[doc. web no. 9888113]

Provision of 23 March 2023

Register of measures

no. 84 of 23 March 2023

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components, and the cons. Fabio Mattei, 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 which repeals 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 individuals 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 general secretary 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 the lawyer Guido Scorza;

WHEREAS

1. The complaint.

With a complaint, Ms XX, an employee of the Municipality of Pulsano (hereinafter "Municipality"), complained about the publication, on the institutional website of the Municipality, of documentation containing her personal data, including data

relating to health. In particular, the complainant, who held an organizational position within the municipal organization chart, represented that, with decree no. XX of the XX, bearing the indication "considering that the [...] employee was absent due to illness from XX to XX", the General Secretary of the Municipality was nominated ad interim. This appointment was extended until the twentieth century, with decree no. XX of XX.

With decree n.XX of the XX the same appointment was further extended until the XX. In the decree n. XX cited above, published in the Praetorian Register of the Municipality's institutional website, it was also reported that the Municipality "having taken note of the momentary inability to hold the position" of the complainant, announced the "initiation of a disciplinary procedure" to load thereof.

The publication of the decrees in question and their indexing on generalist search engines were verified by the Office with service reports in the file.

2. The preliminary investigation.

Based on the elements acquired, the Office notified the Municipality, as data controller, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, as the publication on the website of the Municipality of the aforementioned decrees caused the "dissemination" of the personal data of the complainant, also relating to health, in violation of articles 5, 6 and 9 of the Regulation and 2-ter and 2-septies paragraph 8 of the Code, in the text prior to the amendments made by Legislative Decree 8 October 2021, no. 139. Therefore he invited the aforesaid owner to produce defensive 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).

The Municipality sent its defense briefs representing, in particular, that:

- "the adoption of the [...] cited decrees [...] and their publication in the "Transparent Administration" section was [...] carried out as in execution of the following regulatory provisions: art. 50, paragraph 10, of Legislative Decree no. 267/2000, which attributes to the Mayor the competence to appoint the heads of the offices and services, to assign and define the management positions and those of external collaboration according to the methods and criteria established by articles 109 and 110 of the same TUEL";
- “art. 109, paragraph 1, of Legislative Decree no. 267/2000, which reads verbatim: "Managerial positions are conferred on a fixed-term basis, pursuant to article 50, paragraph 10, with a reasoned provision and in the manner established by the

regulation on the organization of offices and services, according to criteria of professional competence, in relation to the objectives indicated in the mayor's administrative program [...]";

- “art. 14 of the National Collective Bargaining Agreement of the "Local Functions" Section for the three-year period 2016-2018, which requires the adoption of a "written and motivated deed" for the assignment of tasks relating to organizational positions";

- “art. 14, paragraph 1, letter a), and paragraph 1-quinquies, of Legislative Decree no. 33/2013, which provide for the obligation, in relation to the case in question, to publish in the "Transparent Administration" section the act of appointment also for holders of organizational positions, such as the trade union decrees conferring the Secretary management functions [...], aimed at the temporary replacement of the [complainant]";

- “the inclusion in the union decree n. XX of the words "following absence due to illness" and in Trade Union Decree no. XX of the words "after initiation of the disciplinary procedure", the same words constituting essential parts of the founding reasons for the respective Decrees, could not fail to be foreseen, as such content is due to a precise unavoidable legislative obligation. In fact, Article 3, paragraph 1 of Law No. 241/1990 prescribes that "every administrative provision, including those concerning the administrative organization, must be motivated";

- "moreover, this motivation is not only essential for the direct addressees (the employee replaced in her managerial functions and the substitute municipal secretary) in whose legal spheres the Decrees in question produce legal effects, but also for those "whoever" holders of the right "simple" access pursuant to art. 5, paragraph 1, of Legislative Decree no. 33/2013) who, in compliance with the principle of transparency, have the right to know the reasons underlying those organizational measures of the municipal administration, in application of art. 1, paragraph 1 of the same legislative decree n. 33/2013 which recognizes and guarantees them "widespread forms of control over the pursuit of institutional functions and the use of public resources";

- “regarding the dispute relating to the dissemination, in violation of art. 2-septies, paragraph 8, of Legislative Decree 196/2003, of "data on health", [...] having reported the word "disease" in the prefatory Decrees, it is certainly not possible to attribute the meaning of "data relating to health" pursuant to art. 4, par. 1, point 15), of the GDPR, as indicating that the employee was "sick" did not allow any "specific" information to be deduced, even indirectly, on the specific "state of health" afflicting the data subject. The word "illness" constitutes an impediment to working performance even if it is a "generic" reference to the cause - an essential and unavoidable element of the motivation - which led to the replacement [of the complainant] in her managerial functions";

- "in relation to the dispute of having disclosed personal data in violation of the principles of lawfulness, correctness and transparency as well as minimization of data, [...] this civic administration cannot fail to justify the inclusion respectively in the aforementioned Decrees of both the word "illness" and and of the words "disciplinary procedure" as fulfillment of the unavoidable duty to motivate, in fact and in law, the adoption of the same provisions on the basis of the aforementioned sources of law".

It is also represented that, although the Municipality has expressed its willingness to be heard in a hearing, it has not followed up on the invitation of this Authority, sent with a note dated XX, prot.n.XX, to participate in the hearing set for the day XX.

3. Applicable legislation.

3.1 The regulatory framework.

The regulation of personal data protection provides that public bodies, even if they operate in the performance of their duties as employers, can process the personal data of workers, if the processing is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks envisaged by national sector regulations (articles 6, paragraph 1, letter c), 9, par. 2, lit. b), and 4, and 88 of the Regulation) or "for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (Article 6, paragraph 1, letter e), of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (Article 6, paragraph 2, of the Regulation). In this regard, it should be noted that processing operations which consist in the "dissemination" of personal data are permitted only when provided for by a law or regulation (Article 2-ter, in the text of the Code prior to the amendments made by Legislative Decree 8 October 2021, no. 139).

With regard to the particular categories of personal data, the processing is, as a rule, permitted, as well as to fulfill specific obligations "in the field of labor law [...] to the extent that it is authorized by law [...] in the presence of guarantees appropriate" (Article 9, paragraph 2, letter b), of the Regulation), even where "necessary for reasons of significant public interest 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 appropriate and specific measures to protect the fundamental rights and interests of the data subject" (Article 9, paragraph 2, letter g), of the Regulation).

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, of the Regulation; see also recital 35 of the same), due to their particular delicacy, "they cannot be disclosed" (art. 2-septies, paragraph 8, and art. 166, paragraph 2, of the Code and article 9, paragraphs 1, 2, 4, of the Regulation).

The employer, who is the data controller, is also required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "data minimization", on the basis of which personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party" 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, letter a) and c), of the Regulation).

3.2. The dissemination of personal data.

As can be seen from the deeds and declarations made by the data controller, as well as from the assessment carried out on the basis of the elements acquired following the preliminary investigation and the subsequent evaluations of this Department, the Municipality has published, up to the XX - date on which it received, from the Office, the act of initiation of the procedure - on its institutional website, and indexed on search engines, the decrees n. XX of the XX, n. XX of the XX and n. XX of the XX, disseminating personal data of the complainant, also relating to health.

Preliminarily, it should be noted that, with specific reference to the nature of the data being disseminated, it should be remembered that according to the Guarantor's constant orientation in the notion of personal data relating to health "it may also include information relating to absence from service due to illness, regardless of the circumstance that the diagnosis is explicitly indicated at the same time" (par. 8 of the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector", of 14 June 2007 web doc. n. 1417809; see point 50 of the judgment of the Court of Justice of the European Communities of 6 November 2003 C-101/01, Lindqvist, and Civil Cassation Section I, 8 August 2013, no. 18980, which states that "it cannot be in doubt whether an absence from work "due to illness" constitutes personal data "relating to the health" of the subject to whom the information refers").

Having clarified this, it should be noted, in general, that the Municipality has invoked, as legal bases for the treatment relating to the dissemination of personal data contained in the decrees in question, regulatory bodies that are not sufficient to justify, for the data protection profiles, the conduct of the Common.

In particular, the invoked provisions of Legislative Decree 267 of 2000 and of the National Collective Labor Agreement ("Local Functions" sector for the three-year period 2016-2018), do not prescribe regarding the publication of the decrees in question.

Furthermore, the Municipality justified the disclosure of the complainant's personal data, recalling the transparency obligations pursuant to Legislative Decree 14 March 2013, n. 33. In particular, it indicated, as rules legitimizing the publication of the decrees in question, art. 14, paragraph 1, letter a) and paragraph 1-quinquies, of the aforementioned legislative decree which oblige the Public Administrations to also publish the documents of appointment of the holders of Organizational Positions, as in the case of the complainant.

Given that in the present case the publication of data relating to the employee's health was also initiated, in violation of the general prohibition on disseminating such highly sensitive information (Article 2-septies of the Code), also the possible presence of a specific regime of advertising cannot lead to any automatism with respect to the online dissemination of personal data and information, nor a derogation from the principles regarding the protection of personal data (see provision of 15 December 2022, n.420 web doc. 9853429; provision of September 15, 2022, n. 299, n. 9815665 and provision of February 25, 2021, n. 68, web doc. 9567429). Therefore, where the online publication of documents involves the processing of personal data and therefore their dissemination, the publicity needs pursued with fundamental rights and freedoms must be appropriately reconciled, as well as the dignity of the interested party, with particular reference to confidentiality, personal identity and the right to the protection of personal data. In this context, it should also be noted that the Municipality has also disclosed personal data relating to specific events connected with the complainant's employment relationship, expressly recalling in one of the published decrees "the initiation of a disciplinary procedure" against the complainant.

Furthermore, it is not clear whether the decrees in question have been published in the "Transparent Administration" section of the institutional website of the Municipality, as would have been necessary in the event of the application of Legislative Decree 14 March 2013, n. 33, or exclusively in the "Albo Praetorio" section of the institutional website. In this regard, the Guarantor has reiterated, on numerous occasions, that all the limits established by the principles of personal data protection apply also to the publications on the online Praetorian Register of deeds or resolutions, having regard above all to the existence of suitable conditions for the lawfulness of the online dissemination of the personal data contained therein, even before any minimization of the same (see "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for purposes of advertising and transparency on the web by subjects public and other obliged bodies" of the

Guarantor of 15 May 2014 web doc. n. 3134436) . On the other hand, this is also confirmed by the personal data protection system contained in the Regulation, in the light of which it is envisaged that the data controller must "implement adequate technical and organizational measures to ensure that they are processed, by default, only the personal data necessary for each specific purpose of the processing" and must be "able to demonstrate" - in the light of the principle of "accountability" - that he has done so (articles 5, paragraph 2; 24 and 25, paragraph 2, regulation).

Furthermore, also with regard to the need, as represented by the Municipality, to have proceeded with the publication of the decrees due to the need to accompany the measures adopted with an adequate motivation, it should be emphasized that the general obligation to give reasons which permeates the administrative action also in the drafting phase of the deeds (art. 3, l. 241/1990), cannot however be invoked to justify any operation of online publication of the same in full version, given that every administrative deed adopted, remaining in the deeds of the The administration that formed it continues to be accessible by qualified individuals, in the ways and within the limits established by law (on this point see the constant orientation of the Guarantor, precisely with regard to administrative documents formed in the context of proceedings involving also the administration staff, most recently, provision n. 45 of 10 February 2022, web doc. n. 9751549 and the provisions referred to therein).

4. Conclusions.

In the light of the assessments referred to above, taking into account the statements made by the data controller during the preliminary investigation □ the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code □ it should b noted that the elements provided by the data controller in the defense briefs do not allow for overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the filing of the present proceeding, not resorting Moreover, any of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality is noted, for having disseminated, by means of online publication on its institutional website, from the date of issue of each single decree up to the XX, personal data of the complainant contained in the decrees n. XX of the XX, n. XX of the XX and n.XX of the XX and the illegality of the processing of personal data carried out by the Municipality is noted, in violation of the articles 5, par. 1, lit. a) and c), and 6, par. 1, lit. c), and e) and 9 pars. 1, 2, 4 of the Regulation and of the art. 2-ter and 2-septies, paragraph 8 of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8

October 2021).

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. 3, of the same Regulation and of the art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, the conditions for the adoption of corrective measures pursuant to 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; art. 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 College [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 the present 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 the unlawfully processed personal data regarding events relating to the complainant's employment relationship was considered, as well as information regarding health, in contrast with the indications that, for some time, the Guarantor has provided to employers public and private work with the Guidelines referred to above and with numerous decisions on individual cases referred to above.

On the other hand, it was favorably taken into consideration that the data processed concern a single case, the small size of the Municipality which immediately removed the complainant's personal data as soon as it received the notice initiating the procedure from the Office. It was also noted that 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, in the amount of 3,000 (three thousand) euros for the violation of articles 5, 6 and 9 of the Regulation, 2-ter and 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 that the decrees circulated online contained references to a delicate personal matter of the interested party, 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

pursuant to art. 57, par. 1, lit. f), declares the illegality of the processing of personal data carried out by in the terms described in the motivation, consisting in the violation of the articles 5 and 6 of the Regulation and 2-ter of the Code;

ORDER

pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, to the Municipality of Pulsano in the person of its pro-tempore legal representative, with registered office in via Degli Orti n. 37 - 74026 Pulsano (TA), Tax Code 80010270736 to pay the sum of 3,000 (three thousand) euros as an administrative fine for the violations indicated in this provision. 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 Municipality - without prejudice to the provisions of art. 166, paragraph 8 of the Code, to pay the sum of 3,000 (three thousand) euros according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law n. 689/1981;

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code (see art. 16 of the Guarantor's Regulation no. 1/2019);

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lit. u), of the Regulation, of the violations and of the measures adopted in accordance with art. 58, par. 2, of the Regulation (see art. 17 of Regulation no. 1/2019).

Pursuant to articles 78 of the Regulation, 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, 23 March 2023

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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