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Injunction order against I.N.M.I. Lazzaro Spallanzani - 25 October 2018

Register of measures

no. 475 of 25 October 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

NOTING that the Office of the Guarantor for the protection of personal data (hereinafter the Guarantor), with note no. 11026 of 12 April 2018, defined the administrative procedure relating to a complaint, ascertaining that the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S. Fiscal code: 05080991002, with headquarters in Rome, via Portuense n. 292, in the person of the legal representative pro-tempore, has disclosed online the personal data of the complainant contained in the object of the Resolutions of the Director General n. 754 of 7 January 2017 and n. 820 of 29 December 2017 visible on the institutional website www.inmi.it, beyond the 15-day period envisaged by art. 31 of the regional law of Lazio n. 45/1996 and, therefore, in the absence of a suitable regulatory prerequisite in violation of art. 19, paragraph 3 of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196 - hereinafter, the "Code");

CONSIDERING the report n. 17339/122745 of 7 June 2018 with which it was challenged by the Guarantor's Office to the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S., in the person of the pro-tempore legal representative, the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code, in relation to art. 19, paragraph 3, informing you of the right to make a reduced payment pursuant to art. 16 of the law n. 689/1981;

HAVING EXAMINED the report of the Guarantor's Office prepared pursuant to art. 17 of the law of 24 November 1981, n. 689, from which the reduced payment does not appear to have been made;

HAVING REGARD TO the written defense received on 17 July 2018 and sent pursuant to art. 18 of the law n. 689/1981, with which the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S. observed how "From the examination of the provision (protest report n. 17339/122745 of 7 June 2018) it is clear that it was issued at the conclusion of a proceeding initiated in the previous months (...) but still undertaken on 07/ 06/18, i.e. when the General Data Protection Regulation 2016/679 had already become fully effective.

The art. 83, paragraph 2, provides that - When deciding whether to impose a pecuniary administrative sanction and setting the amount of the same in each individual case, due account is taken of the following elements:….-.

It is clear that the wording of this provision is quite different from that of article 162, paragraph 2bis, of Legislative Decree 196/03(...).

The art. 83 mentioned above, in the same paragraph 2, continues by listing the factors that must be considered case by case by the Guarantor Authority to evaluate the processing activities and to weigh up the methods of execution by the owner, as well as to arrive at the final decision to impose whether or not a pecuniary administrative sanction, and if one is inclined towards the infliction, to quantify its entity.

Recital 148 of the Regulation, for its part, clarifies that - In the event of a minor violation (...) a warning could be issued instead of a fine -.

The guidelines concerning the application and provision of administrative fines for the purposes of regulation (EU) no. 2016/679 of the Working Group art. 29 for data protection, adopted on 3 October 2017 (…) on page 9 explain that - Recital 148 introduces the notion of "minor infringements". Such breaches may consist of the breach of one or more of the provisions of the Regulation listed in Article 83(4) or (5). However, the assessment of the criteria referred to in Article 83(2) may lead the supervisory authority to believe that in the concrete circumstances of the case the infringement, for example, does not create a significant risk for the rights of the data subjects in question and does not affect the essence of the obligation in question. In such cases, the sanction may (but not always) be replaced by a warning. Recital 148 (…) provides (…) a possibility, after the concrete assessment of all the circumstances of the case.

The Community legislator therefore puts the national Authority in a position not to impose a pecuniary administrative sanction at all if the existence of a minor violation is found in the specific case submitted to its scrutiny.

Well, in the case before us, each of the aforementioned assumptions mitigating the Institute's liability is present and effective", motivating the evaluation assumptions pursuant to art. 83, par. 2 of Regulation (EU) 2016/679;

HAVING REGARD TO the report of the hearing of the party drawn up on 18 September 2018, pursuant to art. 18 of the law n. 689/1981, in which the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S., in highlighting how "(...) the publication was promptly removed following the start of the investigation by the Guarantor (...)" and in reiterating what was argued in the defense brief, requested, "(...) by virtue of the recent entry into force of the new European Regulation on the protection of personal data, the imposition

of the same (pecuniary administrative sanction) in the form of a warning, as provided for by art. 58, paragraph 2 of the GDPR";

WHEREAS the arguments put forward do not make it possible to exclude the liability of I.N.M.I. Lazzaro Spallanzani I.R.C.C.S. in relation to the disputed. The Institute deems the regulatory system governed by Regulation (EU) 2016/679 to be erroneously applicable by virtue of the fact that the administrative violation complaint report that concerns us was "(...) still taken on 07/06/18 , i.e. when the General Data Protection Regulation 2016/679 (...) had already become fully effective". In reality, in order to determine the applicable rule, from a temporal point of view, the principle of legality pursuant to art. 1, paragraph 2 of the law n. 689/1981 which, in providing that "The laws that provide for administrative sanctions are applied only in the cases and within the times considered in them", asserts the recurrence of the principle of tempus regit actum. The application of these principles determines the obligation to take into consideration the law in force at the time of the violation committed. In the case that concerns us at this moment, given the permanent nature of the disputed offence, it must be identified at the moment of cessation of the unlawful conduct, or on the date of 14 March 2018, in which the complainant's data were removed from the institutional website www. inmi.it (as noted by the note from I.N.M.I. Lazzaro Spallanzani I.R.C.C.S. received by the Authority on 21 March 2018). Therefore, it is evident that, in the case in question, the discipline of Regulation (EU) 2016/679 which has applied since 25 May 2018 cannot be applied, but the separate rule provided for by the Code in force at the time when the the disputed conduct has ceased. This assumption brings with it the inconsistency of the further deductions articulated by the offender also with reference to what has been argued about the occurrence of the application conditions pursuant to art. 58, paragraph 2 of the GDPR;

NOTING, therefore, that the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S., has disclosed online personal data of the complainant contained in the object of the Resolutions of the Director General n. 754 of 7 January 2017 and n. 820 of 29 December 2017 visible on the institutional website www.inmi.it, beyond the 15-day period envisaged by art. 31 of the regional law of Lazio n. 45/1996 and, therefore, in the absence of a suitable regulatory prerequisite in violation of art. 19, paragraph 3 of the Code;

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those pursuant to art. 19, paragraph 3, of the same Code, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and twenty thousand euros;

CONSIDERING that, in the case in question, the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that if any of the violations referred to in art. 161, 162-ter, 163 and 164 is less serious, the minimum and maximum limits

established in the same articles are applied in an amount equal to two fifths;

WHEREAS, for the purpose of determining the amount of the fine, it is necessary to take into account, pursuant to art. 11 of the law of 24 November 1981 n. 689, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERED having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine for the violation of art. 162, paragraph 2 bis of the Code in conjunction with art. 164-bis, paragraph 1, in the amount of Euro 4,000.00 (four thousand);

HAVING REGARD to the law of 24 November 1981 n. 689, and subsequent modifications and additions;

HAVING REGARD to the documentation in the deeds;

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

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

at the I.N.M.I. Lazzaro Spallanzani I.R.C.C.S. Fiscal code: 05080991002, with headquarters in Rome, via Portuense n. 292, in the person of the pro-tempore legal representative, to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violation of art. 162, paragraph 2-bis, indicated in the justification;

ENJOYS

to the same subject to pay the sum of 4,000.00 (four thousand) euros according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 25 October 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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