2.1. Given that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code "False declarations to the Guarantor and interruption of the execution of the duties or exercise of the powers of the Guarantor", it emerged that the company, having received the request to exercise rights on 4.6.2018 (in relation to articles 15, 17 and 20 of the Regulation; see Annexes 4 and 5 of the complaint) and the reminder dated 27.7.2018 (see Annex 6 of the complaint), sent the complainant's lawyers on 7.8.2018 a note with the which [you] have been "fully contested [...] the claims and requests advanced", based on the "legitimate interest of managing orders and communications in transit in the company e-mail box, even after the termination of the employment relationship" (see Annexes 1, 1a and 1b, company note 29.11.2018). On 11.27.2018 (subsequent to the opening of the complaint procedure by this Authority with a note dated 10.12.2018) the company provided a response to the complainant (see Annex 4, company note 11.29.2018) by sending "file pdf containing the

complete e-mail correspondence received [on the account referring to the complainant] after 31 July 2017" and declaring that the personal data of the interested party had been "entirely canceled in accordance with the request of the same [...] of 1/ 4 June and 27 July 2018".

It therefore appears that the company has not provided a reply to the requests relating to the exercise of access and cancellation rights advanced by the complainant (nor has it communicated the deemed existence of a hypothesis of limitation of the rights of the interested party, in the terms provided for by art. 2-undecies of the Code) only after receipt of the invitation to provide feedback from the Authority. This occurred in violation of art. 15 of the Regulations, in force at the time of presentation of the access request. It is also violated the art. 12 of the same Regulation, also with reference to the late response to the cancellation request presented pursuant to art. 17 of the same (cancellation which, according to what was declared, would have taken place after the presentation of the notice by the interested party, but before the presentation of the complaint to the Guarantor).

2.2. Furthermore, according to what has been declared, the company has kept the complainant's e-mail account active since the termination of the employment relationship − on 07/31/2017 −, with automatic redirection of all incoming messages to the assigned account to the complainant's former hierarchical superior starting from 1.8.2017 (therefore for a significant period of time, just over 10 months) until the cancellation which took place following the submission of a notice by the interested party on 4.6.2018. This processing continued beyond the date of application of the Regulation (May 15, 2018)

In this regard, it does not appear that the complainant had been informed in advance of the possibility of the treatment - allegedly intended to ensure continuity of the company activity - carried out by the company after the termination of the employment relationship. In fact, the document "Security and correct use of IT systems - Procedure", dated 20.2.2017 (see Annex 2, company note 11.29.2018), although it clarifies that e-mail is a "corporate communication tool" to be used exclusively for professional purposes, does not contain, contrary to what is claimed by the company, any reference to the possibility that the same will keep the accounts active after the termination of the relationship with automatic redirection to a different e-mail address. On the other hand, the only and different possibility is envisaged for the company to access, during the employment relationship, the mailboxes for specific, justified and documented business needs, as well as to temporarily enable automatic forwarding to another mailbox of mail in the event of prolonged absence of the user receiving the message, without indicating the relative modalities (see "Security and correct use of information systems - Procedure", point 4.4.). However, these

procedures differ from the indications provided to employers in the "Guarantor's Guidelines for e-mail and Internet" aimed at reconciling the legitimate needs of orderly performance of work activities with the prevention of possible intrusions into the personal sphere of workers, as well as violations of the regulation on the possible secrecy of correspondence (Provision 1.3.2007, in Official Gazette no. 58 of 10.3.2007, spec. point 5.2, letter b),

This is in contrast with the provisions of art. 13 of Legislative Decree lgs. 30.6.2003, no. 196 of the Code (text in force at the time of the start of the treatment), on the basis of which the owner is required to provide the interested party - before the start of the treatments - with all the information relating to the essential characteristics of the treatment. In the context of the employment relationship, the obligation to inform the employee is also an expression of the general principle of correctness (see Article 11, paragraph 1, letter a) of the Code, the text in force at the material time; considering that the treatment continued until 4 June 2018, see also, articles 5, par. 1, lit. a) and 13 of the Regulation).

2.3. Finally, it emerged that during the period during which the account remained active after the termination of the employment relationship, the company, by forwarding it to a different company account, had access to the 238 messages sent to the e-mail box individualized referring to the complainant. This treatment method has allowed the company to view the incoming electronic correspondence (unrelated or not to the work activity) to the individualized mailbox referring to the complainant and coming from subjects inside and outside the workplace. In this way, the company has become aware of some personal information relating to the interested party and concerning not only the so-called data of the aforementioned communications and any attached files, but also the content of the same (see, most recently, provision 4.12.2019, n. 216, in www.garanteprivacy.it, web doc. n. 9215890). In particular, an examination of the communications received on the account referring to the complainant after the termination of the employment relationship (see Doc. 4-A, company note 10.10.2019) reveals the presence of some contents that do not pertain only to the professional activity carried out by the interested party at the company, but also to aspects of the complainant's personal sphere (notifications relating to the LinkedIn account, advertising messages relating to services unrelated to the work activity) with respect to which the interested party and the third parties involved (the whose rights must be equally protected) could have claimed legitimate expectations of confidentiality. As noted in the "Guarantor's guidelines for e-mail and the Internet", these protection requirements must be taken into consideration by the employer even in the event that the employment relationship between the parties ceases (see Provision cit ., specifically point 5.2, letter b and, most recently, the aforementioned provision of 4.12.2019 and other provisions referred

to therein). To this end, the employer, in compliance with the principles regarding the protection of personal data and the indications contained in the aforementioned Guidelines, should instead have adopted technological and organizational measures aimed at allowing the legitimate interest of the owner to access the information necessary for the efficient management of one's business and to guarantee its continuity with the expectation of confidentiality of correspondence by workers and third parties. In particular, in line with the aforementioned Guidelines, after the termination of the employment relationship, the company should have removed the employee's account after deactivating it and at the same time adopting automatic systems aimed at informing third parties and providing to the latter alternative addresses referring to his professional activity. Procedure which, however, on the basis of the declarations in the documents, the same company has adopted since September 2019, following the review of the internal policies, "as part of the application of the accountability process envisaged by the Regulation" as proof of the possible different balance of the aforementioned interests.

The treatment carried out by the company therefore violated the principles of necessity, lawfulness and proportionality (see articles 3 and 11, paragraph 1, letters a) d) and e) of the Code, the text in force at the time in which the treatment was started; Considering that the treatment continued until 4 June 2018 see also art. 5, par. 1, lit. a), c) and e) of the Regulation).

3. Conclusions: illegality of the treatment. Corrective measures pursuant to art. 58, par. 2, Regulation.

For the aforementioned reasons, the processing of personal data referring to the complainant carried out by the company through the failure to reply to the requests to exercise the rights within the terms established by the law, as well as through the prolonged activity of the individualized e-mail account after the termination of the employment relationship and consequent access to the messages received there (until the interested party gives warning and in any case for more than ten months), without this practice having been made explicit in the document dedicated to the policies regarding the use of the company's IT systems, it is illegal , in the terms set out above, in relation to the articles 5, par. 1, lit. a), c) and e), 12, 13 and 15 of the Regulation.

It is noted that the company, during the proceeding, has provided the interested party with feedback on the access request and has also started a process of reviewing its internal policy with particular reference to the management of e-mail accounts after the termination of the employment relationship (see Corporate IT Operative Instructions for hiring, termination and relocation of employees, 24.9.2019, in Annex 7, company note 10.10.2019).

In order to bring the processing of personal data of employees into line with the provisions of the Regulation, the company

must also adopt measures aimed at providing data subjects with all the information and communications envisaged following the exercise of rights as well as facilitating the exercise of the rights on the part of the interested parties, in the terms established by art. 12 of the Regulation.

Therefore, given the corrective powers attributed by art. 58, par. 2 of the Regulation, in the light of the circumstances of the specific case:

- the company is ordered to comply with the provisions of art. 12 of the Regulation, its treatments, with particular reference to the obligation to adopt appropriate measures to provide feedback to the interested party, facilitating the exercise of the rights provided for by the articles. 15-22 of the Regulation;

- in addition to the corrective measure, a pecuniary administrative sanction is ordered pursuant to art. 83 of the Regulation, commensurate with the circumstances of the specific case (Article 58, paragraph 2, letter i) of the Regulation).

4. Injunction order.

Pursuant to art. 58, par. 2, lit. i) of the Regulation and of the art. 166, paragraphs 3 and 7 of the Code, the Guarantor orders the application of the pecuniary administrative sanction provided for by art. 83, par. 5, letter. a) of the Regulations, through the adoption of an injunction order (art. 18, l. 11.24.1981, n. 689), in relation to the processing of personal data referring to the complainant, the illegality of which has been ascertained, within the terms on exposed, in relation to the articles 5, par. 1, lit. a), c) and e), 12, 13, 15 of the Regulation, following the outcome of the procedure pursuant to art. 166, paragraph 5 carried out jointly with the data controller (see previous points 1.4. and 1.5).

Considering it necessary to apply paragraph 3 of the art. 83 of the Regulation where it provides that "If, in relation to the same treatment or related treatments, a data controller [...] violates, with willful misconduct or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction does not exceed amount specified for the most serious violation", considering that the ascertained violations of art. 5 of the Regulation are to be considered more serious, as they relate to the non-compliance with a plurality of principles of a general nature applicable to the processing of personal data, the total amount of the fine is calculated so as not to exceed the maximum prescribed for the aforementioned violation .

Consequently, the sanction provided for by art. 83, par. 5, letter. a) of the Regulations, which fixes 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.

With reference to the elements listed by art. 83, par. 2 of the Regulation for the purposes of applying the pecuniary

administrative sanction and the relative quantification, taking into account that the sanction must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), it is represented that In the present case, the following circumstances were considered:

a) in relation to the nature, gravity and duration of the violation, the nature of the violation which concerned the general principles of processing was considered relevant; the violations also concerned the provisions on the exercise of rights and information;

b) with reference to the intentional or negligent nature of the violation and the degree of responsibility of the owner, the negligent conduct of the company and the degree of responsibility of the same was taken into consideration which did not comply with the data protection regulations in relation to a plurality of provisions;

c) the company has fully and actively cooperated with the Authority during the proceeding;

d) the absence of specific precedents (relating to the same type of treatment) against the company.

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness with which the Authority must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), in firstly, the economic conditions of the offender, determined on the basis of the revenues earned by the company with reference to the financial statements for the year 2018. Lastly, account is taken of the statutory sanction established, in the previous regime, for the corresponding administrative offenses and of the amount of sanctions imposed in similar cases.

In the light of the elements indicated above and the assessments made, it is believed, in the present case, to apply against Mapei S.p.A. the administrative sanction of the payment of a sum equal to Euro 15,000.00 (fifteen thousand).

In this framework, it is also considered, in consideration of the type of violation ascertained, which concerned the electronic correspondence of a worker and lasted for over 10 months, as well as the lack of prior information and the adoption of organizational measures not compliant with the current legislation, which pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision must be published on the Guarantor's website.

It is also believed that the conditions pursuant to 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.

It is recalled that, pursuant to article 170 of the Code, anyone who fails to comply with this prohibition provision is punished

with imprisonment from three months to two years; in any case, the sanction referred to in art. can be applied in the administrative office. 83, par. 5, letter. e) of the Regulation.

ALL THAT BEING CONSIDERED, THE GUARANTOR

notes the illegality of the processing carried out by Mapei S.p.A. in the person of the pro-tempore legal representative, with registered office in Milan, Via Cafiero Carlo 22, Tax Code 01649960158, pursuant to articles 57, par. 1, lit. f) and 83 of the Regulation, as well as art. 166 of the Code, for the violation of the articles 5, par. 1, lit. a), c) and e), 12, 13 and 15 of the Regulation, as well as articles 3 and 11, paragraph 1, lett. a), d) and e) of the Code, in force at the time in which the processing began and now corresponding, in the current legislation, to art. 5, par. 1, lit. a), c) and e) cit. of the Regulation);

ENJOYS

pursuant to art. 58, par. 2, lit. d) of the Regulations to Mapei S.p.A. to conform their treatments to the provisions of art. 12 of the Regulation, with particular reference to the obligation to adopt appropriate measures to provide feedback to the interested party, facilitating the exercise of the rights provided for by the articles 15-22 of the Regulation, within 60 days of receipt of this provision (Article 58, paragraph 2, letter d) of the Regulation);

ORDER

pursuant to art. 58, par. 2, lit. i), of the Regulation, to Mapei S.p.A., to pay the sum of 15,000 (fifteen thousand) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

also to the same Company to pay the sum of Euro 15,000.00 (fifteen thousand), 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 art. 27 of the law no. 689/1981. It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph 8, of the Code);

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code, and of the art. 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, and believes that the conditions set forth in art. 17 of regulation no.

1/2019.

Ask Mapei S.p.A. to communicate which initiatives have been undertaken in order to implement the provisions of this provision and in any case to provide adequately documented feedback pursuant to art. 157 of the Code, within 90 days from the date of notification of this provision; any failure to reply may result in the application of the administrative sanction provided for by art. 83, par. 5, letter. e) of the Regulation.

Pursuant to art. 78 of the Regulation, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to the ordinary judicial authority may be lodged against this provision, with an appeal lodged with the ordinary court of the place identified in the same art. 10, within the term of thirty days from the date of communication of the measure itself, or sixty days if the appellant resides abroad.

Rome, July 2nd 2020

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

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