[doc. web n. 9581028]

Injunction order against Azienda Messina Social City - 11 March 2021

Record of measures

n. 89 of 11 March 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / CE, "General Data Protection Regulation" (hereinafter, "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national 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 to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46 / EC (hereinafter the "Code");

GIVEN the Regulation n. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved by resolution no. 98 of 4 April 2019, published in the Official Gazette n. 106 of 8 May 2019 and in www.gpdp.it, doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

Having seen the documentation in the deeds;

Given the observations made by the secretary general pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Speaker prof. Pasquale Stanzione;

WHEREAS

1. Introduction.

With a complaint of the XX, submitted pursuant to art. 77 of the Regulations, the publication by the Messina Social City Company, a subsidiary of the Municipality of Messina and instrumental body of the same, of the provision with which the

results of the assessments of the Commission appointed in the context of the public selection were communicated for the conferment of the mandate of XX at the same company. In particular, the complainant complained that, in the provision, in addition to specifying that none of the candidates met the required requirements, the personal data of the complainant and those of the other participants were indicated, including name, surname, educational qualification and the judgment on the professional requirements.

On XX, this Authority ascertained that the document object of the complaint was no longer available on the Company's website and that, at the same address, a different document, dated XX, relating to a subsequent and similar insolvency procedure was published. containing personal data of the complainant and of another candidate, including data of an evaluative nature, also relating to academic qualifications and professional curriculum.

At present, as ascertained, on the XXth date, the aforementioned document was still published on the Company's website and indexed on search engines, freely downloadable at the url https: // ....

2. The preliminary activity.

On the basis of the elements acquired, also through the documentation sent, and of the facts that emerged during the investigation, the Office notified the Company (note prot. XX of XX), as data controller, pursuant to 'art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulations, inviting the aforementioned owner to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of Law no. . 689 of 11/24/1981).

With the aforementioned note, the Office noted that the Company has published, on its institutional website, a document containing the results of the assessments of the Commission appointed as part of the public selection for the appointment of XX at the The company itself - in which personal data relating to the complainant and the other candidates were mentioned, including name, surname, educational qualification and judgment regarding professional requirements - as well as, subsequently, a document relating to a similar procedure competition, containing personal data of the complainant and another candidate, including data of an evaluative nature, also relating to academic qualifications and professional curriculum, in the absence of a suitable regulatory requirement, in violation of Articles 6, par. 1, lett. c) and e) and para. 2 and 3 lett. b) of the Regulation, as well as of articles 2-ter, paragraphs 1 and 3 of the Code and, in violation of the principles of "lawfulness, correctness and transparency" as well as "minimization" of processing, pursuant to art. 5, par. 1, lett. a) and c) of the

Regulation.

The Company sent its defense briefs, with a note from the twentieth century, representing, in particular, that:

- by submitting the application to participate in the selection, the complainant had given his consent to the processing of his personal data, pursuant to art. 6, par.1 lett. a) of the Regulations, and, having "taken note of the content of the Public Selection Notice", had been informed that the aforementioned processing was aimed exclusively at completing the competition procedure;

- the processing of personal data “must be considered lawful as it is exercised to fulfill a legal obligation to which the data controller is subject pursuant to art. 6, paragraph 1, letter c) of the Regulation […] and art. 15, paragraph 6 bis, of the d.P.R. 9 May 1994, n. 487 which provides [that] for local territorial bodies the rankings referred to in paragraph 5 are published in the praetorian register of the relative body ";

- "the processing of data carried out by the deductible Company must be considered equally lawful as it is exercised for the performance of a task of public interest or connected to the exercise of public authority vested in the data controller (Article 6, paragraph 1 , letter e) of the Regulations) [as] the processing of the personal data of the candidates carried out by Messina Social City took place according to the law in order to ensure maximum transparency in the procedures for selecting personnel through a public competition, allowing to make known the decisions adopted by the examining commission and by the Company and, therefore, to allow the parties concerned to check the regularity of the bankruptcy procedures in order to safeguard the principles of impartiality and good performance of the public administration. Today, however, recognized by the so-called civic access (Legislative Decree 33/2013) which allows anyone to be able to request deeds and documents other than those that the Administrations are obliged to publish ";

- the personal data of the candidates have been published "in compliance with the principle of minimization of treatment, so much so that from the examination of the documentation published on the institutional website of the Company it emerges unequivocally that the publication, [...] did not concern the contact details of the interested parties, or fixed or mobile telephone users, the candidates' residence or e-mail address, the tax code and any other data referable to the interested parties ".

From the documentation in the documents and the facts that emerged during the investigation, it appears that the Company has published, in subsequent moments, two provisions, containing the data of the complainant ("XX" and "XX"). These provisions contain the evaluation of the applications for participation of candidates in the two selection procedures that

followed for the assignment of the position of XX.

Furthermore, the "XX" provision is still published on the Company's website and indexed on search engines.

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection discipline provides that public subjects, if they operate in the performance of insolvency, selective or otherwise evaluative procedures, preliminary to the establishment of the employment relationship, may process the personal data of the interested parties (Article 4, No. 1 , of the Regulation), if the processing is necessary "to fulfill a legal obligation to which the data controller is subject" or "for the performance of a task of public interest or connected to the exercise of public authority vested in the data controller "(art. 6, par. 1, lett. c) and e) of the Regulation).

The national legislation has also introduced more specific provisions to adapt the application of the rules of the Regulation, determining, with greater precision, specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing (Article 6, par. 2, of the Regulation) and, in this context, has provided that the processing operations, and among these the "dissemination" of personal data, are allowed only when provided for by a law or, in the cases provided for by law, by regulation (Article 2-ter, paragraphs 1 and 3, of the Code).

The data controller is also required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", on the basis of which personal data must be "processed in lawful, correct and transparent manner towards the interested party "and must be" adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed "(Article 5, paragraph 1, letters a) and c), of Regulation).

3.2 Dissemination of personal data

With regard to the publicity of the results of the competitive exams and the final rankings, it is noted that the sector regulations establish, in general, the publicity of the final measures and rankings, as well as of the other documents concerning competitions, selective tests and career progressions. and other procedures that end with the formation of rankings. Other specific forms of disclosure of these acts, provided for by the law, find their discipline in provisions, which have been stratified over time, in order to allow the interested parties, participating in the insolvency or selective procedures, to activate the forms of protection of their rights and to check the legitimacy of the administrative action.

These rules also provide that only the final rankings of the winners of the competition are published and not the results of the

intermediate tests or the personal data of the non-winning or non-admitted competitors (see art.7, Presidential Decree 10 January 1957, n.3 ; as well as art.15, Presidential Decree no. 487 of 9 May 1994, in particular, paragraphs 5, 6 and 6 bis, Regulation laying down rules on access to employment in public administrations and the procedures for carrying out competitions, single competitions and other forms of recruitment in public employment and more generally, on the advertising of the procedures for the recruitment of public administration personnel, Article 35, paragraph 3, of Legislative Decree no. 165 of March 30, 2001). The Guarantor has also provided specific indications to public administrations regarding the precautions to be taken for the dissemination of personal data on the Internet for the purposes of transparency and publicity of the administrative action with the Guidelines on transparency, also with reference to the publication of the rankings of public competitions (provision no. 243 of 15 May 2014, web doc. no. 3134436, spec. II, par. 3.b), but see also Guidelines on the processing of personal data, of workers for purpose of managing the employment relationship in the public sphere, provision 161 of 14 June 2007, web doc 1417809).

The legislative decree 14 March 2013, n. 33, moreover, recalled by the Company during the investigation, does not contain any provision that requires the mandatory publication of this type of deeds or, in general, of determinations that report the evaluations of the examination committees or provide for the exclusion of some candidates. This is because the provision relating to competitions and selective tests contained in art. 23, paragraph 1, lett. c), of the aforementioned decree, moreover relating to the publication of summary elements of the final provisions of the proceedings, was repealed by art. 22, paragraph 1, lett. a), no. 3, of the d. lgs. 25 May 2016, n. 97. In any case, moreover, art. 19 of Legislative Decree 14 March 2013, n. 33 (effective from 1 January 2020) provides for the publication of the final rankings only, also with reference to the eligible non-winners, but not with regard to the excluded subjects.

Nor can art. 5 paragraph 2 of the aforementioned legislative decree (so-called generalized civic access) considering that the institute - although it allows anyone to access data and documents held by public administrations in addition to those subject to publication, (within the limits provided for by art. 5-bis paragraph 2) - is configured, in any case, as autonomous and independent from the obligations of publication which remain limited exclusively to those indicated by the law. In fact, even in the presence of a specific request for civic access, which in any case does not appear to have been received by the Company, the aforementioned regulatory framework provides for the activation of a specific procedure that includes the involvement of the counter-interested party who is in any case guaranteed the possibility to present a reasoned opposition; in any case, civic

access must be refused if the existence of a concrete prejudice to the protection of personal data is verified (Article 5-bis, paragraph 2, letter a).

Moreover, if the Company wanted to publish them, it determines that it did not have the obligation to publish, pursuant to Legislative Decree no. 33/2013, should have "ordered the publication on its institutional website of data, information and documents [...] proceeding with the anonymous indication of any personal data present" (Article 7-bis, paragraph 3, of Legislative Decree no. 33/2013).

With particular reference to the acquisition of the consent of the candidates as a condition of lawfulness of the processing, it is represented that, as recently confirmed by the Guarantor with reference to the processing carried out in the context of public competitions (see, provision of 17 September 2020, n. 160, web doc n. 9461168), the consent of the interested party cannot, as a rule, constitute a valid prerequisite of lawfulness for the processing of personal data when there is "an evident imbalance between the interested party and the owner" (cf. . recital 43 of the Regulation), especially when this is a subject acting in the performance of a "task of public interest or connected to the exercise of public authority" (Article 6, paragraph 1, letter e) of the Regulation) or in the context of activities related to the establishment and management of employment relationships (eg. "for hiring purposes", Article 88 of the Regulation; Guidelines on consent pursuant to EU Regulation 2016 / 679- WP 259- of 4 major i 2020). These circumstances both exist in the present case.

4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller in the defense writings whose truthfulness may be called upon to answer pursuant to art. 168 of the Code - do not allow the findings notified by the Office to be overcome with the act of initiating the procedure and are insufficient to allow the filing of this proceeding, however, none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

The processing of the data of the interested parties, which occurred in violation of the regulations regarding the processing of personal data, began with the publication of the competition in the Official Gazette on the 20th, the date from which candidates could submit their application for participation in the competition; the violation that led to the online dissemination of personal data took place starting from the XX, in full force therefore of the provisions of the Regulation and the Code, which therefore constitute the provisions applicable to the case in question (Article 1, paragraph 2, of l. November 24, 1981, n. 689).

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data

carried out by the Messina Social City Company is noted, for having disclosed personal data relating to the complainant contained in the provisions of 1XX "XX" and of the XX " XX ", in the absence of suitable regulatory conditions, in violation of art. 5, 6, par. 1, lett. c) and e), of the Regulation and 2-ter, of the Code.

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulations, as also referred to by art. 166, paragraph 2, of the Code.

5. Adoption of corrective measures (Article 58, par. 2, letter f) of the Regulation)

The unlawful conduct conducted by the Company has not completely exhausted its effects, as, at present, the Company has not removed the determination of XX "XX" from the website

In this regard, due to the unlawfulness of the processing carried out, it is therefore considered necessary to have, pursuant to art. 58, par. 2, lett. d), of the Regulation - which provides that the Guarantor has the corrective powers to "order the data controller or the data processor to comply with the provisions of this regulation, if necessary, in a certain manner and within a certain period "- the removal of the aforementioned provision from the Company's website or, alternatively, to proceed with anonymization, by obscuring the personal data of the interested parties contained in the deed, by submitting a request for de-indexing of the aforementioned deed, within and no later than 30 days from receipt of the same, confirming it to this Authority pursuant to art. 157 of the Code no later than 30 days from the notification of this provision.

6. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. I and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary sanction pursuant to Article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, depending on the circumstances of each single case "and, in this context," the College [of the Guarantor] adopts the injunction order, with which it also disposes with regard to the application of the ancillary administrative sanction of its publication, in whole or in excerpt, on the website of the Guarantor pursuant to Article 166, paragraph 7, of the Code "(Article 16, paragraph 1, of the Guarantor Regulation no. 1/2019).

In this regard, taking into account 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 administrative fine provided for by art. 83, par. 5, of the Regulation.

The aforementioned administrative fine imposed, depending on the circumstances of each individual case, must be determined in the amount taking into account the elements provided for by art. 83, par. 2, of the Regulation.

In relation to the aforementioned elements, it was considered that the detected conduct, held in violation of the regulations on the protection of personal data, had as its object the dissemination of personal data, and that the Guarantor had provided indications, since 2014, to all the public subjects in the "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public subjects and other obliged entities" mentioned above. This dissemination of personal data continued for a considerable period of time (almost two years) considering the publication of the provision relating to the first procedure (Publication of the results of the Commission appointed by resolution of the Board of Directors no. XX of the XX), replaced by the provision of the second procedure ("XX"), which is still published on the Company's website.

On the other hand, it was favorably acknowledged that there are no previous relevant violations committed by the data controller or previous measures pursuant to art. 58 of the Regulation.

On the basis of the aforementioned elements, evaluated as a whole, it is believed to determine the amount of the financial penalty in the amount of € 10,000 (ten thousand) for the violation of Articles 5, paragraph 1, lett. a) and c), 6, paragraph 1, lett. c) and e) and 2 and 3, lett. b) of the Regulation, as well as of articles 2-ter, paragraphs 1 and 3 of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, paragraph 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the extended period of time during which the aforementioned data were available on the network, it is also believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is noted that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

notes the unlawfulness of the processing carried out by Azienda Messina Social City, consisting in the violation of Articles 5, par. 1, lett. a) and c), 6, par. 1, lett. c) and e), 2 and 3, lett. b), of the Regulations, as well as art. 2-ter, paragraphs 1 and 3 of the Code, in the terms set out in the motivation

ORDER

to the Messina Social City Company in the person of the pro tempore legal representative with registered office in Piazza

Unione Europea n.1 - 98122 Messina, Tax Code 03542680834, to pay the sum of 10,000 (ten 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 sanction imposed;

INJUNCES

a) the Company to pay the sum of € 10,000 (ten thousand) - without prejudice to the provisions of art. 166, paragraph 8 of the Code - 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 n. 689/1981.

b) to the Company, due to the unlawfulness of the processing carried out, pursuant to art. 58, par. 2, lett. d) of the Regulations to conform the processing to the provisions of the Regulations by adopting the corrective measures indicated in par. 5 of this provision no later than 30 days from receipt of the same; non-compliance with an order formulated pursuant to art. 58, par. 2, of the Regulations, is punished with the administrative sanction referred to in art. 83, par. 6, of the Regulations;

c) to the Company, pursuant to art. 58, par. 1, lett. a), of the Regulations and art. 157 of the Code, to communicate, by providing an adequately documented feedback, no later than 30 days from the receipt of this provision, the initiatives undertaken to conform the treatments to the provisions of the aforementioned paragraph 5. Failure to respond to a request made pursuant to 'art. 157 of the Code is punished with an administrative sanction, pursuant to the combined provisions of art. 83, par. 5, of the Regulation and 166 of the Code.

HAS

- the publication of this provision on the website of the Guarantor, pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019;

- the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation.

Pursuant to art. 78 of the Regulation, of art. 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, it is possible to 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 applicant resides abroad.

Rome, March 11, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei