

Injunction order against the Province of Benevento - 1 February 2018

Record of measures

n. 59 of 1 February 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

GIVEN the provision of the Guarantor n. 585 of 12 November 2015 adopted against the Province of Benevento (hereinafter referred to as "Province"), which must be understood as fully referred to herein, with which it was ascertained that on the institutional website of the aforementioned Province the "Provisional ranking for disabled and protected categories was published to the year 2012 "bearing in clear the identification data of the interested parties, as well as the tax code of the same, freely accessible and reachable through the main search engines on the web. The dissemination of data was thus ascertained from which it was possible to infer the state of illness or the existence of pathology of the subjects concerned, falling within the category of sensitive data (Article 4, paragraph 1, letter d) of Legislative Decree no. lg. June 30, 2003, n. 196, hereinafter referred to as the "Code"), in violation of art. 22 paragraph 8 of the Code, as well as the dissemination of information that is excessive and irrelevant to the purpose of the publication, in particular the tax code of the interested parties, in violation of art. 11, paragraph 1, lett. d) of the Code. Having ascertained, therefore, the unlawfulness of the processing of the aforementioned data, the Guarantor has ordered towards the Province:

- pursuant to art. 154 paragraph 1 letter. d) of the Code, the prohibition of further dissemination on the Internet of personal data suitable for revealing the state of health of the interested parties and of data exceeding and irrelevant to the pursued purpose contained in the aforementioned ranking and in other similar documents that may be present on the website of the Province;
- pursuant to art. 154 paragraph 1 letter. c) of the Code, to conform for the future the publication of deeds and documents on the Internet with the provisions contained in the Code and in the Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purposes of advertising and transparency on the web by public entities and other obliged entities (www.gpdp.it web doc. n. 3134436);
- pursuant to art. 157 of the Code, to notify the Guarantor of the measures adopted to comply with the prescriptions issued with

the provision itself within 20 days from the date of receipt of the same;

NOTING that the aforementioned provision was notified to the Province on 24 November 2015 by certified e-mail, as shown in the delivery notice that is filed with the Guarantor, and that the 20-day deadline for the adoption of the prescribed measures and for the consequent reply to the Guarantor he therefore expired on 14 December 2015;

GIVEN the note of the Public and Private Labor Unit of the Guarantor of January 27, 2016, which highlighted not only the non-response within the aforementioned term of 20 days by the data controller with regard to the measures adopted to comply with the requirements of the Guarantor, but also the permanence on the website of the Province of the personal data object of the provision, despite the prohibition adopted by the Guarantor;

GIVEN the report of the operations carried out on 3 February 2016 by the Inspection activities, sanctions and treatment register Department of the Guarantor, which ascertained the persistence of easy accessibility and accessibility, through the most common search engines, of the data relating to the mentioned provisional ranking (document prot. 3758 of 4 June 2013, available at <http://app1.provincia.benevento.it/art48/wp-content/uploads/2013/06/graduatoria-provvisoria-disabili.pdf>) , as well as data relating to the "Final ranking disabled and protected categories relating to the year 2012" (document prot. n. 4575 of 8 July 2013, available at <http://app1.provincia.benevento.it/art48/wp-content/uploads/2013/07/graduatoria-definitiva-disabili.pdf>). As proof of what was ascertained, the "print screens" of the screens resulting from the interrogations carried out by the Office were attached to the aforementioned report;

TAKING NOTE of the failure by the Province to adopt the measures prescribed by the Guarantor with provision no. 585/2015; NOTING that with deed no. 3299/101975 of 8 February 2016, which must be understood as fully reported here, the Office of the Guarantor challenged the Province of Benevento, in the person of the pro-tempore legal representative, with registered office in Benevento, Piazza Castello n. 1:

- pursuant to art. 162 paragraph 2-bis of the Code, the violation of the provisions indicated in art. 167 of the Code, with particular reference to art. 22 paragraph 8, in relation to the dissemination of sensitive data of the interested parties. From the documents in the file it emerged that this conduct was carried out by employees of the Province of Benevento in the exercise of their respective functions. Therefore, the data controller is to be identified in the Province itself, based on the combined provisions of Articles 4 paragraph 1 letter. f) and 28 of the Code;

- pursuant to art. 162 paragraph 2-ter of the Code, the violation of the provisions of art. 154 paragraph 1 letter. c) and d) of the

Code, in relation to non-compliance with the provision adopted by the Guarantor;

- pursuant to art. 164 of the Code, the violation of the provision of art. 157 of the Code, in relation to the failure to respond to a request for information from the Guarantor;

GIVEN the defense written by the Province of 8 February 2016, note prot. n. 3487 of 9 February 2016, with which he represented: 1) preliminarily, for the rankings relating to the year 2013 and subsequent ones, not to disclose personal data suitable for detecting the state of health of those interested in the rankings of the disabled and protected categories as per law 68/1999; 2) to have given "slavish execution" to the aforementioned provision of the Guarantor n. 585 of 12 November 2015, "in particular by complying with the prohibition of disclosure of such data pursuant to art. 154 paragraph 1 letter d) of the Code, as well as to conform the publication of deeds and documents according to the provisions of art. 154 paragraph 1 letter c) of the aforementioned Code, respecting in particular the prohibition of dissemination of data pursuant to art. 22 paragraph 8 and of data pursuant to art. 11 paragraph 1 letter d), as required by points 1 and 2 of the operative part of the aforementioned provision "; 3) that "in execution of the provisions of point 3 of the device of the provision in question, the Guarantor's office was notified of the measures adopted for compliance with the prescriptions issued with note prot. N. 0081422 of 11.12.2015, which is attached in copy ". In particular, in the note attached to the defense, it was communicated that "all suitable measures had been adopted to avoid the disclosure of personal data relating to the state of health of the interested parties and data in excess of and irrelevant to the purpose of the ranking of disabled people and protected categories pursuant to law 68/1999, having to comply pursuant to art. 154 paragraph 1 letter d) of the Code, the publication of deeds and documents with the provisions relating to the protection of personal data provided for by the itself, with the express prohibition of disclosure of the data referred to in art. 22 paragraph 8 and art. 11 paragraph 1 letter d) of the Code ";

GIVEN the further communication of 25 March 2016, note prot. n. 8825 of 29 March 2016, with which the Province reiterated that it had provided, with communication no. 81422 of 11.12.2015, the reply requested by the Guarantor within 20 days from the notification of the aforementioned provision and highlighted the non-existence of the contested behaviors, considering that the 2012 ranking was removed from the praetorian register and that no rankings relating to the year 2013 and following have been published, thus asking to dismiss the procedure initiated with the aforementioned complaint "as the regulatory violations found and the conditions for the application of the sanctions do not exist";

CONSIDERING that the arguments put forward are not suitable in relation to the disputed. The following is noted.

- With reference to the alleged violation of art. 157 of the Code referred to in the sanction provided for by art. 164 of the Code, the note recalled by the Province, even if registered with the number 81422 of 11.12.2015 and addressed to the headquarters of the Guarantor, never reached its destination, as can be seen from the data resulting from the protocol register of the Office. It should be noted, however, that the Guarantor requested this response from the Province, with a note from the public and private Labor Unit of 29 December 2015 (the delivery of the relevant PEC is in the records of the relative file), which was not followed by any response. by the Province. Moreover, no proof of the actual transmission of the note of 11 December 2015 was provided, even though this charge was borne by the Province itself. As is known, in fact, taking into account that the obligation to provide the information requested by the Guarantor pursuant to art. 157 is administratively sanctioned by a specific provision of law (Article 164 of the Code), it is the responsibility of the holder to provide proof of compliance in the context of procedures or inspections (regarding the burden of proof, see provision. of the Guarantor n.5 of 12 January 2017 in www.gdpd.it web doc. n. 6026657 and provision of the Guarantor n. 110 of 15 March 2012 in www.gdpd.it web doc. n. judgment of the Court of Milan no. 7555 of 15/10/2013).

- With reference to the alleged violation of art. 154 paragraph 1 letter. c) and d) of the Code referred to in the sanction provided for by art. 162 paragraph 2 ter of the Code, despite what was declared in the note dated 11 December 2015 (never received by the Guarantor), still on 3 February 2016 the persistence of easy accessibility and accessibility, through the most common search engines, of the relative data was ascertained. to the aforementioned provisional and definitive rankings of disabled people and protected categories relating to 2012 (see the "print screens" of the screens resulting from the queries carried out by the Office attached to the aforementioned report of operations carried out). Also from this point of view and differently from what was declared in the aforementioned note of 11 December 2015, the Province has not provided any evidence, prior to the aforementioned violation complaint, of having complied with the prohibition laid down by the Guarantor with the aforementioned provision, pursuant to art. 154 paragraph 1 letter. d) of the Code, but the contrary has been demonstrated;

- With reference to the alleged violation of the provisions indicated in art. 167 of the Code, including that of art. 22 paragraph 8, sanctioned pursuant to art. 162, paragraph 2 bis of the Code, the Province has given acquiescence to what was ascertained in the provision of the Guarantor no. 585 of 12 November 2015, by which it noted "the unlawfulness of the processing carried out by the Province in relation to the dissemination of data suitable for revealing the state of health of the interested parties (Article 22 paragraph 8 of the Code)". Taking into account, in fact, that provision no. 585/2015 was undoubtedly open to challenge

pursuant to art. 152 of the Code within the deadline of 30 days from its communication, its failure to appeal by the Province has determined the acquiescence to the ascertainment of the offense as "it is precisely the right to appeal that gives its non-use the unequivocal value of conscious choice, which results in acquiescence "(in this sense, see Court of Arezzo no. 607 of 12 May 2016 which rejected the appeal filed against the injunction order of the Guarantor no. 643 of 10 December 2015). Moreover, as confirmed by the jurisprudence, the interest of the Province to challenge the provision existed immediately because that provision judged its data processing illegal and prevented it from continuing it and "because it was, precisely, the basis for future possible sanctions "(see cited Court of Arezzo n. 607/2016, as well as Court of Taranto n. 2384/2017 which rejected the appeal filed against the injunction order of the Guarantor n. 38 of 6 February 2016). He notes, on this point, that the Province has declared, in the defense, that it has adapted to what is required by the provision of the Guarantor, one more reason to infer its compliance with it;

READ the report drawn up by the Office pursuant to art. 17 of the law n. 689/1981, from which it appears that the offender did not make a reduced payment for the alleged violations;

GIVEN the note of 8 April 2016 with which the Guarantor took note of what was declared by the Province with a note of 9 February 2016 relating to the measures adopted to comply with the Authority's provision of 12 November 2015 "and to which the communication of the 11 December 2015 prot. 81422 (however never received by the Guarantor) "and also took note of the results of the checks carried out, at different times, by the Office through access to the institutional website of the Province as well as through free searches on the web which show that "the personal data suitable for revealing the state of health of the interested parties contained in the ranking covered by the aforementioned provision are currently no longer available online" (Office note of 8 April 2016);

NOTING, therefore, that the Province of Benevento, on the basis of the above considerations, appears to have committed, as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, the violation envisaged by art. 162 paragraph 2-bis of the Code, in relation to the dissemination of sensitive data of the interested parties (articles 167 and 22 paragraph 8 of the Code); the violation foreseen by art. 162 paragraph 2-ter of the Code, in relation to the non-compliance with the provision adopted by the Guarantor (art. 154 paragraph 1 letter c) and d) of the Code), the violation envisaged by art. 164 of the Code, in relation to the failure to respond to a request for information from the Guarantor (Article 157 of the Code);

GIVEN art. 162 paragraph 2-bis of the Code which punishes the violation of the provisions indicated in art. 167 of the Code,

including that of art. 22 paragraph 8 of the Code, with the administrative sanction of the payment of a sum from ten thousand euros to one hundred twenty thousand euros;

GIVEN art. 162 paragraph 2-ter which punishes the non-observance of the measures of prescription of necessary or prohibition measures, as per art. 154 paragraph 1 letter. c) and d) of the Code, with the administrative sanction of the payment of a sum from thirty thousand euros to one hundred and eighty thousand euros;

GIVEN art. 164 of the Code which punishes the violation of the provisions of art. 157 of the Code with the administrative sanction of the payment of a sum from ten thousand euros to sixty thousand euros;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, 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;

CONSIDERING that in the case in question:

- with reference to the violation pursuant to art. 162 paragraph 2-bis of the Code and with regard to the seriousness of the violation, notes the fact that the illegitimate treatment concerned data suitable for revealing the state of health of the interested parties and consisted in the dissemination of the same via the internet, thus making them accessible to anyone in the face of the express prohibition provided for by art. 22, paragraph 8, of the Code;

- with reference to the violations pursuant to art. 162 paragraph 2-ter and 164 of the Code and from the point of view for the purposes of evaluating the work carried out by the agent, the circumstance that, albeit belatedly, with a note dated 9 February 2016, the Province gave reply to the request for information formulated by the Guarantor pursuant to art. 157 of the Code and communicated that he had complied, even in this case, belatedly, with the requirements pursuant to art. 154 paragraph 1 letter. c) and d) by the Guarantor with the aforementioned provision, as found by the Office with a note dated 8 April 2016;

CONSIDERING, therefore, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, to the extent of:

- € 10,000.00 (ten thousand) for the violation pursuant to art. 162 paragraph 2-bis of the Code;
- € 40,000.00 (forty thousand) for the violation pursuant to art. 162 paragraph 2-ter of the Code;
- € 10,000.00 (ten thousand) for the violation pursuant to art. 164 of the Code;

CONSIDERING, therefore, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary

sanction, based on the aforementioned elements assessed as a whole, in the amount of 60,000.00 (sixty thousand) euros for the violations referred to in Articles 162 paragraph 2-bis, 162 paragraph 2-ter and 164 of the Code;

HAVING REGARD to the documentation on file;

GIVEN the law n. 689/1981, and subsequent amendments and additions;

GIVEN the observations of the Office made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000, adopted by resolution of June 28, 2000;

Rapporteur Dr. Antonello Soro;

ORDER

to the Province of Benevento, in the person of the pro-tempore legal representative, with registered office in Benevento, Piazza Castello n. 1, C.F. 92002770623, to pay the sum of € 60,000.00 (sixty thousand) as a pecuniary administrative sanction for the violations indicated in the motivation;

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to the Province of Benevento to pay the sum of € 60,000.00 (sixty thousand), according to the methods indicated in the annex, 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 art. 152 of the Code and 10 of Legislative Decree n. 150/2011, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller resides, within thirty days from the date of communication of the provision itself. , or sixty days if the applicant resides abroad.

Rome, 1st February 2018

PRESIDENT

Soro

THE RAPPORTEUR

Soro

THE SECRETARY GENERAL

Busia