[doc. web no. 9433080]

Injunction against the Local Health Authority of Ciriè, Chivasso and Ivrea (ASL TO4) - 5 March 2020 [9433080]

Register of measures

no. 53 of 5 March 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

At today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of prof.ssa Licia Califano and of dott.ssa Giovanna Bianchi Clerici, members and of dott. 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 "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 regarding the processing of personal data, as well as the free circulation of such data and repealing 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, 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;

Supervisor Prof. Licia Califano;

WHEREAS

1. Reporting.

A trade union organization reported the installation of video surveillance systems at some health facilities of the Local Health Authority of Ciriè, Chivasso and Ivrea (ASL TO4), in violation of data protection regulations and, in particular, of art. . 4 of law

20 May 1970, no. 300.

2. The preliminary investigation.

In response to the specific requests of the Office, the Company provided feedback, representing (see note of the XX, prot. n. XX) among other things, that:

- the catchment area concerns "178 Municipalities and consists of 5 hospitals, 5 districts and numerous operating offices";

- to have adopted, "following the occurrence of episodes of vandalism and petty crime", some measures, with the aim of protecting people, company assets and the safety of patients, making use of video surveillance systems, installed, in some cases , for over ten years;

- to have undertaken, with the entry into force of the European legislation, a process of adaptation to the Regulation, in order to verify the compatibility of the existing treatments, also relating to the video surveillance systems installed at its facilities, within the latter respect to which “it emerged that there was no formal trade union agreement in the company documents envisaged in the matter by art. 4, of Law no. 300/1970”;

- due to the above, the trade union organizations were summoned "who requested to be able to physically verify the positioning of the cameras, also in order to exclude remote monitoring of the workers' activity"; following the outcome of the checks, the same trade union organizations "requested an increase in the number [... of the cameras] to protect the safety of the operators" and, on 18 July 2018, the related agreement was signed;

- the video recorders, located in special locked rooms or manned by concierge staff, are protected by an authentication system and access takes place on the indication of the judicial authority;

- the duration of storage of the recorded data is limited to twenty-four hours, without prejudice to the presence of "any technical requirements or the particular riskiness of the activity carried out [in the presence of which] a longer time for data retention is permitted, which it can in any case exceed the week” (see Regulations for the regulation of video surveillance within the TO4 Local Health Authority, annexed to the 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 documentation sent by the Company, as well as the facts that emerged following the preliminary investigation, notified the Company, the 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 the law of 24 November 1982, n. 689). In relation to the ascertained illegality of the treatment carried out through the video surveillance systems installed, for over ten years, at some Company structures in the absence of agreements with the trade union representatives or authorizations issued by the National Labor Inspectorate, in violation of the art. 4 of law 20 May 1970, no. 300, as well as of the articles 5, paragraph 1, lett. to); 6, paragraph 1, lett. c); 88 of the Regulation and 114 of the Code (see note of the XX, prot. n. XX).

With the note of the XX (prot. n. XX), the Company sent to the Guarantor its defensive writings in relation to the notified violation, providing clarifications with regard, in particular, to:

- the circumstance that the "union organizations were aware of the positioning of the cameras well before July 2018, the date on which the agreement was signed";
- the positioning of video cameras "in common places (corridors, entrances, waiting rooms) and not on employee workstations, for the sole purpose of protecting the safety of both personnel and users/patients, as well as corporate assets";
- the absence of real damage for the interested parties "since no operator was checked nor was any disciplinary or sanctioning measure ever adopted based on the records, to which neither the employer nor the personnel manager have ever had direct access" .

3. Outcome of the preliminary investigation.

Based on the regulations on the protection of personal data, the administration, which operates as an employer, can process the personal data (art. 4, n. 1, of the Regulation) of employees if the processing is necessary for the management of the employment relationship and to fulfill specific obligations or tasks established by laws, by European Union legislation, by regulations or by collective agreements (articles 6, paragraph 1, letters b) and c), 9, par. 2, lit. b) and 4; 88 of the Regulation). Furthermore, the treatment is lawful when it is "necessary 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) and par. 2 and 3, 9, para. 2, lit. g) of the Regulation; 2-ter and 2-sexies of the Code).

The employer must also comply with the national rules, pre-existing or to be enacted in the future, which "include appropriate and specific measures to safeguard human dignity, legitimate interests and fundamental rights of the interested parties in particular as regards the transparency of the treatment [...] and monitoring systems in the workplace" (articles 6, paragraph 2

and 88, paragraph 2 of the Regulation, recital 155).

On this point, the Code, confirming the system prior to the changes made by Legislative Decree 10 August 2018, n. 101, makes express reference to the national provisions of the sector which protect the dignity of people in the workplace, with particular reference to possible controls by the employer (articles 113 "Data collection and pertinence" and 114 "Guarantees regarding remote control"). As a result of this postponement and, taking into account art. 88, par. 2, of the Regulation, the observance of the articles 4 and 8 of the law 20 May 1970, no. 300 and of the art. 10 of Legislative Decree 19 December 2002, n. 297 (in cases where the conditions are met) constitutes a condition of lawfulness of the treatment.

The art. 4, paragraph 1, of the law 20 May 1970, no. 300 in fact allows the use of "audiovisual systems" and other tools, the use of which may also result in a form of indirect control of the worker, "exclusively for organizational and production needs, for job safety and for the protection of company assets ", in compliance with specific conditions, such as the prior agreement with the unitary union representation or the company union representatives, or, alternatively, with the prior authorization of the territorial offices of the National Labor Inspectorate.

Even in the presence of a specific assumption of lawfulness of the processing, the data controller is required, in any case, to respect the principles of "lawfulness, correctness and transparency", "limitation of purposes", "minimization", as well as "integrity and confidentiality" of data and "accountability" (art. 5 of the Regulation).

Given the above, from the elements in the file, and as confirmed by the Company, the video surveillance systems, installed for over ten years in various structures under the Company's responsibility, are equipped with cameras located in areas (corridors, entrances, waiting rooms, first aid), where employees also transit or stop, with the consequent possibility of indirectly controlling their activity. The installation of the aforementioned systems, while functional, according to what is represented by the data controller, for the needs of security and protection of company assets, was carried out in the absence of a prior agreement with the trade union organizations and in the absence of public authorization and , therefore, in contrast with the provisions of art. 4, paragraph 1, of the law 20 May 1970, no. 300.

The needs for security and asset protection, also invoked by the Company, are not, in fact, by themselves, sufficient to legitimize the presence of such devices in places where work also takes place, giving rise to a treatment of personal data which can only be justified in compliance with the guarantees provided by the applicable national law (see European Court of Human Rights, sentence n. 70838/13 of 28 November 2017; on the subject of the use of video surveillance systems in places

where the work activity also takes place, see most recently, EDPB Guidelines 3/2019 on processing of personal data through video devices, 10.06.2019). Therefore, compliance with the aforementioned art. 4, paragraph 1, also due to the reference to it contained in the art. 114 of the Code, constitutes a condition of lawfulness of the processing of personal data (in this sense, most recently, Provision n. 167 of 19 September 2019, spec. point 4.2, web doc. n. 9147290).

For these reasons, as emerged from the preliminary findings, the Company, through the aforementioned video surveillance systems, carried out - until the conclusion of the concerted procedure with the signing of the agreement of 18 July 2018 - processing of personal data in the absence of a suitable prerequisite of lawfulness of the treatment, in violation of the art. 4 of law 20 May 1970, no. 300, as well as of the articles 5, paragraph 1, lett. to); 6, paragraph 1, lett. c); 88 of the Regulation and 114 of the Code.

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 and in the defense writings the truthfulness of which 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, even if the violation of the personal data object of the investigation by this Authority began on a date prior to the application of the Regulation, in order to determine the applicable regulatory framework in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law 24 November 1981, no. 689, according to which "the laws that provide for administrative sanctions are applied only in the cases and within the times considered in them" (principle of tempus regit actum). The application of this principle therefore determines the obligation to take into consideration the provisions in force at the time of the violation committed. Considering the permanent nature of the offence, in the present case, the applicable regulation must be identified with reference to that in force on the date of completion of the case, to be recognized at the moment of cessation of the conduct, i.e., the conclusion of the codeterminative procedure by signing the agreement with the trade union organizations on 18 July 2018, after the date of application of the aforementioned Regulation.

The preliminary assessments of the Office are therefore confirmed and the unlawfulness of the processing of personal data carried out by the local health authority of Ciriè, Chivasso and Ivrea (ASL TO4) is noted, in the absence of a suitable

assumption of lawfulness, for having installed systems of video surveillance, failing to adopt the guarantees prescribed by the national legislation of the sector, in violation of articles 5, paragraph 1, lett. to); 6, paragraph 1, lett. c); 88 of the Regulation and 114 of the Code, in relation to art. 4 of law 20 May 1970, no. 300.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, letter. a) and d) of the Regulation, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering that the conduct has exhausted its effects, as the Company, albeit belatedly, proceeded to sign a specific agreement with the trade union organizations on 18 July 2018, and without prejudice to what will be said on the application of the pecuniary administrative sanction, it is believed that 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; 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 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 aforesaid elements, the long time frame during which the treatments in question were implemented in the absence of the aforementioned conditions of lawfulness were considered, as well as the circumstance that compliance with the guarantees provided for by the aforementioned sector regulations, such as condition of lawfulness of the consequent treatments, has been consistently affirmed by the Guarantor in numerous provisions (see "Provision of a general nature

regarding video surveillance" of 8 April 2010, web doc. n. 1712680, point 4.1, but see also Provv. May 9, 2018, web doc. n. 8998303 and Provv.ti 04.18.2013, web doc. n. 2483269 and 2476068), as well as by the jurisprudence of legitimacy (most recently, Criminal Cassation, Section 3, 17 December 2019, no. 50919).

However, it is favorably acknowledged that the Company has taken steps to conclude the concerted procedure with the trade union organisations, taking into account the adoption of technical and organizational measures aimed at guaranteeing that the processing takes place in compliance with current legislation (see articles 24 and 25 of the Regulation), actively cooperating with the Authority during the preliminary investigation and the present proceeding, as well as that there are no previous relevant violations committed by the data controller in relation to the same reported facts 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 10 August 2018, n. 101, to the extent of 8,000.00 (eight thousand) euros for the violation of articles 5, paragraph 1, lett. to); 6, paragraph 1, lett. c); 88 of the Regulation and 114 of the Code, in relation to art. 4 of law 20 May 1970, no. 300, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the extended period of time during which the unlawful processing continued, 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 treatment carried out by the Local Health Authority of Ciriè, Chivasso and Ivrea (ASL TO4), for violation of articles 5, paragraph 1, lett. to); 6, paragraph 1, lett. c); 88 of the Regulation and 114 of the Code, in relation to art. 4 of law 20 May 1970, no. 300, in the terms referred to in the justification;

ORDER

to the Local Health Authority of Ciriè, Chivasso and Ivrea (ASL TO4), in the person of its pro-tempore legal representative, with

registered office in via Po n. 11, 10034 Chivasso (TO) - P.I. 09736160012 to pay the sum of 8,000.00 (eight 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 8,000.00 (eight thousand) euros, 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, March 5th 2020

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia