

Injunction order against the Puglia Region - 29 May 2019

Register of measures

no. 124 of 29 May 2019

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dr. Augusta Iannini, vice president, of dr. Giovanna Bianchi Clerici and of prof. Licia Califano, members, and of dr. 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;

CONSIDERING the Legislative Decree 196/2003 containing the "Code regarding the protection of personal data" (hereinafter "Code");

NOTING that the Public Liberties and Health Department of this Authority examined a report presented on 26 November 2015 in which the whistleblower complained of unlawful processing of personal data due to publication in the Official Bulletin of the Puglia Region, with registered office in Bari, Lungomare Nazario Sauro, 22 C.F./P.I. 80017210727 (hereinafter the "Region"), on the web portal of the latter <http://www.sistemapuglia.it>, of the list of names - including that of the whistleblower - of participants in a selection called for years first by the same Region, with a tender called "Back to the Future 2013". In particular, together with these names, the relative tax codes were indicated through which it was possible to clearly view the CUD 2011 and 2012 and, for this reason, the whistleblower asked the Guarantor to intervene so that the Puglia Region obscured these income data in violation of the law to the confidentiality of the interested parties;

HAVING REGARD TO the preliminary assessment carried out on 29 September 2016 by the Department of Public Liberties and Health of this Authority, with which it was found that "(...) on the portal <http://www.sistemapuglia.it>, the link located on the homepage is active entitled "Back to the Future 2013" relating to the project financed by the Puglia Region in support of unemployed and unemployed young graduates (...) (e) in the area entitled "Iter in corso" it is possible to view and download various rankings, containing data for various reasons and personal information of about 5100 applicants (...) “;

GIVEN the note prot. no. 28569/102498 of 29 September 2016 of the Department of Public Freedoms and Health, with which the Puglia region was invited to provide any information useful for the investigations and evaluation of the case;

HAVING ACKNOWLEDGED the response dated AOO/175/1030 of 4 November 2016 with which the administration pointed out that "(...) regarding the publication of the rankings relating to Public Notice no. 1/2013 "Back to the future", the undersigned Administration has (...) decided to clearly publish the name of the candidates (the only identifying data of natural persons present in the lists) considering the limit of 30,000 euros as an admissibility requirement for participation in the Notice, not indicative of a situation of economic hardship -social of the interested parties (art. 26, paragraph 4, of Legislative Decree no. 33 of 14/3/2013 (...)", and that with reference "(...) to the exception regarding access from the platform to the Cud, cannot fail to consider that the same CUD generated only acknowledges the data deriving from the liquidation of the scholarships in question, not adding anything regarding the income positions of the young graduates who, according to the public notice, had to be be unemployed to access the public tender procedure in question (...)". Finally, he stated that he intended "(...) to proceed with the removal of all the rankings from the Official Bulletins and from the websites, since all the actions relating to the management of the Public Notice (in question) have now been completed (...)" , also inhibiting "(...) the possibility of autonomously downloading the Single Certification (CU) models from the appropriate section of the website, guaranteeing interested parties who need it, the possibility of contacting the regional offices directly (...)" ;

GIVEN the note prot. no. 12650/102498 of 3 April 2017 aimed at a supplementary investigation by the Department of Public Freedoms and Health in which the Region was requested to provide further information, to be paid no later than 28 April 2018, relating to the relationship between the latter and "Innovapuglia" S.p.a., in consideration of the collaboration given to the regional administration in the "Back to the future 2013" project;

HAVING ACKNOWLEDGED the response note protocol AOO 175/1283 of 4 October 2017 in which the Region clarified its position as data controller and the relationships with the aforementioned company;

GIVEN the note prot. no. 15870/102498 of 24 May 2018 with which the Department of Public Liberties and Health, in the light of the investigation carried out, having failed to recognize the regulatory conditions that legitimized the Puglia Region to disseminate the personal data described on the aforementioned web portal (the personal data of subjects not admitted, excluded or renounced, from the economic benefit, personal data contained in the Single Certification), defined the procedure ascertaining the violation of article 19, paragraph 3, of the Code. This, in particular, due to the fact that "the Puglia Region, owner of the processing of personal data published on the portal <http://www.sistemapuglia.it>, has disclosed on the aforementioned portal, in addition to the data of the beneficiaries of economic contributions exceeding €1000, even those of

subjects who are not admitted, excluded or who have renounced the aforementioned benefit, the publication of which is not envisaged by the legislation on transparency (Article 26, paragraph 2, of Legislative Decree No. 33/2013) mentioned in the response note from the Region. In addition, the same Region has allowed the possibility of generating, in the area dedicated to the "CUD Procedure", the single certification-CU 2015 and 2016, with all the information and personal data contained therein (name, date and place of birth, code tax, tax data, etc.), by simply entering the tax code of the interested party in the appropriate search mask. The single certification is a document issued by the employer for tax purposes, which - contrary to what was stated by the Region in the acknowledgment note - does not contain only "data deriving from the payment of the scholarships in question", but also other personal information relating, for example, to tax data (e.g.: IRPEF withholdings, regional and municipal surtax, gross tax, deductions for employment, pensions or similar income, total deductions (...)).

However, even in the face of the unlawful conduct put in place, the aforementioned Department ascertained that there were no grounds for promoting the adoption of a prescriptive or inhibitory provision by the College, pursuant to article 11, paragraph 1, letter d and 13, paragraph 4, of internal regulation no. 1 /2007 of 14 December 2007 (web doc. n. 1477480 traceable at www.gpdp.it), in consideration of the fact that this conduct had, at present, exhausted its effects, as the personal data those in question were no longer accessible on the institutional website at the urls indicated in the request for information, reserving the right to verify, however, with an independent procedure, the existence of the conditions for contesting the administrative violation envisaged by art. 162, paragraph 2 bis, of the Code, for the violation of art. 19, paragraph 3, of the Code;

GIVEN the note prot. no. 16075/102498 of 25 May 2018 with which the aforementioned Department sent the documents to the Inspection Activities Department, so that it could evaluate the conditions for the application of the administrative sanction referred to in article 162, paragraph 2-bis, of the Code in relation to the occurred disclosure of the personal data indicated above, in the absence of the legitimizing regulatory conditions and, therefore, in the non-compliance with art. 19, paragraph 3, of the Code;

CONSIDERING the act prot. no. 18924/102498 of 22 June 2018 with which the Guarantor contested the administrative violation provided for by art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 and, in this case, the violation of the art. 19, paragraph 3, for having carried out an unlawful processing of personal data consisting, specifically, in the dissemination of personal data, through its web portal, relating to participants in the Public notice n. 1/2013 "Back to the future" (personal data of subjects who are not admitted, excluded or who have renounced the economic

benefit, personal data contained in the Single Certification);

NOTING that from the administrative report prot. no. 15931/102498 of 13 May 2019, prepared by the Office of the Guarantor pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment has not been made;

HAVING REGARD TO the written defense prot. no. AOO/175/1544 dated 2 August 2018, formulated pursuant to art. 18 of Law No. 689/1981 with reference to the aforementioned notice of dispute prot. no. 18924/102498 of 22 June 2018, with which the Region requested both the hearing before the Guarantor and the archiving of the sanctioning procedure, initiated against him, highlighting that "with reference to the dissemination on the institutional portal of the Region also of the data personal data of subjects who are not admitted, excluded or who have renounced (...) (this dissemination) actually constituted an obligation for the Administration on the basis of the provisions of the Public Notice co-financed by the OP Puglia FSE 2007/2013 and which therefore necessarily refers to the specific discipline dictated for the Operational Program (PO) referred to. On this point, in fact, the Manual of procedures of the Managing Authority, contained in the Management and Control System (Si.Ge.Co.) of the OP Puglia FSE 2007/2013, the approval of which is envisaged by articles 58 et seq. of Regulation (EU) n. 1083/2006 (...) provides for explicit publication obligations that extend well beyond the mere publication of the winners' personal data, but also concern non-winners. In fact, the aforementioned Si.Ge.Co., approved by the European Commission which has expressed a conformity opinion (...), in relation to the case in question, expressly provides (...) (that with regard to the preparation and publication of the ranking and presentation of results of the selection) (...) the evaluation process ends with the formation of the ranking, and on the basis of the scores assigned in the merit assessment, the Service Manager, with his own determination, approves the ranking indicating: the projects suitable for funding, up to the competition of available resources; eligible but non-fundable projects; unsuitable projects. The administration publishes the results of the evaluation in the Official Bulletin of the Puglia Region and on the institutional websites: www.regione.puglia.it and <http://formazione.regione.puglia.it>. The date of publication of the rankings constitutes the initial deadline for the presentation of administrative appeals (...). And again "(...) The Si.Ge.Co. constitutes, for projects financed with European funds, the *lex specialis* for which the regional administrative structure competent to manage the individual tenders and public notices could not have departed from them without incurring liability, especially since publication in such cases constitutes the only procedures for making the results of the participation known to the interested parties and for allowing them to present administrative appeals and exercise judicial protection in the appropriate offices. Given the above, it is believed that the discipline referred to in Si.Ge.Co. of the OP Puglia

FSE 2007/2013 (whose approval, it is reiterated, is provided for by articles 58 and following. Regulation (EU) n. 1083/2006) constitutes the legal basis which, pursuant to art. 19 paragraph 3, of (...) Legislative Decree 196/2003, allows the communication and dissemination of personal data by a public entity".

CONSIDERING the report prot. no. 14443/102498 of 2 May 2019 for the hearing of the parties, during which the Region, recalling in full the defense brief already presented, reiterated that "the legal basis for the publication and dissemination of the data object of the censorship, is constituted, in addition to the Legislative Decree 33/2013, by Regulation (EU) No. 1083/2006 containing the "General regulation on the European regional development fund, the European social fund and the cohesion fund"(...)", as well as "by the Si.Ge.Co. management and control (...) (which) "(...) adopted by resolution of the Regional Council, published in the Official Bulletin of the Region (...)" constitutes *lex specialis* for the purpose of providing economic benefits (...)" . The Region then underlined that "(...) the verification of compliance with the discipline contained in the Si.Ge.Co. is entrusted to the European Court of Auditors, to the Directorates General of the Commission, to the Member State and to the Audit Authority regional. These Authorities could object to the non-compliance with the advertising obligations envisaged by the Si.Ge.Co and therefore proceed with the decertification of the expenditure. To this end, it is necessary to make the publication accessible for the five years following the closure of the fund (...)" . The Region also added that "(...) there are essentially two reasons for the procedure envisaged by the Si.Ge.Co. which obliges the manager to publish the names of the beneficiaries and potential beneficiaries: 1) fully implement Article 69 of Regulation (EU) 1083 entitled "Information and publicity" which provides that the managing authorities provide information, among other things, on the financed operations and publicize them in order to guarantee the transparency of the intervention of the funds; 2) the possibility of provide for further funding with consequent scrolling of the ranking whose validity was extended until 31 December 2015 (...)" . Finally, the Region, in the light of the above, highlighted the absolute good faith with which it acted "(...) in the fulfillment of a legal duty by the manager who could not deviate from the provisions of the Si.Ge. Co. if not incurring serious responsibilities also of a tax nature (...)" .

CONSIDERING that the arguments put forward, aimed at demonstrating the groundlessness of what was ascertained by the Authority and, subsequently, subject to dispute, are not suitable for determining the closure of the sanctioning procedure. The Control and Management System, Si.Ge.Co., containing the aforementioned Manual of procedures which "(...) provides for express publication obligations that extend well beyond the mere publication of the winners' personal data, (including)

non-winners (...)", is adopted by the Member States - in this case, by the Management Authority (Manager of the program implementation service) of the regional administration with reference to the OP Puglia FSE 2007/2013 - pursuant to the articles from 58 to 62 of Regulation (EU) 1083/2013. The latter provisions only provide for the general principles to which the Member States and, in particular, the Regions (for the regional Operational Plans, as in this case), must comply in setting up the Management and Control Systems, as well as indications both on the Authorities (management, certification and audit) to be designated and on the respective functions, without specifying, in detail, any of the obligations mentioned above. This Region, therefore, in formulating the provisions contained in the Si.Ge.Co. and in the Manual of procedures (adopted by resolution of the Regional Council), should have complied with the provisions of the national legislation on transparency, as well as those on the protection of personal data and, in particular, with reference to this circumstance, the aforementioned art. 26, paragraph 4, of Legislative Decree 33/2013 and, in relation to it, to art. 19, paragraph 3, of the Code, thus avoiding the ascertained unlawful conduct consisting in the dissemination, through its web portal, of personal data of the subjects participating in the Public notice n. 1/2013 "Back to the future" not admitted, excluded or renounced, as well as data contained in the related Single Certification.

The above also applies in relation to the aforementioned art. 69 of Regulation (EU) 1083/2013, entitled "Information and publicity", which limits itself to establishing that the Member State (in this case, always the regional administration with reference to the Regional Operational Plan ESF 2007/2013) and the 'Managing Authority "(...) provide information about co-financed programs and operations and publicize it. The information is intended for European citizens and beneficiaries in order to enhance the role of the Community and ensure the transparency of the intervention of the Funds. (...) The managing authority of the operational program is responsible for publicity in accordance with the rules of application of this regulation (...)". Also in this provision, therefore, there is no precise indication of the contents of the information or the methods of publicizing the programs and operations, to be specified, therefore by the Member State or the Region in relation to the reference Operational Plan.

Finally, it should be noted that precisely because of the adoption and articulation of the Management and Control System, Si.Ge.Co., with the specification of the publication obligations to be followed by the Region, cannot accept the reference to the invoked good faith for having the Region, as proposed by the same, acted " (...) in the fulfillment of a legal duty on the part of the manager who could not have deviated from the provisions of the Si.Ge.Co. except in running into serious responsibilities

also of a fiscal nature (...)". In fact, according to consolidated jurisprudence (Cass. Civ. section I of 21 February 1995 n. 1873; Cass. Civ. section II of 13 March 2006, n. 5426), for the application of art. 3 of the law n. 689/1981 it is necessary that good faith or, in the terms of art. 3 of law 689/1981, the error, in order to be excusable, is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the legitimacy of his behavior. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Region, in its capacity as data controller and in relation to the performance of its institutional functions, was diligently required to know the applicable rules in the matter in question, including the legislation on personal data, as well as the relative interpretation and therefore, mainly, to observe, in the preparation phase of the Si.Ge.Co., the specific limits and conditions established in Legislative Decree n. 33 of 2013.

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

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, of the seriousness of the violation and of the offender's personality;

CONSIDERED, therefore, on the basis of the aforementioned elements evaluated as a whole, that it is necessary to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine provided for by art. 162, paragraph 2-bis of the Code, to the minimum amount of 10,000.00 (ten thousand) euros for the violation of art. 19, paragraph 3, of the same Code;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to the Puglia Region, with registered office in Bari, Lungomare Nazario Sauro, 22 C.F./P.I. 80017210727 to pay the sum of 10,000.00 (ten thousand) euros provided for by art. 162, paragraph 2-bis of the Code, for the violation of art. 19, paragraph 3, of the Code, for having carried out an unlawful processing of personal data consisting, specifically, in the dissemination of personal data, through its web portal, relating to participants in the Public notice n. 1/2013 "Back to the future" (personal data

of subjects who are not admitted, excluded or who have renounced the economic benefit, personal data contained in the Single Certification);

ENJOYS

to the same to pay the sum of Euro 10,000.00 (ten thousand) according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree lg. 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, May 29, 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

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