

Injunction order - May 26, 2022

Record of measures

n. 211 of May 26, 2022

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 dr. Claudio Filippi, deputy secretary general;

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016 (hereinafter, the "Regulation");

GIVEN the Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 (Legislative Decree 30 June 2003, n.196, as amended by Legislative Decree 10 August 2018, no. 101, hereinafter the "Code");

GIVEN the complaint of 9 November 2019 regularized on 30 December 2019 submitted pursuant to art. 77 of the Regulations by Ms XX towards the individual enterprise Maier Claudiu Lucian;

EXAMINED the documentation in deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

RAPPORTEUR prof. Pasquale Stanzione;

WHEREAS

1. The complaint against the company and the preliminary investigation.

With a complaint of 9 November 2019, submitted pursuant to art. 77 of the Regulation, regularized on 30 December 2019, Ms XX complained about the violation of the personal data protection regulations in relation to the lack of response by the individual company Maier Claudiu Lucian (hereinafter the individual company), to the request to exercise the right of access pursuant to art. 15 of the Regulation "to the deeds signed by [the complainant]" "on the occasion of the termination of the employment relationship" also with reference to information regarding the processing of the data contained therein presented on 2 July 2019.

The Office initiated an investigation with a note dated May 25, 2020 with which the data controller was invited to communicate his spontaneous adhesion or in any case to provide feedback on the facts that are the subject of a complaint to the Authority, note sent again on 10 August 2020, given the lack of feedback from the sole proprietorship.

On 9 October 2020 (and subsequently also on 2 March 2021, still given the lack of feedback), the Department invited, pursuant to art. 157 of the Code, the data controller to provide a reply, within 15 days following receipt of the same.

Considering the lack of response by the data controller to the multiple requests sent by the Office, the special unit for the protection of privacy and technological fraud has been delegated by the Authority to acquire the information requested and to notify the communication of the initiation of the procedure for the " adoption of corrective and sanctioning measures relating to the violation of art. 157 of the Code.

In particular, on 2 September 2021, during the inspection, the sole proprietorship, through the owner of the same, declared that:

"The explicit request for the documents relating to the termination of the employment relationship by the complainant was never made to me in person, despite the opportunity, but I acknowledge only today that this legitimate claim has been made by certified e-mail which, due to my lack of familiarity with the IT environment, I was unable to open and consequently read the messages therein, including the communications made by the Guarantor for the protection of personal data and for this reason I do not I never replied. I add that the contract with the manager [...], from which I use for the pec service, had expired last year and subsequently renewed by my accountant whose credentials are not in my possession at the moment as I do not remember where to find them ";

"I therefore reiterate my complete willingness to provide as soon as possible, in the manner that the complainant deems most appropriate, all the documentation relating to the termination of the employment relationship that she has requested. I will also contact my lawyer shortly to fulfill the petition presented by the complainant ".

On 2 October 2021, the sole proprietorship submitted its defense papers to the Authority in which it stated that:

"Mr. Maier, through the appointed defender, on 9 September 2021, sent the document requested by the [complainant] by certified e-mail. He also made himself available for the transmission of any documentation relating to the interested party "(note cit. 2.10.2021, p.3);

with reference to art. 83, par. 2, lett. a) of the Regulations "the individual firm Maier does not fail to recognize that there has

been a lack of access by the interested party to their personal data present at the same company; [...] One cannot fail to take into account that it would have been, if anything, an apparent omission and certainly not a formal illegitimate denial by the employer "(cit. Note, p. 4, 5);

"The profile of" appearance "regarding the omissive conduct that would have caused the failed access by the interested party is found in the lack of ability of the owner of the company to download the certified e-mails sent to the address [of the sole proprietorship], as well as the difficulty of access to the same certified mailbox, however, also found before the operators of the Guardia di Finanza "(cit. note, p. 5);

with reference to art. 83, par. 2, lett. b) of the Regulations "the subjective element that would have determined the harmful conduct cannot be traced back to either" fraud "or" fault ". As for the "willful misconduct", the [owner of the sole proprietorship] has never knowingly and voluntarily intended to infringe the [complainant's] right. In fact, as soon as he became aware of the applicant's willingness to receive the documentation relating to the dismissal, he immediately activated by appointing his trusted lawyer to satisfy these requests [...]. As for the profile inherent to "guilt", it cannot be ignored that the [owner of the sole proprietorship] did not respond to the request of the applicant, but this cannot be considered evidence of the existence of "guilt", as the same has had difficulties in finding the credentials to access the certified e-mail having, his accountant, renewed the subscription of the certified mail without informing the [owner himself] "(cit. note, p. 5, 6);

with reference to art. 83, par. 2, lett. c) and d), "the [owner of the sole proprietorship] immediately after accessing the Special Privacy Unit at the place of operation, immediately implemented suitable measures to mitigate the effects of any violation towards the interested party by immediately communicating to the lawyer of the [complainant] the availability to access and making the documents available to the latter for the purpose of delivery. In addition, he proceeded to retrieve the credentials to access his own certified e-mail account in order to avoid similar problems in the future "(cit. Note, p. 6);

with reference to art. 83, par. 2, lett. f) of the Regulations "the sole proprietorship, in the person of its legal representative, immediately cooperated with [the Authority] from the moment in which the Privacy Inspection Unit of the Guardia di Finanza accessed the workplaces of the tailor's shop and, therefore, at the moment in which he had actual knowledge of the request for access of the applicant party. In fact, immediately after the communication of the complaint by the GPDP, in favor of the interested party and through the attorney in charge, the [owner of the sole proprietorship] immediately informed the interested party "(cit., p. 6, 7);

with reference to art. 83, par. 2, lett. g) of the Regulations "the personal data processed in the context of the work activities of the sole proprietorship are exclusively the data of its employees and, in particular, the economic and accounting data, contact data, personal data and electronic identification; on the other hand, as regards data relating to health, the sole proprietorship becomes aware of it only and to a limited extent in the event of a possible illness of the employee "(cit. note, p. 7);

with reference to art. 83, par. 2, lett. i), "following the notes sent by the [...] Guarantor giving notice of the complaint made by the interested party and following the notification made by the Finance Police - Privacy Inspection Unit, the [owner of the sole proprietorship] gave immediate response to the requests made by the [complainant] "(cit. note, p. 7, 8);

with reference to art. 83, par. 2, lett. k) of the Regulations, "the company intended to take the necessary and adequate measures to prevent a similar event from recurring in the future. In fact, the [owner of the sole proprietorship] immediately contacted his accountant to obtain the credentials for accessing the certified e-mail and, therefore, modify them and keep them always updated, in order to be able to check his / her certified e-mail box on a daily basis and, possibly, respond to any further and different requests. Furthermore, the [owner of the sole proprietorship] has informed his employees of the contact details of the owner and, therefore, of the pec address and the address to which the registered letters can be sent in order to guarantee the effective operation. the rights of the interested parties guaranteed and recognized by the GDPR "(cit. note, p. 8).

The company attached to the aforementioned defense writings, among other things, the communication made to the lawyers of the complainant, on 9 September 2021, with which "a copy of the dismissal letter of the [complainant]" was sent. It was also stated that the owner of the sole proprietorship "makes himself available [...] to satisfy any further requests for documentation relating to the proceedings pending before the Guarantor Authority for the protection of personal data".

A copy of the "letter of dismissal for justified objective reason" dated 30 April 2019 was attached to the aforementioned communication.

On 12 October 2021, the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification of alleged violations of the Regulation found in relation to art. 12 of the Regulation with reference to the right of access provided for by art. 15 of the Regulation.

On 11 November 2021, the sole proprietorship presented its defense writings to the Authority in which it represented that:

- "the [owner of the sole proprietorship] as soon as he became aware of the [complainant's] request immediately proceeded to transmit what was requested; as well as to be available to find any other request from the same interested party "(note

11.11.2022, cit., p. 2);

- "with regard to the possible application of the sanction and the determination of its amount, it cannot be ignored that it is a single interested party and that the personal data processed in the context of the working activity object of the individual firm (tailoring) are exclusively personal and contact data, economic, accounting and electronic identification data "(see cit. note, p. 2).

2. The outcome of the investigation.

2.1. Established facts and observations on the legislation on the protection of personal data.

Given that, unless the fact constitutes a more serious offense, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false acts or documents, is liable pursuant to art. 168 of the Code "False statements to the Guarantor and interruption of the execution of the tasks or the exercise of the powers of the Guarantor", based on the elements acquired during the preliminary investigation (referred to in paragraph 1 above) as well as subsequent assessments of this Department, it is ascertained that the sole proprietorship:

did not provide any feedback to the request for access presented by the complainant, on 2 July 2019, in relation to the documentation signed to the same on the occasion of the termination of the employment relationship. Only after the submission of the complaint and the inspection assessment carried out, in particular on 9 September 2021, did the data controller (through his lawyer) send the complainant a copy of the "letter of dismissal for justified objective reason" dated 30 April 2019. At the same time he also made himself available to "satisfy further requests for documentation relating to the proceedings pending before the Guarantor Authority for the protection of personal data";

did not respond to the requests submitted by the Authority pursuant to art. 157 of the Code, so much so that it was necessary to delegate the acquisition of the information requested with the notes also formulated pursuant to art. 157 of the Code regarding the facts of the complaint.

In this regard, the sole proprietorship declared that it did not promptly reply to the request to exercise the rights and to the requests of the Authority as the owner of the company was unable to open the certified e-mail account and read the messages received. It was also specified that, following the expiration of the aforementioned account, it had been renewed by the accountant and therefore the login credentials were not known by the owner of the company.

Art. 12 of the Regulation, to be read also in conjunction with the rules relating to the specific rights recognized by the legal

system to the interested party, provides that "the data controller takes appropriate measures to provide the interested party with all the information referred to in articles 13 and 14 and the communications referred to in articles 15 to 22 and article 34 relating to processing "(par. 1) and that" the data controller facilitates the exercise of the data subject's rights pursuant to articles 15 to 22 " (par. 2).

Paragraph 3 of the same article specifies that "the data controller provides the data subject with information relating to the action taken regarding a request pursuant to articles 15 to 22 without undue delay and, in any case, at the latest within one month of receipt of the request itself. This deadline can be extended by two months, if necessary, taking into account the complexity and number of requests. The data controller informs the interested party of this extension, and of the reasons for the delay, within one month of receiving the request ".

According to paragraph 4 of the same article, the data controller, if he does not comply with the request of the interested party, "informs the interested party without delay, and at the latest within one month of receiving the request, of the reasons for the non-compliance and possibility to lodge a complaint with a supervisory authority and to propose a judicial appeal ".

Based on art. 15, par. 1, of the Regulation "the interested party has the right to obtain from the data controller confirmation that the processing of personal data concerning him or her is in progress and in this case to obtain access to personal data and [...] information [indicated in the same article 15], and that according to paragraph 3 of the same article "the data controller provides a copy of the personal data being processed. In case of further copies requested by the interested party, the data controller may charge a reasonable fee based on administrative costs ".

The Guidelines on the rights of data subjects - right of access, subjected to public consultation which ended on 11 March 2022, specify that "In some cases, the personal data itself sets the requirements in what format the personal data should be provided" ("in in some cases, the personal data themselves define the format requirements to be used ", unofficial translation) (para. 153).

Art. 157 of the Code provides that "within the scope of the powers referred to in Article 58 of the Regulation, and for the performance of its duties, the Guarantor may request the owner, manager, representative of the owner or manager, the interested party or even to third parties to provide information and exhibit documents also with reference to the content of databases ".

2.3. Established violations.

2.3.1. The conduct held by the sole proprietorship, with reference to the request for access pursuant to art. 15 presented by the complainant does not comply with the aforementioned provisions for the reasons indicated below.

The sole proprietorship, in particular, despite having been presented on 2 July 2019 with an application for access by the complainant concerning the documentation signed by the worker on the occasion of the termination of the employment relationship, has not provided any feedback to the same except following the inspection by the Special Unit for the Protection of Privacy and Technological Fraud. To the latter, given the lack of response by the sole proprietorship to requests for information formulated pursuant to art. 157 of the Code by the Authority, the acquisition of the feedback on the facts subject of the complaint was delegated (within the terms formulated with the invitation to adhere sent several times by the Office to the sole proprietorship) as well as the notification of the communication of the initiation of the procedure for the adoption of corrective and sanctioning measures relating to the violation of art. 157 of the Code.

With reference to the claims made by the sole proprietorship regarding the reasons on the basis of which no response was provided to the request to exercise the right of access, reference is made to the orientation of the Court of Cassation according to which the responsibility for the failure to read a communication / notification received by certified e-mail is to be attributed to the entrepreneur, if resulting from a lack of maintenance and control of the mailbox (see Court of Cassation no. 13917/2016 according to which "it is the responsibility of the party who carries out the business activity, legally required by Legislative Decree 29 November 2008, n.185, pursuant to art.16, paragraph 6, converted into Law 28 January 2009, n.2; pursuant to Law 28 January 2009, n.2; Legislative Decree n.179 of 2012, pursuant to art.5, converted into Law n.221 of 2012, to obtain a PEC address and to ensure the correct functioning of their certified mailbox, if necessary by delegating such control, maintenance or assistance per person and experts in the sector (whose costs, clearly inherent to the activity of the company, are in some way attributable to the relevant expenses relating to its financial statements) ", principles recalled by the Court of Cassation no. 7083 of 3.3.2022). It is therefore ascertained the subjective element of the fault on the part of the entrepreneur who, by not verifying the content of the certified e-mail box, did not respond to the request for exercise of the rights, legitimately presented by the interested party, and to the preliminary inquiries of the Authorities aimed, among other things, at inviting the company to adhere to the request of the interested party

The conduct held by the sole proprietorship is not compliant with the provisions of Articles 12 and 15 of the Regulation: following an application to exercise the right of access to data, in fact, the data controller has the duty to provide feedback to

the interested party without undue delay and in any case within thirty days (extendable by two months if necessary in the event of specific circumstances indicated by law) with communication of the requested information or, if it does not deem it to comply with the access request, informing the interested party of the reasons for the non-compliance and of the possibility of proposing a complaint to a supervisory authority and to propose judicial appeal. The data controller, in the face of a request to exercise the rights presented by an interested party, must in any case inform the interested party even if he deems not to comply with the requirements.

It is also emphasized with regard to the methods by which an application for the exercise of rights must be satisfied, that art. 12 par. 1 of the Regulation specifies that "the information is provided in writing or by other means, including, if necessary, by electronic means. If requested by the interested party, the information can be provided orally, provided that the identity of the interested party is proven by other means ". Par. 3 of the same article, then, provides that "if the interested party submits the request by electronic means, the information is provided, where possible, by electronic means, unless otherwise indicated by the interested party.

In the specific case, the request for access was instead provided only during the course of the procedure, by making available the document specifically requested by the complainant. At the same time, the data controller made himself available for any further request.

2.3.2. Furthermore, the sole proprietorship has not provided any feedback to the requests for information pursuant to art. 157 of the Code sent by the Office.

3. Conclusions: declaration of illegality of the treatment. Corrective measures pursuant to art. 58, par. 2, Regulations.

For the aforementioned reasons, the Authority believes that the statements, documentation and reconstructions provided by the data controller during the investigation do not allow to overcome the findings notified by the Office with the act of initiating the procedure and that they are therefore unsuitable. to allow the filing of this proceeding, however, as none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

Failure to reply to the request for access presented by the complainant is in fact illegal, in the terms set out above, in relation to Articles 12 and 15 of the Regulations, as well as the failure to respond to the inquiries sent by the Authority does not comply with the provisions of art. 157 of the Code itself.

Considering all the elements acquired during the investigation, it is believed that the violation ascertained in the terms set out

in the motivation can be considered "minor", taking into account, in particular, the number of interested parties involved (one) and the measures adopted by the owner to mitigate the negative consequences deriving from the offense (see art.83, par. 2, and cons. 148 of the Regulation).

It is therefore believed that, in relation to the case in question, it is necessary to warn the data controller, pursuant to art. 143 of the Code and 58, par. 2, lett. b), of the Regulations, for failing to provide adequate feedback to the request for access presented by the complainant pursuant to art. 15 of the Regulations and for failing to respond to the inquiries sent by the Authority pursuant to art. 157 of the Code, within the terms indicated in the motivation.

In this context, it is also considered, in consideration of the type of violations ascertained that concerned the exercise of the rights of the interested party as well as the violation of art. 157 of the Code, which pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision should be published on the Guarantor's website.

It is also represented that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

a) pursuant to art. 57, par. 1, lett. f), of the Regulations, notes the unlawfulness of the processing carried out by Mr. Claudiu Lucian Maier, owner of the individual company Maier Claudiu Lucian, with registered office in XX, described in the terms set out in the motivation, for the violation of Articles 12 and 15 of the Regulations and art. 157 of the Code;

b) pursuant to art. 58, par. 2, lett. b) of the Regulations warns Mr. Claudiu Lucian Maier owner of the individual company Maier Claudiu Lucian for failing to provide adequate feedback to the request for access presented by the complainant pursuant to art. 15 of the Regulations and for failing to respond to the inquiries sent by the Authority pursuant to art. 157 of the Code, within the terms indicated in the motivation;

c) arranges for 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. 1/20129, and believes that the conditions set out in art. 17 of Regulation no. 1/2019.

Pursuant to art. 78 of the Regulations, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, an opposition to the ordinary judicial authority may be proposed against this provision, with an appeal filed with the ordinary court of the place identified in the same art. 10, within thirty days from the date of communication of the provision itself, or sixty days

if the applicant resides abroad.

Rome, May 26, 2022

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE DEPUTY SECRETARY GENERAL

Philippi