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Injunction order against the Municipality of Genoa - 28 March 2019

Register of measures

no. 101 of 28 March 2019

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;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

NOTING that the Guarantor for the protection of personal data (hereinafter Guarantor), in the face of the definition of two distinct administrative procedures relating to as many distinct reports, has ascertained that the Municipality of Genoa - C.F/P.I. 00856930102 –, with registered office in Genoa, Palazzo Tursi, via Garibaldi n. 9, in the person of the pro-tempore legal representative assigned the management service of phases of the contravention procedure, through a tender, to a Temporary Business Group (RTI).

Of this RTI awarded the contract, with reference to what was ascertained with note no. 5313 of 14 February 2017 which defined the administrative procedure relating to the first report, Maggioli s.p.a. and Poste Italiane s.p.a., which, pursuant to contract no. 67755 of 23 October 2010 stipulated with the Municipality of Genoa (data controller pursuant to article 28 of the Code), data processors have been designated pursuant to art. 29 of the Code only on 21 January 2017 with union provision no. 15. This made it possible to ascertain that the Municipality of Genoa, until 20 January 2017, made an unlawful communication of the whistleblower's personal data to the aforementioned companies in the absence of a suitable regulatory prerequisite, in violation of the provisions of art. 19, paragraph 3, of the Code.

With reference to what was ascertained in note no. 22435 of 22 June 2017, it was found that the Municipality of Genoa, again with regard to the assignment of the management service for phases of the contravention procedure through a tender to a Temporary Business Group (RTI), has traced the complaints in the report to as already described in reference to the first report. However, it can be seen from the deeds that, in the present case, the designation of Maggioli s.p.a. as responsible for data processing pursuant to art. 29 of the Code, carried out with trade union provision 262 of 14 June 2011, was expressly

"conditioned by object and duration to contract no. 66975 of 29 June 2010 currently being implemented between the Municipality of Genoa and the Temporary Business Group (RTI)" - of which the Data Processing Manager, i.e. Maggioli s.p.a., was a member -, and revoked the right to terminate the relationship or to the termination for any cause by the same. As ascertained, the "infringement procedure subject to complaint took place under the procurement contract Rep. No. 67755" entered into on 23 October 2015, for the treatment of which, as specified above, the Municipality proceeded to carry out the designation pursuant to of the art. 29 of the Code, only on 21 January 2017. Taking note of the elements highlighted in the note dated 13 April 2017 from the Municipality, we cannot agree with the statement that "there is no solution of continuity between provision 262 and provision no. 15" and that "the municipality made use of R.T.I. made up of the companies themselves. This is not only because the various tender contracts were stipulated by the Municipality with two different RTI [...] but also because while enhancing the continuity of the activity carried out over time by Maggioli s.p.a., the designation of the latter was carried out only in date following the treatment object of the report. Therefore, the processing of the whistleblower's data was carried out in violation of the conditions set forth in art. 19, ca. 3, of the Code;

HAVING REGARD to the minutes no. rr. 7524/107269 of 28 February 2017 and 25842/113623 of 24 July 2017 with which the Office of the Guarantor contested the Municipality of Genoa, in the person of the pro-tempore legal representative, for two administrative violations both envisaged by art. 162, paragraph 2-bis, of the Code, in relation to art. 19, paragraph 3, informing him, for both dispute reports, of the right to make a reduced payment pursuant to art. 16 of the law n. 689/1981;

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

VISAS, in relation to the dispute report n. 7524/107269 of February 28, 2017, the defensive writings dated, one dated March 30, 2017 and sent pursuant to art. 18 of the law n. 689/1981, the other 4 February 2019 and sent for the purposes of art. 18 of Legislative Decree 10 August 2018 n. 101, with which the Municipality of Genoa, motivating the request for application of art. 164-bis, paragraph 1 of the Code in relation to less serious cases, illustrated the sequence of service contracts no. 66975 of 29 June 2010 and no. 67755 of 23 October 2015 stipulated with Poste Italiane s.p.a. for the management, development and printing of the reports raised for violations of the Highway Code and for the notification and re-notification of the same reports and Maggioli s.p.a. for postal reporting and payments, indicating as an act of designation of data processors pursuant to art. 29 of the Code, the provision of the Mayor n. 262 of 14 June 2011. Against this, he highlighted how "(...) the relationship between

the Municipality of Genoa and the Maggioli and Poste Italiane companies for the management of phases of the contravention procedure continued without interruption between the Rep 66975 and the contract Rep. n. 67755, maintaining the respective tasks and respective functional attributions unchanged during the various contracts that have followed one another over time", reason for which "(...) the Municipality of Genoa does not appear to have committed any violation of art. 19, paragraph 3, of the Code". Furthermore, the Municipality, in observing how "(...) the defenses already carried out (...) retain their value even more in the light of the principles that emerge from Regulation (EU) no. 2016/679 on the protection of natural persons with regard to the processing of personal data (...)", invokes "(...) the application of the juridical combination pursuant to art. 8 paragraph 1 of Law 689/81 of the penalties imposed with report no. 25842/113623 of 24.7.2017 and with report no. 7524/107269 of 28.2.2017" deeming applicable, if more favourable, the "(…) sanction possibly provided for by Regulation (EU) no. 2016/679";

HAVING REGARD TO the report of the hearing of the party drawn up on 19 December 2017, pursuant to art. 18 of the law n. 689/1981, in which the Municipality of Genoa substantially reaffirmed what was argued in the defense brief;

VISAS, in relation to the dispute report n. 25842/113623 of 24 July 2017, the dated defense writings, one dated 8 August 2017 sent pursuant to art. 18 of the law n. 689/1981, the other 4 February 2019 sent for the purposes of art. 18 of Legislative Decree 10 August 2018 n. 101, with which the Municipality of Genoa, motivating the request for application of art. 164-bis, paragraph 1 of the Code in relation to less serious cases and reiterating what was argued in relation to the succession of service contracts Rep. no. 66975 and Rep. n. 67755 stipulated with Poste Italiane s.p.a. and Maggioli s.p.a. according to the act of designation of the data controller pursuant to art. 29 of the Code or the provision of the Mayor n. 262 of 14 June 2011, found that "(...) the exponent body has provided the information requested with note prot. 128282 dated 13.4.2017, sent on 13.4.2017 via PEC. No other request for additions appears to have been received by this Authority from the Municipality of Genoa. (...) from that date of 13.4.2017 this Authority was in possession of the elements necessary to proceed or not with the issuing of the sanction report (...) and therefore from that date the 90-day term established by art. 14, paragraph 2, Law 689/81 for the notification of the report. Since this notification was instead completed via PEC only on 24.7.2017, and therefore after said term, it is objected, pursuant to art. 14, paragraph 6, Law 689/81 the extinction of the obligation to pay the sum due (...)". He also observed that "(...) both with this report (protest report no. 7524/107269 of 28 February 2017), and with that referred to in these defences, the Municipality was challenged for the same omissive conduct (...) by resulting in (…) the same violation of art. 19 paragraph 3 of the Privacy Code. It therefore follows that, given this uniqueness of the omission and of the violation, it

will be correct to apply to the Municipality of Genoa, in relation to both of these identical cases, a single penalty (...)". In the alternative to this last argument, it invokes the application of legal cumulation, pursuant to art. 8 paragraph 1 of the law n. 689/1981, of the sanctions imposed with the reports n.rr. 25842/113623 of 24.7.2017 and 7524/107269 of 28.2.2017;

HAVING REGARD TO the report of the hearing of the party drawn up on 19 December 2017, pursuant to art. 18 of the law n. 689/1981, in which the Municipality of Genoa substantially reaffirmed what was argued in the defense briefs;

CONSIDERING that the arguments put forward do not allow for the exclusion of the responsibility of the Municipality of Genoa. With regard to both notifications of the dispute, the observation regarding the fact that "(...) the same omissive conduct was challenged to the Municipality (...) from which (...) the same violation of art. 19 paragraph 3 of the Privacy Code". Those subject to control activities by the Authority, at different times, are two distinct administrative procedures (investigated in different files) resulting from as many independent reports that have determined the classification of independent processing of personal data. This evidently led to the ascertainment, at different times, of distinct violations contested with the reports in question. This evidence also produces its effects with regard to the impossibility of recognizing the application conditions of the homogeneous formal competition with the consequent application of the legal accumulation of the sanctioning provisions pursuant to art. 8, paragraph 1, of the law n. 689/1981, given that, for the reasons already set out, in the present case, the requirement of the uniqueness of the action envisaged as a necessary prerequisite for the recurrence of the institution mentioned does not subsist.

Equally not appreciable are the observations regarding the recurrence, if more favourable, of the "(...) sanction possibly envisaged by Regulation (EU) no. 2016/679", given that, in reality, for the purpose of determining the applicable rule, in terms of time, 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 recurrence 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, this moment must be identified at the time of the communication of the data of the whistleblowers. It is therefore evident that, in the case in question, the provisions of Regulation no. 679/2016, the effects of which are produced from the date of 25 May 2018, cannot be taken into consideration, but the separate rule provided for by the Code in force at the time in which the disputed conduct was put in place must be applied.

With regard to the complaint report no. 7524/107269 of 28 February 2017, with reference to the succession of service contracts no. 66975 of 29 June 2010 and no. 67755 of 23 October 2015 stipulated with Poste Italiane s.p.a. and Maggioli s.p.a. according to the act of designation of the data controller pursuant to art. 29 of the Code or the provision of the Mayor n. 262 of June 14, 2011, it is noted that no further evaluation element has been produced in deeds with respect to those already taken into consideration in the context of the preliminary investigation defined with the assessment deeds of February 14, 2017 and June 22, 2017 which do not appear to be been challenged and of which, moreover, is fully taken into account in the dispute report in question.

With regard to the complaint report no. 25842/113623 of 24 July 2017, in addition to reiterating what has already been represented in relation to the dispute of 28 February 2017, the arguments relating to the expiry of the term pursuant to art. 14, paragraph 2 of the law n. 689/1981, given that the dies a quo for the notification of the dispute must be correctly identified in the date of ascertainment of the violation and this must be understood as the date on which all the factual and the relevant legal elements for the purposes of identifying a conduct sanctioned as an administrative offence, as established by the same jurisprudence of the Court of Cassation cited in the brief. In the case in question, the Municipality erroneously believes that the limitation period pursuant to art. 14 of the law n. 689/1981 takes effect "(...) from that date of 13.4.2017 (...)". In reality, the violation, as expressly noted in the complaint report, was ascertained, pursuant to art. 13 of the law n. 689/1981, with note no. 22450 of 22 June 2017 with which the division of the Office of the Guarantor competent for the matter took note of the omissive conduct constituting an administrative offence. The Department of inspections and sanctions, moreover, after having received the discussion on the subject, proceeded to notify the dispute in compliance with the ninety-day deadline set by art. 14 of the law n. 689/1981, or on 24 July 2017;

NOTING, therefore, that:

with reference to what was ascertained with note no. 5313 of 14 February 2017 which defined the administrative procedure relating to the first report, are part of the Temporary Business Group (RTI) Maggioli s.p.a. and Poste Italiane s.p.a., which, pursuant to contract no. 67755 of 23 October 2010 stipulated with the Municipality of Genoa (data controller pursuant to article 28 of the Code), data processors have been designated pursuant to art. 29 of the Code only on 21 January 2017 with union provision no. 15. This made it possible to ascertain that the Municipality of Genoa, up to 20 January 2017, had unlawfully communicated the personal data of the whistleblower to the aforementioned companies, in the absence of a suitable

regulatory prerequisite, in violation of the provisions of art. 19, paragraph 3, of the Code.

With reference to what was ascertained in note no. 22435 of 22 June 2017, it was found that the Municipality of Genoa, again with regard to the assignment of the management service for phases of the contravention procedure through a tender to a Temporary Business Group (RTI), has traced the complaints in the report to as already described in reference to the first report. However, it can be seen from the deeds that, in the present case, the designation of Maggioli s.p.a. as responsible for data processing pursuant to art. 29 of the Code, carried out with trade union provision 262 of 14 June 2011, was expressly "conditioned by object and duration to contract no. 66975 of 29 June 2010 currently being implemented between the Municipality of Genoa and the Temporary Business Group (RTI)" - of which the Data Processing Manager, i.e. Maggioli s.p.a., was a member -, and revoked the right to terminate the relationship or to the termination for any cause by the same. As ascertained, the "infringement procedure subject to complaint took place under the procurement contract Rep. No. 67755" stipulated on 23 October 2015, for which the Municipality proceeded to carry out the designation pursuant to art. 29 of the Code, only on 21 January 2017. Taking note of the elements highlighted in the note dated 13 April 2017 from the Municipality, we cannot agree with the statement that "there is no solution of continuity between provision 262 and provision no. 15" and that "the municipality made use of R.T.I. made up of the companies themselves. This is not only because the various tender contracts were stipulated by the Municipality with two different RTI [...] but also because while enhancing the continuity of the activity carried out over time by Maggioli s.p.a., the designation of the latter was carried out only in date following the treatment object of the report. Therefore, the processing of the whistleblower's data was carried out in violation of the conditions set forth in art. 19, ca. 3, of the Code;

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which, for each of the two disputes, 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;

NOTING that the Municipality, as soon as it received news of the first report, proceeded on its own initiative to designate the data processors (the two companies Poste Italiane s.p.a. and Maggioli s.p.a.) with union provision no. 15 of 27 January 2017, and that therefore, evaluating this element positively, the application conditions of less serious cases pursuant to art. 164-bis, paragraph 1 of the Code;

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 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 and that therefore, taking into account the recurrence of the provision pursuant to art. 164-bis, paragraph 1 of the Code, the amount of the two pecuniary sanctions must be quantified as 4,000.00 (four thousand) euros for each violation, for a total amount of 8,000.00 (eight thousand) euros;

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 Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to the Municipality of Genoa – C.F/P.I. 00856930102 –, with registered office in Genoa, Palazzo Tursi, via Garibaldi n. 9, in the person of the pro-tempore legal representative, to pay the sum of 8,000.00 (eight thousand) euros as an administrative fine for the two violations of art. 162, paragraph 2-bis, in conjunction with art. 164-bis, paragraph 1 of the Code which governs less serious cases, in the terms indicated in the justification;

ENJOYS

to the same subject to pay the sum of 8,000.00 (eight 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, 28 March 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia