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Injunction against Maganetti Spedizioni S.p.A. - June 6, 2018

Register of measures

no. 381 of 6 June 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 Special Privacy Unit of the Guardia di Finanza, in execution of the request for information from the Guarantor no. 31540/114083 of 3 October 2017, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code"), carried out the investigations, pursuant to art. 13 of law 689/1981, with "Maganetti Spedizioni S.p.A." (hereafter the "Company"), engaged in the transport of goods by road, Tax Code 00050490143 and VAT number 11813000152, with registered office in Milan via Dante, n. 4, zip code 20121 - secondary and operational headquarters in Tirano (SO), via del Progresso, n. 2 zip code 23037 - formalized in the report of operations carried out on 24 October 2017 and aimed at verifying the lawfulness of the processing of personal data carried out by the Company ;

GIVEN the documents of the inspection assessment;

CONSIDERING that, on the basis of the statements made during the inspections and the documentation sent by the Company to the Special Privacy Unit of the Guardia di Finanza, the resolution of the reservations formulated during the inspection, it was found that:

- the Company was established in 1972 and deals with road freight transport on behalf of third parties;

- for this activity, the Company uses 14 owned vehicles on which geolocation devices (GPS Tracker mod. 103/B) have been installed and activated since January 2017;

- the drivers of these vehicles are employees of the Company;

- the Company has also purchased and installed GPS detectors on the vehicles of other companies, jointly owned by the latter, which carry out transport on behalf of Maganetti Spedizioni S.p.A. (currently around 100);

- the Company provides "(...) the geolocation service of the vehicles also in favor of the carriers" (see report of operations

carried out on 24 October 2017, point 1, page 3);

- as declared by the Company " (...) the system that manages all the GPS trackers, installed both on vehicles owned by the company and on those owned by third parties, was developed within the company itself (...); (cf. report of operations carried out of 24 October 2017, point 2, page 3);

- as declared by the Company " (…) The vehicle geographic detection system consists of a GPS device which houses a SIM card (all the SIM cards used for the service, including those inserted in devices installed on third-party vehicles, are made out to Maganetti Spedizioni S.p.A.). The GPS device, via GPRS, sends a signal to the company server which, via specific software, is processed allowing the detection of the vehicle's position on a map. This detection takes place with a time interval of 3 minutes. This system keeps the last 7 positions in memory for a period of approximately 21 minutes (...)" (see report of operations carried out on 24 October 2017, point 2, page 3);

- as declared by the Company " (…) The developed software shows the list of installed and active devices, by displaying a nick name referring to the company that owns the vehicle (Maganetti or third parties), the license plate number of the tractor and trailer, the date of loading, the name of the buyer as well as the cities of departure and destination of the goods. Furthermore, on a geographical map, the positions of all geolocated vehicles are displayed using icons. Placing the mouse pointer on the various icons displays the information listed above. Through geolocation, the Company does not know the driver's personal details in real time, but a specific vehicle is assigned to each of them (...)" (see report of operations carried out of 24 October 2017, point 2, page 3);

- as declared by the Company " (…) Authorized carriers can access the geolocation of their vehicles by authenticating in a reserved area on the website www.maganetti.com owned by the Company (…) (see operations report carried out on 24 October 2017, point 2, page 3);

- " (...) The data is not communicated to third parties in any way but, to some subjects such as carriers and clients, the right is given to be able to access, respectively, the data relating to the geolocation of their vehicles and the data relating to their own goods. (...) No customer is authorized to access such data" (...)" (see report of operations carried out on 24 October 2017, point 5, page 5);

- as declared by the Company "(...) The geolocation system (on its vehicles) was installed in order to increase the security of the company assets against theft, optimize company costs by reducing empty kilometers and allow the geolocation of the

transported goods (...)" (see report of operations carried out on 24 October 2017, point 2, page 3);

- the Company, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is the owner of the processing of personal data carried out in the execution of the aforementioned geolocation activity;

- the Company, in relation to the processing of personal data implemented through the geolocation system installed on board the no. 14 company vehicles driven by own employees:

- has failed, as data controller, to notify the Guarantor, pursuant to articles 37, paragraph 1, lett. a) and 38, paragraphs 1 and 2, of the Code, before the start of the treatment;

- it has not been demonstrated that the relative designation of the appointees has been made as required by articles 30 and 33 of the Code, providing the specific instructions;

HAVING REGARD TO the report of the Special Privacy Unit of the Guardia di Finanza no. 1 of 9 January 2018 with which "Maganetti Spedizioni S.p.A.", Tax Code 00050490143 and VAT number 11813000152, with registered office in Milan via Dante, n. 4, postal code 20121 and secondary and operational headquarters in Tirano (SO), via del Progress, no. 2, postal code 23037:

- the violation of art. 161 of the Code ("Omitted or unsuitable information to the interested party") for "(...) not having issued to the administrative employees who carry out the processing of data relating to the geographical positions of the operators driving the aforementioned vehicles, an appropriate information, in violation of the 'art. 13 of Legislative Decree no. 196/2003";

- the administrative violation envisaged by art. art.163 of the Code ("Omitted or incomplete notification") for failure to fulfill the obligation to notify the Guarantor pursuant to the combined provisions of articles 37, paragraph 1, lett. a) and 38 of the Code in relation to the processing of data indicating the geographical position of persons or objects via an electronic communication network;

- the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code due to non-compliance by the Company with reference to the geolocation of no. 14 company vehicles, of the measures indicated by the articles 30 and 33 of the Code for not having carried out, in the context of the processing of data relating to geographical positions, the relative designation of the persons in charge by giving them specific instructions;

NOTING that from the report prepared by Section I of the Special Privacy Unit of the Guardia di Finanza pursuant to art. 17 of the law of 24 November 1981 n. 689, no reduced payments appear to have been made;

HAVING REGARD TO the written defense and related attachments dated 9 February 2018, formulated pursuant to art. 18 of the law n. 689/1981 with reference to the disputes referred to in the aforementioned report no. 1 of 9 January 2018, with which the Company intended to represent its position by deeming "(...) the objections raised from a factual and legal point of view unfounded and being convinced that it had behaved in good faith in compliance with Legislative Decree 196 /2003 (…)". First of all, the party, before going into the merits of the disputes, decided to "claim a serious flaw in the reasoning which overwhelms the entire Minutes and, therefore, all the findings", highlighting that "(...) in the Minutes there is no trace of the reasons and the factual and legal assumptions that led the Guardia di Finanza to formulate the de quibus findings" and that "(...) the alleged lack of motivations makes the Minutes (administrative act) entirely illegitimate. For the effect, the sanctioning process should conclude with a dismissal order, as well as cancellation and/or revocation of the Report itself".

With regard, then, to the findings raised in the notice of dispute, the Company, in support of the alleged groundlessness of the same, has also represented the following.

a) With reference to the first finding, concerning the failure to release information, pursuant to art. 13 of the Code, to the administrative employees who carry out the processing of data relating to the geographical positions of employees driving company vehicles, the Company pointed out the irrelevance of the release of this information both because " (...) it is not (...) of "administrative" employees (...) but of the IT technician of the company and of the personnel who manage shipments" and because "(...) the System manages (...) the vehicle positioning data (and) not "personal data" (e) least of all employees who access the system from their workstations, in the office (...)". The Company points out that it has "(...) always used a privacy information model suitable for all employees, even for those who "process data relating to the geographical positions of drivers (...)".

b) As regards the second finding, relating to the failure to fulfill the obligation to notify the Guarantor pursuant to the combined provisions of articles 37, paragraph 1, lett. a) and 38 of the Code, the Company argued that it was groundless, deeming that " (...) Maganetti is not subject to the notification obligation pursuant to art. 37 of the Code as in the present case the necessary requirements of continuity of location and suitability to identify the interested party (i.e. driver) are missing. Indeed, due to its characteristics and functionality, the System is not suitable and is not intended to guarantee neither the continuity of the localization, nor the identification of the driver of the located vehicle. This fundamentally excludes the fact that data processing

subject to the notification obligation is carried out through it, as clarified by the Guarantor with provision of 04.23.2004 (web doc. 993385)". The party also added that the "(…) purpose pursued with the geolocation system (is that relating to) transport safety (…). As this Authority recalled with resolution no. 1 dated 31.03.2004, the security of vehicles does not represent the requirements and features of the location that are indispensable for it to be assimilated to data processing".

c) Finally, with regard to the third finding referred to in the notification of dispute no. 1/2018, referring to the failure to designate the appointees as required by articles 30 and 33 of the Code providing them with specific instructions, the party objected to their erroneousness and groundlessness as "All employees have been appointed "in charge of processing as confirmed also to the Guardia di Finanza by certified e-mail on 6.11.2017 (...) : with this communication was also sent the text of the assignment that the Company delivers to employees "upon hiring", in accordance with the provisions of Article 30 of the Code".

In view of the above, the Company has requested:

- as a preliminary step, to file the assessment and dispute procedure, canceling and/or revoking the notification of administrative violation n. 1/2018 for the aforementioned lack of motivation;
- primarily, to file the assessment and dispute procedure, canceling and/or revoking the dispute report for the reasons mentioned above referred to in letters a) b) and c);
- subordinately, "in the denied and unbelieved hypothesis in which the Company considers itself subject to the obligation to notify the treatment pursuant to art. 37 of the Code, also in the light of good faith and/or of the Company's excusable error, cancel and/or revoke the administrative violation notice (...)" mentioned above, with regard to finding no. 2;
- alternatively "(...) in the denied and unbelieved hypothesis in which the Company considers itself responsible for finding no. 1 and/or relief n. 2 and/or relief n. 3, determine and limit the relative administrative sanctions to the statutory minimum reduced by an amount equal to two fifths, pursuant to art. 164 bis, paragraph 1 of the Code (…)".

The Company has requested the payment of any fines in no. 30 monthly installments.

READ the minutes of the hearing of 2 May 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party, reiterating what has already been declared and requested in the defense brief, intended to highlight that "As regards findings no. 1 and no. 3, the Company has provided sufficient documentation to consider that the provisions of articles 13 and 30 of the Code have been met. As regards the remark no. 2, it is reiterated that the geolocation system is not designed or set up to

monitor employee drivers, but only vehicles and not continuously, as a temporary backup of the last seven surveys (21 minutes). It should be noted that once the vehicle has been identified through a specific alias, the authorized personnel communicate a telephone number associated with the vehicle, sending the same the necessary instructions. There is no direct correlation between the telephone number and the driver (…)".

CONSIDERING that the arguments put forward by the Company in the defense writings cited above and aimed at demonstrating the groundlessness of the findings raised with report no. 1 of 9 January 2018 are eligible for the acceptance of the request to dismiss the sanctioning procedure with regard to findings no. 1 and no. 3 referred to in the aforementioned dispute report, but not to exclude the Company's liability and, therefore, to determine the closure of the sanctioning procedure, in relation to the deduction regarding finding no. 2.

First of all, with reference to the alleged lack of reasoning for which, as believed by the Company, " (...) in the Minutes there is no trace of the reasons and assumptions of fact and law that led the Guardia di Finanza to formulate the findings de quibus ", it should be noted that the notification of dispute is the opening act of the sanctioning procedure and valid if it satisfies, as in this case, all the requirements set forth in art. 14 of the law of 24 November 1981, n. 689. In this case, the contestation report no. 1 of 9 January 2018 also expressly refers to the report of operations carried out drawn up by the soldiers of the Privacy Special Unit of the Financial Guard, known to the Company because it was delivered at the end of the investigations carried out at its headquarters. In fact, in the premises of the report n. 1/2018 for which "(...) the transactions performed were described in a specific process of operations carried out drawn up for this purpose which, together with the attachments referred to therein and the documentation received subsequently by PEC (upon resolution of the reservations formulated by the), express reference is made to this notification of dispute". For these reasons, what the party believes is irrelevant.

As for the second finding, in relation to which the Company is recognized as liable, relating to the failure to fulfill the obligation to notify the Guarantor pursuant to the combined provisions of articles 37, paragraph 1, lett. a) and 38 of the Code, for which the Company, referring to the "Clarifications on the treatments to be notified to the Guarantor", provided by the latter on 23 April 2004 (web doc. n. 993385 traceable on the site www.gpdp.it), has proposed the non-existence, in the geolocation system used, of the requirements of the continuity of the location and of the suitability to identify the interested party, the following should be noted.

- With regard to the requirement of continuity, it is specified, as already highlighted on other occasions, that, on the basis of

the aforementioned provision for which the "location must be notified when it allows for the continuous identification - even with possible intervals - of the location in the territory or in certain geographical areas (...)" the requirement of "continuity" is deemed to exist whenever the data controller is able to know, at any time, automatically or not (also, for example, through a cognitive mechanism such as a phone call or sending a text message) the position of the geolocated vehicle, regardless of the possibility or otherwise of constant automatic tracking of the entire route taken by the geolocated vehicle. In other words, "continuity" means the detectability of the position of the vehicle whenever the data controller has this information requirement and also where any reconstruction of the "tracing" of the route taken is particularly laborious, also considering any "intervals" ; this, being able, at the same time, to trace the identity of the driver, even indirectly - on the basis of the provisions of art. 4, paragraph 1, lett. b), of the Code, for which personal data must be understood as "(...) any information relating to a natural person, identified or identifiable, even indirectly, by reference to any other information (...)". In light of the above, in this circumstance, since the system used by the Company allows, even if at intervals of time, the location of the vehicles and since the Company is able to identify, even if indirectly - i.e. externally and not from the system - the personnel employed by the driving such vehicles

- as declared by the Company, in fact, "(...) Through geolocation, the Company does not know in real time the personal details of the driver but each of them is assigned a specific vehicle (...)" (cf. report of operations carried out on 24 October 2017, point 2, page 3) - it is believed that the conditions for applying the articles 37, paragraph 1, lett. a) and 38 of the Code. Nor can it be considered that the exemption provided for by the aforementioned "Provision relating to cases to be removed from the notification obligation" n. 1 of 31 March 2004 of the Guarantor, since, in this case, the purpose for which the Company uses the geolocation system does not appear to be "exclusively" that of security, as required by the aforementioned provision in point A), n. 1, lit. c) for which they are exempt from the notification obligation "(...) the processing of data that indicate the geographical position of means of air, naval and land transport, carried out exclusively for transport safety purposes". In this regard, note what was declared by the company during the inspection - and reported above - for which "(...) The geolocation system (on its vehicles) was installed in order to increase the security of the company assets with respect to theft, optimize company costs by reducing empty kilometers and allow the geolocation of the transported goods (...)" (see report of operations carried out on 24 October 2017, point 2, page 3). With regard, then, to the invoked good faith it should be noted that, in relation to art. 3 of law 689/1981, it is necessary that the error - according to established jurisprudence - in order for it to be

excusable, is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the lawfulness of his behavior. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Company, covering to all intents and purposes the title of data controller, was diligently required to know and fulfill the obligations required by the applicable legislation in the matter in question, also due to the fact that, in relation to its professional qualities was required to inform itself on the applicable rules and on the relative interpretation, including the obligation to proceed with the notification to the Guarantor pursuant to art. 37, paragraph 1, lett. a), in the manner indicated by art. 38 of the Code. Therefore, the argument relating to the existence of good faith, with respect to the obligation of the data controller to comply with the legislation on the protection of personal data, cannot be accepted.

CONSIDERING that it is necessary to close the sanctioning procedure in relation to findings no. 1 and no. 3 referred to in the dispute report n. 1 of 9 January 2018.

With regard to the first finding concerning the violation envisaged by art. 161 of the Code "Omitted or unsuitable information to the interested party" in relation to art. 13 of the Code, the irrelevance - for the purposes of the correct application of the legislation on the protection of personal data - of the release of a disclosure (containing references to the geolocation activity carried out by the Company) to the employees responsible for accessing and management of the system relating to the location of vehicles; this because the preventive information must be provided exclusively to the subjects whose data are processed, as interested parties. In the present case, it appeared that the data of the employees responsible for accessing and managing the aforementioned system were not subject to processing in relation to the geolocation activity.

As for the third finding - concerning the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code for not having designated the persons in charge of the treatment and not having given them adequate instructions, in accordance with the provisions of the articles 30 and 33 of the Code, with reference to the processing of personal data of the employees responsible for driving the n. 14 company vehicles - the Company's lawyer has sent to the Guarantor, attached to the defense brief, the deeds of designation as "person in charge of processing" signed, for acknowledgment and acceptance, by the Company employees in charge of processing the data indicating the position of company vehicles and their drivers. Of these deeds, the Company had initially sent to the Guardia di Finanza, to resolve the reservations formulated during the inspection, only the assignment forms without the signatures of those in charge of processing. Therefore, in the light of the existence of the assignment documents referring to the Company's employees in charge of processing data that indicate the geographical

position of the persons or vehicles mentioned above, the request for archiving is also accepted for the relief in question.

NOTING that the Company as data controller pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, on the basis of the considerations referred to above, he appears to have committed the violation pursuant to art. 163 of the Code for failure to fulfill the notification obligation pursuant to the combined provisions of articles 37, paragraph 1, lett. a) and 38 of the Code in relation to the processing of data indicating the geographical position of persons or objects via an electronic communication network;

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;

CONSIDERING the art. 163 of the Code which punishes the violation of articles 37, paragraph 1, lett. a) and 38, paragraphs 1 and 2, of the same Code with the administrative sanction of the payment of a sum from twenty thousand to one hundred and twenty thousand euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code according to which “if any of the violations pursuant to art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied to an extent equal to two fifths";

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;

WHEREAS, in the present case:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element of the alleged violations, pursuant to art. 163 of the Code, it is believed to present the characteristics of less seriousness;

b) about the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings must be considered;

c) with regard to the economic conditions of the agent, the elements of the ordinary financial statements for the year 2016 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine in relation

to art. 163, for the violation of the articles 37, paragraph 1, lett. a) and 38, paragraphs 1 and 2, on the basis of the aforementioned elements evaluated as a whole, in the amount of 20,000.00 (twenty thousand) euros reduced by two fifths, according to the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of less seriousness, for an amount equal to 8,000.00 (eight thousand) euros;

HAVING DEEMED to accept the Company's request for payment in installments of the amount of the fine determined above in no. 25 (twenty-five) monthly installments corresponding to the amount of Euro 320 (three hundred and twenty) each;

HAVING REGARD to the documentation in the deeds;

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

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, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

HAS

the archiving of the sanctioning procedure referred to in the report of the Special Privacy Unit of the Guardia di Finanza no. 1 of 9 January 2018 relating to the contestation of the administrative violation pursuant to art. 161 of the Code ("Omitted or unsuitable information to the interested party") with reference to art. 13 of the Code (Relief no. 1), as well as the contestation of the administrative violation pursuant to art. 162, paragraph 2-bis, of the Code with reference to the measures indicated by articles 30 and 33 of the same Code (Relief no. 3) for the reasons highlighted above;

ORDER

to "Maganetti Spedizioni S.p.A.", tax code 00050490143 and VAT number 11813000152, with registered office in Milan, via Dante, 4, postal code 20121, to pay the sum of 8,000.00 (eight thousand) euros, by way of administrative fine for the violations indicated in the justification, dividing it, in acceptance of the installment request, into 25 (twenty-five) monthly installments of the amount of Euro 320.00 (three hundred and twenty) each;

ENJOYS

to the same company to pay the sum of 8,000.00 (eight thousand) euros according to the methods indicated in the attachment, the fractional payments of which will begin by the last day of the month following the one in which the notification of this order takes place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n.

689, prescribing that, within 10 (ten) days from the payment, receipt of the payment must be sent to this Authority, in original or certified copy.

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, 6 June 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia