[doc. web no. 9434609]

Injunction order against the Giglio Theater Company - 28 May 2020

Register of measures

no. 92 of 28 May 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Augusta Iannini, vice-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, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and repealing Directive 95/46/ CE, “General Data Protection Regulation” (hereinafter, “Regulation”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data, as well as to the free movement of such data and which repeals Directive 95/46/EC (hereinafter the "Code");

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Dr. Giovanna Bianchi Clerici;

WHEREAS

1. The complaint.

With two independent complaints, received respectively on 29 April and 6 May 2019, Mr. XX and Ms. XX, employees of the Teatro del Giglio ATG company in Lucca - an instrumental public body of the Municipality of Lucca, established for the

management of the municipal theater del Giglio – (hereinafter, Company), complained about the publication on the Company's institutional website of the "XX" (available by accessing the web page: https://www.teatrodelgiglio.it/...), containing , alongside the names of the Company's employees, elements suitable for revealing information relating to the state of health of the interested parties (eg the reference to Laws No. 104 of 1992 and No. 68 of 1999).

2. The preliminary investigation.

The publication of the aforementioned document was confirmed by the preliminary checks carried out by the Office, respectively on 13 and 30 May 2019 (see Service report in the file). In any case, on 24 June 2019, following further investigations carried out by the Office, the document was found to have been removed (see Service report in the file documents).

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired from the checks carried out and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, notified the Company pursuant to art. . 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in article 58, paragraph 2, of the Regulation, inviting the aforesaid holder to produce defense writings or documents to the Guarantor or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code; as well as art. 18, paragraph 1, of law n. 689 of 11/24/1981).

With the note mentioned above, the Office noted that the Company has published on the institutional website the document containing personal data relating to the interested parties (employees or relatives of the same), consisting of personal data suitable for revealing data relating to the health of the same :

- in a manner that does not comply with the principles of "lawfulness, correctness and transparency" as well as "minimization" of the processing, in violation of art. 5, par. 1, lit. a) and c), of the Regulation;
- in violation of the ban on the dissemination of health data (art. 9, par. 1, 2 and 4, of the Regulation and art. 2-septies, paragraph 8, of the Code).

With note of the XX (prot. n. XX) the Company sent its defense briefs, representing, among other things, that:

- "the company workforce [...] is represented by 22 units [... of which only] 6 employees [...] to support the entire administrative area [...]" and therefore there are "difficulties in guaranteeing a sufficiently structured supervision of privacy rules";
- "the mere numerical references indicative of a legislative provision placed following the name of the interested parties [...]

without any reference to the articles of the aforementioned laws and even less to the personal reasons to which these laws would refer [...they would deprive] the disputed conduct [...] of effective harm, not even implicitly revealing personal data on the health of the interested parties or their relatives";

- "nor the indication of only the details of the regulatory provision lends itself to an easy and intuitive process of knowledge - by the users of the site - of the sensitive data involved [...]";

- "the organizational chart updated to 18 October 2019 was uploaded to the institutional website in the "XX" section on the date XX"; following the report of an employee, on 5 February 2019, "the existence of the aforementioned document on the website was acknowledged";

- "The Teatro del Giglio company, by mere distraction, had attached an internal document instead of the one prepared for publication on the site. Having acknowledged the inconvenience, steps were taken to immediately remove it [...] on 5 February 2019 [...] within two hours of the report" (see annexes nos. 2 and 3 to the aforementioned note);

- following checks carried out by the company Mediaus s.r.l. who manages the site, it emerged that "although the document was not visible to new users who accessed the site, it could still be accessible by those who had memorized this URL previously"; this is because an "employee, not having (like the others) technical training in information technology, unknowingly and in good faith, believed, by removing only the link to the page, that he had also eliminated the URL of the incorrect organization chart" ; for this reason, the file would have returned to being visible on 20 and 21 May 2019;

- "who [...] had come across only in those days of exposure of the wrong file (from 7/1 to 5/2 and 20/21 May) and only if he had memorized the specific path to view the wrong file, could he view again such file";

- "during the entire period of permanence of the file […] 36 unique accesses to the page were made to the section (i.e. by different users) for a total of 91 accesses; with an average stay time of 1 minute and 55 seconds [...] only 4 are [accessed] directly to the Organization page which, it should be reiterated, also contained other contents";

- "in the company documents of that period there is no documentation [...] received from employees who felt they were harmed in the protection of their privacy, reporting or inviting them to remove the information erroneously exposed".

3. Outcome of the preliminary investigation.

The personal data protection regulations provide that public entities, even if they operate in the performance of their duties as employers, can process the personal data (art. 4, n. 1, of the Regulation) of employees, if the treatment is necessary "to fulfill a

legal obligation to which the data controller is subject" (i.e. the specific obligations or tasks established by law for the purpose of managing the employment relationship) or "for the execution of a task in the public interest or connected to the 'exercise of public powers vested in the data controller" (Article 6, paragraph 1, letters c) and e) of the Regulation).

The national legislation has introduced more specific provisions to adapt the application of the rules of the Regulation, determining, with greater precision, specific requirements for the treatment and other measures aimed at guaranteeing a lawful and correct treatment (Article 6, paragraph 2 of the Regulation ) and, in this context, has provided that the processing operations which consist in the "dissemination" of personal data are permitted only when provided for by a law or, in the cases provided for by law, by regulation (Article 2-ter, paragraphs 1 and 3 of the Code).

With regard to the particular categories of personal data, including those relating to health (in relation to which there is a general prohibition of processing, with the exception of the cases indicated in Article 9, paragraph 2 of the Regulation and, in any case, a regime of greater guarantee with respect to other types of data, in particular, as a result of article 9, paragraph 4, as well as article 2-septies of the Code), processing is permitted, as well as to fulfill specific obligations "in terms of labor law [...] to the extent that it is authorized by law [...] in the presence of appropriate guarantees" (Article 9, paragraph 2, letter b), of the Regulation), also, where "necessary for reasons of interest relevant public on the basis of Union or Member State law, which must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for appropriate and specific measures to protect the fundamental rights and interests of the data subject" (art . 9, par. 2, lit. g), of the Regulation).

With regard to the particular categories of personal data, the national legislator has defined the public interest as "significant" for the processing "carried out by subjects who perform tasks of public interest or connected to the exercise of public powers" in the matters indicated, albeit in a not exhaustive, from the art. 2-sexies of the Code, establishing that the related treatments "are permitted if they are provided for by European Union law or, in the internal legal system, by legal provisions or, in the cases provided for by law, by regulations that specify the types of data that can be processed, the operations that can be performed and the reason of significant public interest, as well as the appropriate and specific measures to protect the fundamental rights and interests of the data subject".

In any case, data relating to health, i.e. those "related to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health" (Article 4, par. 1, no. 15, recital 35),

due to the particular delicacy of this category of data, "cannot be disclosed" (Article 2-septies, paragraph 8 and Article 166, paragraph 2, of the Code and Article 9 , paragraphs 1, 2, 4, of the Regulation; see already art. 22, paragraph 8, of the previous Code). In fact, this provision, already contained in the previous regulatory framework (Article 22, paragraph 8 of the Code, prior to the amendments pursuant to Legislative Decree No. 101/2018), finds further foundation in the regulatory framework outlined by the Regulation which allowed member states to maintain or introduce "further conditions, including limitations" precisely with regard to the processing of data relating to health, similarly to genetic and biometric data (cf. 9, paragraph 4 of the Regulation). In adapting the national legal system to the provisions of the Regulation, art. 2-septies of the Code (Guarantee measures for the processing of genetic, biometric and health-related data) - in addition to providing that the processing of these categories of data is lawful when one of the conditions enumerated by the Regulation in art. 9, paragraph 2 "and in compliance with the guarantee measures established by the Guarantor" - confirmed the general prohibition on the dissemination of data relating to health (paragraph 8).

Furthermore, the data controller is required to respect the principles regarding data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in lawful, correct and transparent manner in relation to the data subject" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letters a) and c), of the regulation).

3.1. Dissemination of health data.

Given the above, it should be noted that the Company, in its defense briefs, confirmed the publication, in the "Transparent Administration" section of its institutional website, of the document called "Organization chart as at 18 October 2018" and that in the same reported, in correspondence with some names, the details of the law 5 February 1992 n. 104 (Framework law for assistance, social integration and the rights of disabled people) and the law of 12 March 1999, n. 68 (Regulations for the right to work of the disabled).

Contrary to what the Company claims, precisely because of the definition of personal data contained in the Regulation - "any information relating to an identified or identifiable natural person ("data subject")" and that "the natural person who can be identified, is considered identifiable, directly or indirectly, with particular reference to an identifier such as a name, an identification number, location data, an online identifier or one or more characteristic elements of your physical, physiological,

genetic, mental, economic, cultural or social identity ” (art. 4, par. 1, n. 1, of the Regulation) - even the mere reference to the two legislative bodies in question which, notoriously, govern benefits and guarantees for the assistance, social and work integration of disabled people or their family members, allows you to obtain information on the state of health of a person.

For these reasons, it is confirmed that the Company, by publishing the described document, has given rise to a "dissemination" (art. 2-ter, par. 4, letter b), of the Code) of data relating to health referring to its employees or their family members (see on this point, the definition of data relating to health contained in article 4, paragraph 1, no. 15, of the Regulation, but already "Guidelines on the processing of personal data, contents also in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged entities" of the Guarantor, provision n. 243 of 15 May 2014, web doc. n. 3134436, spec. first part, par. 2; part two, par. 1; as well as measures referred to in note no. 5).

Therefore, although the employer can lawfully carry out the processing of data relating to the health of its employees (and their relatives), in order to allow them to enjoy the benefits of the law, as in the case of the concessions provided for assistance to disabled family members, paid leaves and leave for serious family reasons (see, on this point, paragraph 8.6 of the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector" of the Guarantor , of 14 June 2007, web doc. No. 1417809), however, the prohibition of disseminating data relating to the health of the interested parties remains.

This prohibition must also be respected when fulfilling the specific publication obligations required by the law such as, for what is relevant in the present case, those provided for by the sector regulations on transparency, pursuant to Legislative Decree 14 March 2013, no. 33, Reorganization of the regulations concerning the right of civic access and the obligations of publicity, transparency and dissemination of information by public administrations, modified by Legislative Decree lgs. 97/2016 (see 2-septies, paragraph 8 of the Code and articles 4, paragraph 6 and 26, paragraph 4 of Legislative Decree no. 33/2013).

For these reasons, as emerged from the preliminary findings, the Company, by publishing the document in question, carried out - until its definitive removal ascertained by the Office on 24 June (see the aforementioned service report) - a dissemination of data relating to the health of employees and/or their families in violation of the basic principles of treatment contained in the art. 5, par. 1, lit. a) and c) and art. 9, par. 1, 2 and 4 of the Regulation and in violation of the prohibition of dissemination of data relating to health pursuant to art. 2-septies, paragraph 8, of the Code.

4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller in the defense writings □ for the truthfulness of which one may be called upon to answer pursuant to art. 168 of the Code □, although worthy of consideration, do not allow overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the Regulation of the Guarantor n. 1/2019.

It is also represented that the violation of the personal data object of the preliminary investigation by the Company took place in full force of the provisions of the Regulation and of the Code, as amended by Legislative Decree 101/2018, and that, therefore , for the purpose of determining the regulatory framework applicable from a temporal point of view (art. 1, paragraph 2, of law no. 689 of 24 November 1981), these constitute the provisions in force at the time of the committed violation, which in the present case it is extended, albeit for non-continuous periods, during the first months of 2019 ("from 7/1 to 5/2 and 20/21 May 2019").

The preliminary assessments of the Office are therefore confirmed and the illegality of the processing of personal data carried out by the Teatro del Giglio company is noted, as the publication on the institutional website of the "Organization chart as of 18 October 2018" occurred in violation of the basic principles of the treatment, contained in the art. 5, par. 1, lit. a) and c) and art. 9, par. 1, 2 and 4 of the Regulation, and in violation of the ban on the dissemination of data relating to health, pursuant to art. 2-septies, paragraph 8, of the Code.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5 of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 5 of the same Regulation and art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the Company has taken steps to remove the document from the institutional website, the conditions for the adoption of further corrective measures pursuant to art. 'art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i and 83 of the Regulation; article 166, paragraph 7, of the Code).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in

this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the Board [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

In this regard, taking into account the art. 83, par. 3 of the Regulation, in this case - also considering the reference contained in art. 166, paragraph 2, of the Code – the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation.

The aforementioned pecuniary administrative sanction imposed, depending on the circumstances of each individual case, must be determined in the amount taking into due account the elements provided for by art. 83, par. 2, of the Regulation.

In relation to the aforementioned elements, the particular delicacy of personal data unlawfully disclosed by the Company was considered, since it concerns data relating to health (Article 4, paragraph 1, no. 15 of the Regulation) as well as the failure to comply with the indications which, from time, the Guarantor has provided all public entities (see for example, Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for purposes of publicity and transparency on the web by public entities and by other obliged entities mentioned above) and in numerous provisions concerning specific cases (most recently, provision no. 3 of 15 January 2020, web doc. no. 9261227; provision no. 35 of 13 February 2020, web doc. no. 9285411).

On the other hand, it was considered that the diffusion took place due to a mere error which led to the publication of a document for internal use, without the intention of harming or discriminating against anyone and that the time frame of the diffusion was limited, overall and in any case on a non-continuous basis, in the period "from 7/1 to 5/2 and 20/21 May 2019". It is also favorably noted that the Company, which is a small entity with a limited number of employees and with scarce budgetary resources, has in any case taken action to remove the published document and has collaborated with the Authority during the investigation of this proceeding in order to remedy the violation and mitigate its possible negative effects. There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction also taking into account the phase of first application of the sanctioning provisions pursuant to art. 22, paragraph 13, of Legislative Decree lgs. 10/08/2018, no. 101, to the extent of 6,000 (six thousand) euros for the violation of articles 5, par. 1, lit.

a) and c) as well as art. 9, par. 1, 2 and 4, of the Regulation and art. 2-septies, paragraph 8, of the Code as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the particular delicacy of the data disclosed, it is also believed that the ancillary sanction of publication on the website of the Guarantor of this provision should be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted 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.

ALL THIS CONSIDERING THE GUARANTOR

notes the illegality of the processing carried out by the Teatro del Giglio Company, for violation of the articles 5, par. 1, lit. a) and c) as well as art. 9, par. 1, 2 and 4, of the Regulation and art. 2-septies, paragraph 8, of the Code, in the terms set out in the justification;

ORDER

to the Teatro del Giglio Company, in the person of its pro-tempore legal representative, with registered office in Piazza del Giglio, 13-15, 55100 Lucca - P.I.01670770468, pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 6,000.00 (six thousand) euros as an administrative fine for the violations indicated in the justification; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the fine imposed;

ENJOYS

to the same Company to pay the sum of Euro 6,000.00 (six thousand), in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, 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 no. 689/1981;

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, believing that the conditions set out in art. 17 of the Regulation of the Guarantor n. 1/2019.

Pursuant to art. 78 of the GDPR, of the articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, against this provision it is possible to lodge an appeal before the ordinary judicial authority, under penalty of inadmissibility,

within thirty days from the date of communication of the provision itself or within sixty days if the appellant resides abroad.

Rome, 28 May 2020

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia