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Injunction order against National Social Security Institute (INPS) - 29 November 2018

Register of measures

no. 492 of 29 November 2018

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

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;

NOTING that the Office of the Guarantor for the protection of personal data (hereinafter Guarantor), with note no. 13076/123765 of 4 May 2018, defined an administrative procedure initiated by the initiative Authority, ascertaining that the National Social Security Institute (INPS) Fiscal Code: 80078750587, with headquarters in Rome, via Ciro il Grande n. 21, in the person of its pro-tempore legal representative, processed, from 8 February 2011 to March 2018, the personal data relating to 12.6 million private workers absent due to illness through the use of the "Data Mining/ Savio" which attributes a "probability score" to the medical certificate referring to the worker, thus carrying out an automated processing of personal data, also suitable for revealing the state of health, comparing the information contained in the aforementioned certificate with the others contained in the management archive of the VMC and in further administrative archives of the Institute.

This treatment, which does not appear to have been subjected to preliminary verification pursuant to art. 17 of the Code, was carried out on the basis of rules which, despite recognizing the obligation to have home visits for workers absent from work due to illness and introducing the electronic transmission of sickness certificates for both the public and private sectors, have nothing regarding the types of data and the operations that can be performed in the context of the automated processing in question, therefore in violation of the provisions of the articles 14 and 20 of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196 - hereinafter, the "Code").

With the aforementioned note of 4 May 2018 it is also ascertained that the processing of data carried out through the use of the "Data Mining/Savio" software, configures a real and proper data profiling against which INPS has not taken steps to carry out notification to the Guarantor pursuant to art. 37 of the Code.

Furthermore, the treatment in question, with specific reference to sensitive data, was carried out without it being disclosed to the interested parties, pursuant to art. 22, paragraph 2 of the Code, the required disclosure in violation of art. 13 of the Code;

CONSIDERING the report n. 21274/123765 of 16 July 2018 with which it was challenged by the Guarantor's Office, to INPS, in the person of the pro-tempore legal representative:

a) in the aggravated form provided for by art. 164-bis, paragraph 3 of the Code, the administrative violation envisaged by art. 161, in relation to the articles 13 and 22, paragraph 2 (heading a) of the provisions of the dispute report;

b) in the aggravated form provided for by art. 164-bis, paragraph 3 of the Code, the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code, in relation to art. 20 (heading b) of the operative part of the contestation report;

c) the administrative violation envisaged by art. 163, in relation to the art. 37 (heading c) of the operative part of the contestation report;

informing him, for all three disputed findings, of the right to make a reduced payment pursuant to art. 16 of the law n. 689/1981;

HAVING EXAMINED the report of the Guarantor's Office prepared pursuant to art. 17 of the law of 24 November 1981, n. 689, from which the reduced payment does not appear to have been made;

CONSIDERING the written defense dated 1 August 2018 sent pursuant to art. 18 of the law n. 689/1981, with which the INPS, recalling sentence no. 78/1988 of the Constitutional Court, found that this pronouncement "(...) led the Institute to believe that it had legitimately adopted the procedure, (use of the "Data Mining/Savio" software), (...) given that it operated in relation to powers expressly attributed to it by law, so as to exclude that in relation to the same it was necessary to inform or acquire further authorizations or consents from the interested parties, since these are personal data already acquired to the knowledge of the Organization for the compliance with its institutional functions and resorting , therefore, in the present case, the exemption hypotheses provided for by paragraph 5, lett. a, of the art. 13 and by the aforementioned art. 24 of the Code".

The Institute also noted that "(...) a detailed examination of the comparison operations of the data actually used by the procedure (use of the "Data Mining/Savio" software) highlights how extraneous the reported profiling effect is (…)". This is because "(...) the aforesaid IT procedure, in addition to not producing any judicial or administrative act or provision which implies an assessment of human behavior (a necessary condition for the hypothesis prohibited by article 14 to occur and in the absence of which it cannot constitute any administrative offence) has not even outlined any subjective profile defining the personality of the interested party, but has simply identified a contingent de facto situation falling within the objective of the

check-ups established by law. Result that the IT procedure achieves without any operator ever being in a position to be able to trace a subjective or behavioral profile of the citizen from it. It follows that it must be completely excluded that, (...) the hypothesis referred to in art. 37 lett. d of the Code, the violation of which has however been contested (...)". Moreover, these arguments must not prejudice the recurrence, always with specific reference to the violation pursuant to art. 37 of the Code, the five-year prescription governed by art. 28 of the law n. 689/1981.

The Institute then argued the reasons why, unlike what was ascertained in the dispute report that deals with us in which the aggravated hypotheses pursuant to art. 164-bis, paragraph 3 of the Code, the application conditions of art. 164-bis, paragraph 1 of the Code;

HAVING REGARD TO the report of the hearing of the party drawn up on 7 November 2018, pursuant to art. 18 of the law n. 689/1981, in which INPS produced a supplementary defense brief dated 6 November 2018 with which, "(...) without any waiver or prejudice to the right to extinguish the sanctioning procedure by paying the reduced amount indicated by art. 18 of the law n. 101/18 (...)", further examined the defense arguments already set out in the defense brief dated 1 August 2018, highlighting how, in relation to what has already been argued about the exemption of good faith in relation to an excusable error, it must be considered what was established by the Constitutional Court in sentence no. 364/1988;

CONSIDERING that the arguments put forward do not allow INPS to be excluded from liability in relation to the violations subject to ascertainment and subsequent dispute. The Institute, while explaining further details and insights into the nature and methods of processing data attributable to the "Data Mining/Savio" software, did not provide any significant elements regarding the recurrence of the disputed sanctions. In fact, what was argued in the defense briefs dated 1 August 2018 and 6 November 2018 as well as what was represented in the minutes of the hearing, does not highlight any additional evaluation elements with respect to those taken into consideration in the context of the preliminary investigation defined with note no. 13076/123765 of 4 May 2018, with which the disciplinary findings that concern us were ascertained. Furthermore, it must be noted that, contrary to what was deemed by the Institute, in the present case, also taking into account what was established in the aforementioned sentence of the Constitutional Court n. 364/1988, none of the constituent elements of the excusable error commonly definable as good faith pursuant to art. 3 of the law n. 689/1981, given that this discriminant can be considered as a cause for exclusion of liability only when he is found to be innocent. To this end, that is, a positive element is required which is suitable for inducing such an error, which cannot be remedied by the interested party with ordinary diligence, an element which cannot be found in

the present case (Cass. Civ. section I of 21 February 1995 n 1873; Civil Cassation Section II of 13 March 2006, No. 5426).

With regard to what has been observed regarding the recurrence, in the matter in question, of less serious cases referred to in paragraph 1 of art. 164-bis of the Code instead of the aggravated hypotheses referred to in paragraph 3 of the aforementioned article of the Code (with reference to the violations referred to in articles 13 and 22, paragraph 2 as well as in article 20 of the Code), must be kept in consideration of the fact that also in this area the Institute has not provided any further elements with respect to those already assessed in relation to the recurrence of the aggravated hypotheses referred to in the aforementioned paragraph 3. On this point it must therefore be reiterated, as duly ascertained, that the violations of referred to in items a) and b) of the dispute report involve numerous interested parties (12.6 million private workers absent due to illness) thus making the recurrence of the "greater gravity" expressly provided for by art. 164-bis, paragraph 3 of the Code. On the other hand, the invoked recurrence of less serious cases provided for by paragraph 1 of art. 164-bis of the Code, cannot be identified with reference to the relief referred to in art. 161 and the relief pursuant to art. 162, paragraph 2-bis of the Code, considering that the personal data of numerous data subjects (12.6 million workers) are subject to illegitimate processing and are also suitable for revealing their state of health.

Finally, it should be pointed out that, with reference to the possibility of being admitted to the extinction of the sanctioning procedure through the payment in the reduced amount indicated by art. 18 of Legislative Decree no. 101/18, this right can be exercised only if the violators have received the deed with which the details of the violation were notified (or the deed of immediate notification) referred to in art. 14 of the law of 24 November 1981, n. 689, in relation to the sanctioning proceedings concerning the violations referred to, among others, in articles 161, 162 and 163 of the Code, by 25 May 2018, as explained in the FAQs prepared by the Authority on the institutional website (https://www.gpdp.it/home/faq/definizione-agevolata-delle-violazioni- in-matter-of-protection-of-personal-data#1). In the case in question, the initiation of the sanctioning procedure took place following the notification of the administrative dispute in question or on 16 July 2018;

NOTING, therefore, that the INPS, from 8 February 2011 to March 2018, processed the personal data relating to 12.6 million private workers absent due to illness through the use of the "Data Mining/Savio" software which attributes a "probability score" to the medical certificate referring to the worker, thus carrying out an automated processing of personal data, also suitable for revealing the state of health, comparing the information contained in the aforementioned certificate with the others contained in

the VMC management archive and in further administrative archives of the Institute. This treatment was carried out on the basis of rules that do not provide anything regarding the types of data and the operations that can be performed in the context of the automated treatment in question, therefore in violation of the provisions of the articles 14 and 20 of the Code regarding the protection of personal data (legislative decree 30 June 2003, n. 196 - hereinafter, the "Code"). The data processing carried out through the use of the "Data Mining/Savio" software configures a real and proper data profiling against which the INPS has not proceeded to notify the Guarantor pursuant to art. 37 of the Code. Furthermore, the treatment in question, with specific reference to sensitive data, was carried out without it being disclosed to the interested parties, pursuant to art. 22, paragraph 2 of the Code, the required disclosure in violation of art. 13 of the Code;

NOTING, also, that the INPS promptly informed the Authority that it had suspended the use of the "Data Mining/Savio" software;

CONSIDERING the art. 161 of the Code which punishes the violation of the provisions of art. 13, in relation to the lack of information for the processing of sensitive data as required by art. 22, paragraph 2, with the administrative sanction of the payment of a sum from six thousand euros to thirty-six thousand euros;

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including those pursuant to art. 20 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 the art. 163 of the Code which punishes the violation of the provisions of articles 37 and 38 with a fine of between twenty thousand and one hundred and twenty thousand euros;

CONSIDERING that, on the basis of what was found in the dispute report in question, they must be considered to exist, with reference to the finding pursuant to art. 161 and the relief pursuant to art. 162, paragraph 2-bis, the application conditions of the aggravated hypotheses pursuant to art. 164-bis, paragraph 3 of the Code in consideration of the involvement of numerous interested parties (12.6 million workers);

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

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into

account, pursuant to art. 11 of the law of 24 November 1981 n. 689, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender and therefore:

- the amount of the pecuniary sanction for the violation pursuant to art. 161 of the Code must be quantified, in application of the aforementioned art. 164-bis, paragraph 3 of the Code, in the amount of 12,000.00 (twelve thousand) euros;
- the amount of the pecuniary sanction for the violation pursuant to art. 162, paragraph 2-bis of the Code must be quantified, in application of the aforementioned art. 164-bis, paragraph 3 of the Code, in the amount of Euro 20,000.00 (twenty thousand);
- the amount of the pecuniary sanction for the violation pursuant to art. 163 of the Code must be quantified in the minimum amount of Euro 8,000.00 (eight thousand),

for a total amount of 40,000.00 (forty thousand) euros;

HAVING REGARD to the law of 24 November 1981 n. 689, and subsequent modifications and additions;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations of the Office, formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Prof. Licia Califano;

ORDER

to the National Social Security Institute (INPS) Fiscal code: 80078750587, with headquarters in Rome, via Ciro il Grande n. 21, in the person of the pro-tempore legal representative, to pay the sum of 40,000.00 (forty thousand) euros as an administrative fine for violations of articles 161,162, paragraph 2-bis and 163 indicated in the justification;

ENJOYS

to the same subject to pay the sum of 40,000.00 (forty thousand) euros 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 of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant

resides abroad.

Rome, November 29, 2018

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia