[doc. web no. 9445550]

Injunction order against the National Social Security Institute - Provincial Directorate of Brescia - 2 July 2020

Register of measures

no. 122 of 2 July 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, 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 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE, "General Data Protection Regulation" (hereinafter the Regulation);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data (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");

HAVING REGARD to 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 office of the Guarantor for the protection of personal data (web doc. n. 1098801);

SPEAKER Dr. Giovanna Bianchi Clerici;

WHEREAS

1. The instance

With a note dated May 29, 2018, Ms XX filed an appeal pursuant to articles 145 et seq. of the Code, in force at the time of the facts object of the request, requesting to obtain access to the health data concerning you against the National Social Security Institute-Provincial Directorate of Brescia, hereinafter "Institute", having not received a reply to the requests already formulated against the same pursuant to the legislation on the protection of personal data.

2. The preliminary investigation

The Authority, with a note dated 31 July 2018, reiterated on 17 October 2018, pursuant to art. 157 of the Code, invited the Institute, as data controller, to evaluate the possibility of adhering to the requests of the interested party and to proceed, in any case, to inform her about the decisions adopted or which it would be intended to adopt, attaching any documentation and at the same time sending a copy of the reply to this Authority as well.

Considering the Institute's failure to respond within the indicated deadline (despite having been told that, in the event of non-compliance with the request, the administrative sanction provided for by Article 83, paragraph 5 of the Regulation would be applicable) and therefore making it applicable, pursuant to art. 166, paragraph 2, of the Code, the aforementioned sanction, the required notification was made to the Institute, communicating the start of the procedure and inviting it to send the Guarantor written defenses or documents and, possibly, to request 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 24 November 1981) (deed of 25 January 2019, prot. n. 2736/19, notified on the same date by certified mail).

The Institute, in the context of the requested defensive writings, provided a reply to the Authority (with a note of 22 February 2019), highlighting, moreover, the various phases in which Ms XX had come into contact with the same. In particular, the Provincial Director, XX, declared that:

- "the request (from Ms XX) was received on 31 July in conjunction with the period of greatest use of absences for holidays for most of the personnel";

- "the complexity and size of the productive fabric are also evident in terms of the management of communications that reach us daily from the various and different channels made available to companies, professionals, other Administrations and citizens", highlighting the considerable number of telematic contacts (approximately 225,000), being able to take advantage of 318 units available in 2018;

- the Institute "did not formally acknowledge the request received from Ms XX, deeming that she had been repeatedly made aware of all the treatments that concerned her and that, having all the accompanying documentation available of a possible and eventual appeal if the judgment was not deemed suitable, such correspondence was fully considered suitable to satisfy the request for access. In essence, it was not understood which documents Ms complained of not having received" considering that "the reports sent and all the remaining correspondence also contained information regarding the Data Controller, the

processing methods and so on pertaining to the right of access exercised".

A communication from the Data Protection Manager was also attached to the aforementioned note of 22 February, who, in addition to what has already been represented by the Provincial Director, in expressing regret for the lack of response from the Institute, declared that :

- "concerning the release of medical documentation, INPS acted according to the rules imposed by the administrative procedure referred to in the service requested by Ms XX; in fact, more specifically, it is noted that the paper documentation presented by the lady during the visit (...), is made visible only to healthcare personnel and, in the event of any need to retain all or part of the medical documentation presented, this is acquired in copy by the Commission and, consequently, inserted in the personal health file and archived in such a way that it can only be consulted by the authorized head office health personnel and for the purposes connected to the ongoing procedure";
- "in any case, it is believed that the acquisition of documentation relating to the administrative procedure (...) is to be requested in the context of exercising the right of access to administrative documents, pursuant to law no. 241/90 and subsequent amendments m. and i., in the manner indicated therein, and not through the instrument of proposing the request for access to personal data pursuant to art. 7 of Legislative Decree no. 196/2003".

The same Institute, with a subsequent note dated 29 March 2019, also sent to the Guarantor, provided Ms XX with the information requested, also informing her of the possibility of "requesting, without any charge, the PIN that INPS has activated and which will allow you to access, via the institutional website, all the information concerning you, including information regarding the status of any services requested". The Institute also sent additional subsequent acknowledgment notes to Ms XX, in order to satisfy her requests and to clarify the misunderstandings that had arisen (December 12, 2019, January 22, 2020 and February 12, 2020).

Having taken note of the declarations of the Institute (which confirmed that it had not provided, before the Office's invitation, the information relating to the action taken by Ms XX, regarding her request pursuant to Article 15 of the Regulation), the Office, with deed of 22 May 2019, prot. no. 17163, notified on the same date by certified e-mail, which here must be understood as reproduced in full, initiated, pursuant to art. 166, paragraph 5, of the Code, this time, with reference to the failure to respond to the requests made by the interested party regarding the exercise of rights, a procedure for the adoption of corrective measures pursuant to art. 58, par. 2 of the Regulation against the Institute, again inviting the same to send the

Guarantor defense writings or documents or to ask to be heard by the Authority. The Institute has not produced any documents in this regard.

3. The legislation on the protection of personal data

As a preliminary point, it should be noted that the Regulation became applicable starting from 25 May 2018, which made it necessary to adapt the existing national regulatory framework on the matter; the Authority, by virtue of the direct applicability of the Regulation and pending the intervention of the national legislator, with provision dated 31 May 2018 (web doc. n. 8997237), ordered the non-application, starting from the aforementioned date, of the relating to the appeal procedure contained in the Code as they are deemed incompatible with the provisions relating to complaints pursuant to articles 77 ff. of the Regulation itself. The Office, with a note dated 31 July 2018, explained to the interested party the effects of the change in the regulatory framework; therefore the deed presented is decided according to the provisions applicable to the complaint procedure currently contained in the art. 77 of the Regulation, as well as in art. 143 of the revised Code - as well as in the internal regulation n. 1/2007 - for the part compatible with the new regulatory framework; the Office proceeded, with a subsequent internal note of 17 October 2018, to order the return of the secretarial fees already paid by the interested party for the presentation of the appeal, taking into account the free nature of the complaint expressly provided for by the Regulation (see art. 57 , paragraph 3, Regulation).

With reference to the facts that are the subject of the request, it should be noted that the regulations on the protection of personal data provide for the right of the interested party to obtain from the data controller access to personal data and specific information on the processing of data referring to the same (see Article 15 and subsequent of the Regulation and Recital No. 63 and Articles 7 and subsequent of the Code regarding the protection of personal data, before the amendments made to the same by Legislative Decree August 10, 2018, No. 101).

In this regard, for the determination of the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question must be identified when the unlawful omissive conduct took place, which occurred before the date of 25 May 2018 in which the Regulation has become applicable. In fact, the preliminary investigation documents revealed that Ms XX's request for access was made on 16 April 2018 and requested on 8 and 9 May

2018 and that the owner should have provided her with a response within fifteen days from its receipt (art. 146, paragraph 2, of the Code, in the version prior to the reformulation of the same made by means of Legislative Decree no. 101/2018).

Therefore, the Code applies to the processing of personal data in question, in the described version prior to Legislative Decree no. 101/2018, which did not provide that the violation of the provisions of articles 7 et seq. was punished by any administrative fine.

From another point of view, however, the omissive conduct of the Institute with respect to the obligation to ensure a response to the Authority's requests to provide information and produce documents, pursuant to art. 157 of the Code and within the scope of the powers pursuant to art. 58 of the Regulation was implemented in November 2018, a time in which the Regulation was fully applicable and the Code had already been amended by Legislative Decree no. 101/2018.

4. Outcome of the investigation

Given that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code ("False statements to the Guarantor and interruption of the execution of the duties or the exercise of the powers of the Guarantor"), following the examination of the acquired documentation as well as the declarations made to the Authority during the proceeding which, in fact, in highlighting the culpable nature of the violation, they recognize the deficiencies contested, it emerges that the Institute has violated articles 7 et seq. of the Code (in the version prior to the amendments made by Legislative Decree no. 101/2018), having provided feedback to the access request of the complainant only following the invitation, by the Guarantor's Office, to adhere to its requests, as well as the art. 157 of the Code (in the version following decree 101), having failed to comply with the Guarantor's invitation to provide information, within the terms indicated by the same.

5. Conclusions

In the light of the assessments referred to above, it is believed that, limited to the profile concerning the conduct relating to the failure to respond to the request for access to data formulated pursuant to articles 7 et seq. of the Code, the archiving of the administrative sanctioning procedure must be ordered, taking into account, for the reasons set out above, the applicability of the Code, in the version prior to the amendments made by Legislative Decree no. 101/2018, which did not provide that the violation of the provisions of articles 7 et seq. was punished by an administrative fine.

Otherwise, it is represented that the elements provided by the data controller in the defense briefs in relation to the conduct relating to non-compliance with the Guarantor's invitation to provide the requested information, pursuant to art. 157 of the Code, although worthy of consideration, do not allow the findings notified by the Office to be overcome with the act of initiation of the proceeding and are insufficient to allow the filing of the present proceeding, since none of the cases envisaged by the art. 11 of the Regulation of the Guarantor n. 1/2019.

Therefore, in relation to this last violation, the preliminary assessments of the Office are confirmed and the violation of art. 157 of the Code, for not having the Institute responded to the Guarantor's invitation to provide the requested information, by the date indicated by the same Authority, within the scope of the powers pursuant to art. 58 of the Regulation.

In relation to the aforementioned conduct concerning the non-compliance with the Guarantor's invitation to provide the requested information, pursuant to art. 157 of the Code, it should be noted that the violation of art. 157 of the Code, caused by the conduct implemented by the Institute, is subject to the application of the administrative fine pursuant to art. 83, par. 5, letter. a) of the Regulation.

The Guarantor, pursuant to articles 58, par. 2, lit. i), 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).

The aforementioned pecuniary administrative sanction according to 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, with respect to which, on the one hand, the culpable nature of the violation, the represented lack of staff of the Office and the fact that there are no previous violations of the same type previously committed and, on the other, the fact that the non-compliance with the Guarantor's invitation to provide the requested information has led to an aggravation of the procedure with consequent lengthening of the times of the same.

Due to the aforementioned elements, evaluated as a whole, also pursuant to art. 83, par. 2 of the Regulation, it is deemed necessary to determine the amount of the pecuniary sanction provided for by art. 83, par. 5) of the Regulation, in the amount of

5,000.00 (five thousand) euros for the violation of art. 157 of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the same Regulation, effective, proportionate and dissuasive.

In relation to the specific circumstances of the present case, it is believed that the accessory 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.

It is also believed 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

a) orders the archiving of the administrative sanctioning procedure referred to in the notification of the violation carried out pursuant to art. 166, paragraph 5, of the Code, limited to the disputed violation of failure to respond to the request regarding the exercise of rights, for the reasons mentioned in the justification;

b) pursuant to art. 57, par. 1, lit. f) of the Regulation, declares the conduct of the National Social Security Institute - Provincial Directorate of Brescia to be unlawful for having violated art. 157 of the Code, failing to respond to the request for information formulated by the Guarantor, within the terms indicated by the latter;

ORDER

to the National Social Security Institute-Provincial Directorate of Brescia, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as 166 of the Code, to pay the sum of 5,000.00 (five thousand) euros as an administrative fine for the violation of art. 157 of the Code;

ENJOYS

to the same Institute to pay the sum of Euro 5,000.00 (five thousand) 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.

Pursuant to art. 166, paragraph 8, of the Code, informs the aforementioned Institute that «within the term referred to in article 10, paragraph 3, of legislative decree no. 150 of 2011 envisaged for the filing of the appeal, the offender and the parties jointly liable may settle the dispute by adapting to the provisions of the Guarantor, where given, and by paying an amount equal to half of the fine imposed».

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor and believes 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.

Pursuant to art. 78 of the Regulation, of the articles 152 of the Code and 10 of Legislative Decree no. 150/2011, 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, July 2nd 2020

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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