[doc. web no. 9039215]

Injunction against MARTRAS S.r.l. - June 21, 2018

Register of measures

no. 393 of 21 June 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;

NOTING that the Special Privacy Unit of the Guardia di Finanza, in execution of the request for information from the Guarantor no. 31540/114083 of 3 October 2017, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, containing the Code regarding the protection of personal data (hereinafter the "Code"), carried out the investigations, pursuant to art. 13 of law 689/1981, at "MARTRAS S.r.l." (henceforth the "Company), with registered office in Tirano (SO), via del Progresso n. 2, VAT and Tax Code 00914770144, carrying out the transport business of goods by road, formalized in the report of operations carried out on 19 December 2017 and aimed at verifying the lawfulness of the processing of personal data carried out by the Company;

GIVEN the documents of the inspection assessment;

CONSIDERING that, on the basis of the statements made during the inspections and the documentation sent by the Company to the Special Privacy Unit of the Guardia di Finanza to resolve the reservations formulated during the inspection, it was found that:

- the Company carries out road transport exclusively on behalf of Maganetti Spedizioni S.p.A. on the basis of an existing sub-transportation contract with the latter (Annex No. 1 to the report of operations carried out on 19 December 2017);

- for this activity, the Company uses n. 7 owned vehicles and the staff assigned to drive these vehicles is made up of its own employees;

- geolocation devices (GPS Tracker mod. 103 of the Coban company) have been installed and activated since 2015 on these vehicles (see report of operations carried out on 19 December 2017, point no. 2, page 3);

- " (…) These devices are the property of Maganetti Spedizioni S.p.A. and the SIM card inside them is in the name of the aforesaid company" (see report of operations carried out on 19 December 2017, point no. 1, page 3);

- " (...) The geolocation service is managed directly by Maganetti Spedizioni S.p.A (...)" and the technical functions of the system and the data relating to geolocation are entered in a database owned by Maganetti which decides on the functioning of the device, as well as regarding the recording and storage of data (the system keeps the last 7 positions in its memory for a period of 21 minutes) (see report of operations carried out on 25 October 2017, points no. 1 and 2, page 3) ;

- as declared "(...) The Company can in any case access the geolocation service exclusively for its vehicles, by entering credentials in the specific reserved area of the website www.maganetti.com (...)" (see report of operations performed of 25 October 2017, point no. 1, page and 3);

- as declared " (...) The Company (...) can trace the driver of the vehicle not only with the mobile phone number also due to the fact that each vehicle is assigned to a specific driver or by consulting the chronotachograph which by law must also contain the driver's identification data (...)" (see ibid., as above);

- as highlighted in the information issued to its employees "potentially subject to automatic control of their geographical position (...)", the Company has "(...) installed the satellite system with the aim of increasing the security of corporate assets with respect to theft, optimizing the company costs by reducing empty kilometers and allowing the geolocation of the transported goods (…);

- the Company requested the Sondrio Territorial Labor Directorate and, from the latter, obtained, with note prot. no. 4554 of 27 April 2012, the authorization to use the geolocation system indicated above;

- the Company, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is the owner of the processing of personal data carried out in the execution of the aforementioned geolocation activity;

- the Company, in relation to the processing of personal data implemented through the geolocation system installed on board the no. 7 company vehicles driven by its employees has failed, as data controller, to notify the Guarantor, pursuant to articles 37, paragraph 1, lett. a) and 38, paragraphs 1 and 2, of the Code;

HAVING REGARD TO the Minutes of the Special Privacy Unit of the Guardia di Finanza no. 99 of 19 December 2017 with which "MARTRAS S.r.l." with registered office in Tirano (SO), via del Progresso n. 2, VAT and Tax Code 00914770144 was charged with the administrative violation envisaged by article 163 of the Code (" Omitted or incomplete notification") for failure to fulfill the obligation of prior notification to the Guarantor pursuant to the combined provisions of articles 37, paragraph 1, letter a) of the Code in relation to the processing of data indicating the geographical position of persons or objects via an

electronic communications network;

NOTING that from the report prepared by Section I of the Special Privacy Unit of the Guardia di Finanza pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment does not appear to have been made;

HAVING REGARD TO the written defense and related attachments, dated 18 January 2018, formulated pursuant to art. 18 of the law n. 689/1981 with reference to the disputes referred to in the aforementioned report no. 100 of 19 December 2017, with which the Company intended to represent its position considering:

a) "(...) incorrect (the) reconstruction of the factual and legal assumptions (...)" referring to the objections raised.

In relation to this, first of all, the party attributed the ownership of the processing of the data collected and managed by means of the geolocation system exclusively to Maganetti due to the fact that " (...) Only and exclusively to the former are in fact responsible for "decisions regarding the purposes, the methods of processing personal data and the tools used, including the security profile (see Article 4, paragraph 1, letter f) of the Code)". The lawyer of the parties then argued that " (...) The Company has never used the geolocation system simply because it has no need and requirement, and does not even have the resources to be able to do so (...)" and " (...) has never initiated any processing of geolocation data in relation to its vehicles (…)". Furthermore, the geolocation system is set up by Maganetti to satisfy "(….) only its own need for transport logistics organization (purpose) (...)", where the Company "(...) does not carry out logistics organization activities (...)":

b) The inapplicability of art. 37 of the Code.

From this point of view, the lawyer of the parties pointed out that he believed that "(...) the requirements of continuity of location and suitability to identify the interested party are lacking (...)". In fact, with reference to the first aspect, he argued that" (...) the detection takes place every 3 minutes, at a given instant, after which it is interrupted for the following 2 minutes and 59 seconds. The data of the last 7 surveys are stored on Maganetti's servers, with a "history" of only 21 minutes (...)" and, with reference to the second aspect, that " (...) the geolocation system in question is not able to identify "who" is in a given place, but only "where" a vehicle is. Any subsequent verification of who is driving the geolocated vehicle requires a further deductive, non-automatic, non-immediate activity".

c) the applicability to the case in question, "(...) in a strictly subordinate way" - in the event that the Company is deemed to be the data controller - of the provisions of the Guarantor in letter A), point c), of the "Provision relating to cases to be removed from the notification obligation" of 31 March 2004 (web doc. n. 85256 which can be found on the website www.gpdp.it), for

which they are removed from the obligation to notification to the Guarantor of the processing of data indicating the geographical position of means of air, naval and land transport, carried out exclusively for the purposes of "safety" of transport. The lawyer has, in fact, specified that the party, if it were held to be the data controller of the data relating to the geolocation function, would use this function for the sole purpose of transport safety.

Lastly, the lawyer represented "(...) the less seriousness of the case, also in consideration of the conduct held by the Company, of absolute good faith and correctness towards its employees, informed of the presence of the geolocation system (...)" and furthermore that "(...) The Company's good faith and/or excusable error were also determined by the description of the geolocation system provided by Maganetti (...)".

In the light of the above, the Company requested, primarily, to dismiss the sanctioning procedure, canceling and/or revoking the notification of administrative violation n. 99 of 12.19.2017; alternatively, “(…) in the denied and unbelieved hypothesis in which the Company considers itself subject to the obligation to notify the treatment pursuant to art. 37 of the Code, in light of the Company's good faith and/or excusable error, cancel and/or revoke the dispute report (...)" mentioned above; "(...) in a further subordinate way (...) (always) in the denied and unbelieved hypothesis in which the Company considers itself subject to the obligation to notify the processing pursuant to art. 37 of the Code, considering the non-gravity of the case and of the conduct of the Company, determine and limit the administrative sanction to the statutory minimum reduced by an amount equal to two fifths, pursuant to art. 164 bis paragraph 1 of the Code (...)", as well as the installment of the amount in no. 30 monthly installments.

READ the minutes of the hearing of 2 May 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party, reiterating what has already been declared and requested in the defense brief, intended to highlight that "(..) does not own or manage the geolocation system and it does not have any decision regarding the purposes and methods of data processing carried out through the system itself. Furthermore, the company has never had access to the system as it does not manage logistics, but only provides the transport service to Maganetti Spedizioni S.p.a.";

CONSIDERING that the arguments put forward by the Company in the defense writings cited above and aimed at demonstrating the groundlessness of the findings raised with report no. 99 of 19 December 2017 are not suitable for determining the closure of the sanctioning procedure.

First of all, with regard to the ownership of the processing of data relating to geolocated vehicles owned by the Company, the

following is highlighted.

On the basis of the sub-transport agreement entered into on 1 January 2014 between Maganetti S.p.a. and the Company, the latter undertook to carry out the road transport services on behalf of Maganetti with its own "(...) capital, machinery, personnel and equipment necessary and sufficient to guarantee the execution of the services (..)" (see Annex no. 1 to the report of operations carried out on 19 December 2017). In carrying out this activity, the Company, for the purposes of "(...) increasing the security of company assets against theft, optimizing company costs by reducing empty kilometers and allowing the geolocation of the transported goods (...)" (cf. text information issued to employees), determined by the same, made use of the technological infrastructure for the geolocation of company vehicles configured and supplied by Maganetti S.p.a.; to this end, it correctly informed its employees about the presence of automatic position detectors on company vehicles, as well as requested and obtained, on 27 April 2012, the authorization to use the geolocation system from the DTL of Sondrio. The Company, authorized to access the geolocation data relating to its vehicles on the website www.maganetti.com owned by Maganetti S.p.a., has a confidential username and password; therefore, "(…) decisions regarding the purposes, methods of processing personal data and the tools used, including the security profile (see Article 4, paragraph 1, letter f) of the Code)" are, in this case, attributable to both companies.

As regards the declared non-use of the geolocation function by the Company to demonstrate the alleged lack of responsibility of the latter, it should be noted that this circumstance is irrelevant, since the Company has the credentials to access, in the capacity of co-owner of the treatment as highlighted above, to the system. In the information correctly issued to employees, drivers of company vehicles equipped with a geolocation device, the Company has, in fact, written that these employees are "potentially subject to automatic control of their geographical position", in the sense that, at any time, the Company has right to access the system to verify the position of the same.

With reference, then, to the inapplicability of art. 37 of the Code presented by the lawyer of the party in relation to what was clarified by the Guarantor in the Provision of 23 April 2004 mentioned above, due to the non-existence, in the geolocation system used, of the requirements of continuity of location and of the ability to identify the interested party, it should be noted that, as regards the requirement of continuity, as already highlighted on other occasions by the Guarantor, on the basis of the aforementioned provision for which the "location must be notified when it allows to identify on an ongoing basis - even with possible intervals - the location on the territory or in certain geographical areas (...)" the requirement of "continuity" is deemed

to exist if the data controller is able to identify, automatically or not (also, for example, through a cognitive mechanism such as a telephone call or sending a text message) the position of the geolocated vehicle, regardless of the possibility or not of a constant automatic tracking of the entire route taken by the geolocated vehicle. In other words, "continuity" means the detectability of the position of the vehicle whenever the data controller has this information requirement and also where any reconstruction of the "tracing" of the route taken is particularly laborious, also considering any "intervals" ; this, being able, at the same time, to trace the identity of the driver, even indirectly - on the basis of the provisions of art. 4, paragraph 1, lett. b), of the Code, for which personal data must be understood as "(...) any information relating to a natural person, identified or identifiable, even indirectly, by reference to any other information (...)". In the light of the above, in this circumstance, since the system used by the Company allows, even if at intervals of time, the reconstruction of the route taken by the vehicles and since the Company is able to identify, even if indirectly - i.e. alien and not from the system - the employees driving these vehicles - as declared by the Company, in fact, "(...) The Company (...) can trace the driver of the vehicle not only with the mobile phone number also due to the fact that each vehicle is assigned to a specific driver or by consulting the chronotachograph which by law must also contain the driver's identification data (...)" (see report of operations performed, point no. 1, page 3) - it is believed that the conditions are met for applying articles 37, paragraph 1, letter a) and 38 of the Code.

Nor can it be considered that the exemption provided for by the aforementioned "Provision relating to cases to be removed from the notification obligation" n. 1 of 31 March 2004 of the Guarantor, since, in this case, the purpose for which the Company uses the geolocation system does not appear to be "exclusively" that of security, as required by this provision in point A), n. 1, lit. c) for which they are exempt from the notification obligation "(...) the processing of data that indicate the geographical position of means of air, naval and land transport, carried out exclusively for transport safety purposes". In this regard, in fact, it should be noted that in the information issued to its employees "potentially subject to automatic control of the geographical position (...)", the Company informed that it had "(...) installed the satellite system with the aim of increasing security of company assets against theft, optimizing company costs by reducing empty kilometers and allowing the geolocation of the transported goods (…);

Finally, with reference to the invoked good faith, it should be noted that, in relation to art. 3 of law 689/1981, it is necessary that the error - according to established jurisprudence - in order for it to be excusable, is based on a positive element, extraneous

to the agent and capable of determining in him the conviction of the lawfulness of his behavior. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Company, covering to all intents and purposes the title of co-data controller, was diligently required to know and fulfill the obligations required by the applicable legislation in the matter in question, also due to the fact that, in relation to its professional qualities was required to find out about the applicable rules and their interpretation, including the obligation to proceed with notification to the Guarantor pursuant to art. 37, paragraph 1, lett. a), in the manner indicated by art. 38 of the Code. Therefore, the argument relating to the existence of good faith, with respect to the obligation of the data controller to comply with the legislation on the protection of personal data, cannot be accepted.

NOTING that the Company as co-controller of the treatment pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, on the basis of the considerations referred to above, he appears to have committed the violation pursuant to art. 163 of the Code for failure to fulfill the notification obligation pursuant to the combined provisions of articles 37, paragraph 1, letter a) and 38 of the Code in relation to the processing of data indicating the geographical position of persons or objects via an electronic communication network;

CONSIDERING the art. 163 of the Code which punishes the violation of articles 37, paragraph 1, letter a) and 38, paragraphs 1 and 2, of the same Code with the administrative sanction of the payment of a sum from twenty thousand to one hundred and twenty thousand euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code according 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";

WHEREAS, for the purpose of determining the amount of the fine, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, 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;

WHEREAS, in the present case:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element of the alleged violations, pursuant to art. 163 of the Code, it is believed to present the characteristics of less seriousness;

b) about the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings must be considered;

c) regarding the economic conditions of the agent, the elements of the ordinary financial statements for the year 2016 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine in relation to art. 163, for the violation of the articles 37, paragraph 1, letter a) and 38, paragraphs 1 and 2, on the basis of the aforementioned elements evaluated as a whole, to the extent of 20,000.00 (twenty thousand) euros reduced by two fifths, according to the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of less seriousness, for an amount equal to 8,000.00 (eight thousand) euros;

HAVING DEEMED to accept the Company's request for payment in installments of the amount of the fine determined above in no. 25 (twenty-five) monthly installments corresponding to the amount of Euro 320 (three hundred and twenty) each;

HAVING REGARD to the documentation in the deeds;

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

CONSIDERING the art. 1, paragraph 2, of the aforementioned law, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

GIVEN the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to "MARTRAS S.r.l." with registered office in Tirano (SO), via del Progresso n. 2, VAT number and tax code 00914770144, to pay the sum of 8,000.00 (eight thousand) euros, by way of administrative fine for the violations indicated in motivation, dividing it, upon acceptance of the installment request, into 25 (twenty-five) monthly installments of the amount of Euro 320.00 (three hundred and twenty) each;

ENJOYS

to the same company to pay the sum of 8,000.00 (eight thousand) euros according to the methods indicated in the attachment, the fractional payments of which will begin by the last day of the month following the one in which the notification of this order

takes place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689, prescribing that, within 10 (ten) days from the payment, receipt of the payment must be sent to this Authority, in original or certified copy.

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, 21 June 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia