

[doc. web no. 9815665]

Injunction against the Municipality of Thiene - 15 September 2022

Register of measures

no. 299 of 15 September 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement 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 regard to the processing of personal data, as well as to the free movement of such data and which repeals 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 April 2019, published in the Official Gazette no. 106 of 8 May 2019 and 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 general secretary 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;

Speaker Dr. Agostino Ghiglia;

WHEREAS

1. Introduction.

The Authority has received a complaint alleging the publication, in the online Praetorian Register of the Municipality of Thiene (hereinafter, the "Municipality"), of determination no. 742 of 16 October 2019, concerning "employee matr. [...] -

acknowledgment of termination of service due to dismissal", containing the information of the dismissal of the complainant, identified by his matriculation number, following the disciplinary procedure, as well as a press release relating to the matter.

2. The preliminary investigation.

With a note of the XX (prot. n. XX) the Municipality, in response to a request for information formulated by the Office, declared, in particular, that:

- "the purpose of the processing of personal data - implemented through the publication on the praetorian register of the managerial provision with which the dismissal of the employee was acknowledged - is inherent in the ratio legis of art. 124 of the TUEL, i.e. in legal knowledge for the generality of citizens";
- "with reference to the methods of processing the data in question, [...], it should be noted that the owner makes use of subjects authorized to process the data as defined by art. 29 GDPR, identified according to a functional principle: all employees for whom the treatment itself is necessary for the performance of the tasks to which they are assigned within the organization of the entity are authorized for a specific treatment";
- "although in the presence of a legal title which legitimizes - indeed which makes it compulsory - the publication of the measure in the online register and the absence, within the measure, of particular categories of data, the body has taken care to guarantee respect for the dignity [of the interested party], providing to pseudonymize the personal details [of the complainant], identifying [the same] by means of the serial number only and avoiding highlighting other elements which, not even indirectly, could allow to trace [the same] ";
- "it was considered that the encryption system used satisfies the requirements of pseudonymisation since the alphanumeric code used, even if not generated for this purpose, is in any case created randomly; the decryption algorithm is known exclusively - according to the functional principle of strict necessity - by the same personnel office employees who - each for the performance of their duties - have legitimately processed the employee's personal data";
- "the Municipality has provided for the publication in the online register within the time limits established by the reference legislation (art. 124 of the legislative decree 18 August 2000, n. 267): precisely the deed was published from 17 October 2019 to 31 October 2019. No data contained in the deeds published in the municipality's online register can be indexed, at any time, on the municipality's website using general search engines. Even more, the online register of the municipality of Thiene is not indexed in generalist search engines";

- with regard to the press release issued by the Municipality "it is a completely anonymous press release. The aim that was intended to be pursued through this press release was to prevent the dissemination of distorted and/or incomplete information, as it was learned that the XX would publish an article on the matter the following day. Consequently, in order not to create disturbance and disorientation among users, the Administration deemed it appropriate to clarify that the problem that arose was immediately resolved, first with the suspension, and subsequently with the dismissal [of the complainant], without any economic prejudice for the users of the service".

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Data Controller, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lit. a) and c) and 6, of the Regulation as well as of the art. 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021), inviting the aforementioned owner to produce defense writings or documents to the Guarantor or to request to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, of Law No. 689 of 24 November 1981).

With a note of the XX (prot. n. XX), the Municipality presented a defense brief, declaring, in particular, that:

- "in the present case, the prerequisite for the lawfulness of data processing consists of the following rules: art. 2 paragraph 1 of Law 241/1990; art. 124 of Legislative Decree 18 August 2000, n. 267 (TUEL); art. 59, paragraph 9, no. 2 of the CCNL Local Functions dated 21.05.2018; articles 94 ss of the Internal Regulations for the organization of offices and services, adopted by the Organization by virtue of the regulatory autonomy recognized to the Municipality by art. 117 co. 6 of the Republican Constitution";
- "in particular, pursuant to art. 2, 1st paragraph, Law 241/90, the Public Administration has the obligation to conclude the proceeding, initiated ex officio or upon request by a party, with an express provision, unless a formal administrative resolution has not already been contested and there have been no changes in the factual or legal situation, or the requests are manifestly absurd or totally unfounded or illegal";
- "with reference instead to the alleged processing of personal data carried out through the publication of the provision - in any case given that the latter does not contain any personal data intelligible by anyone in the text - the basis of lawfulness, pursuant to the aforementioned art. 124 TUEL, is not to be found in the object of the determination but in its provisional nature:

every determination is published in the praetorian register, regardless of the matter that constitutes the object”;

- "the Municipality has provided for the publication in the online register within the time limits established by the reference legislation (art. 124 of the legislative decree 18 August 2000, n. 267): precisely the deed was published from 17 October 2019 to 31 October 2019. No data contained in the deeds published in the municipality's online register can be indexed, at any time, on the municipality's website using generalist search engines”;

- “the Municipality, having ascertained the existence of the formal requirement pursuant to the aforementioned art. 124 TUEL, in consideration of the principles of necessity, proportionality and relevance, verified the absence of particular categories of data within the provision and proceeded from the planning of the treatment, in compliance with the principle of minimization pursuant to art. 5 of EU Regulation/2016/679, to the pseudonymisation of [the employee's] personal details, immediately identifying [the complainant] by means of the serial number only and avoiding highlighting other elements which, not even indirectly, could allow to trace the person who has been subjected to disciplinary proceedings”;

- “it was considered that the encryption system used satisfies the requirements of pseudonymisation since the alphanumeric code used, even if not generated for this purpose, is in any case created randomly; the decryption algorithm is known exclusively - according to the functional principle of strict necessity - by the personnel department authorized to process [the employee's] personal data for the purpose of providing the economic treatment. There is therefore no way to trace the data [of the same], nor for any other person, either internal or external to the Administration, to know the decryption algorithm. Therefore, there is no possibility of identifying [the complainant] through the serial number, not even potentially through identification, correlation and deduction, with the exception of employees who were already aware, *ratione officii*, of the incident”;

- “finally, with reference to the press release, it should be noted that its issuing did not involve any processing of personal data as the text is completely anonymous. The aim that was intended to be pursued, through this press release, was to prevent the dissemination of distorted and/or incomplete information, as it was learned that the XX would publish an article on the matter. Consequently, in order not to create disturbance and disorientation in users, the Administration deemed it appropriate to clarify that the problem that arose was immediately resolved, first with the suspension, and subsequently with the dismissal, without any economic prejudice for the users of the service”.

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection regulation provides that public subjects, within the working context, can process the personal data of the interested parties, also relating to particular categories, if the treatment is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks established by law or by the law of the Union or of the Member States (Articles 6, paragraph 1, letter c), 9, par. 2, lit. b) and 4 and 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), 2 and 3, and art. 9, par. 2, lit. g), of the Regulation; art. 2-ter of the Code, in the text prior to the changes made by Legislative Decree 8 October 2021, no. 139).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of the [...] regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining with greater precision specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (Article 6, paragraph 2, of the Regulation). In this regard, it should be noted that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when provided for by a law or, in the cases provided for by law, a regulation (cf. . art. 2-ter, paragraphs 1 and 3, of the Code, in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021).

In any case, the data controller is required to respect the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "data minimization", according to which personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter a) and c), of the Regulation).

3.2 The dissemination of personal data.

As can be seen from the deeds and declarations made by the data controller, as well as from the assessment carried out on the basis of the elements acquired following the preliminary investigation and the subsequent evaluations of this Department, the Municipality has published, on the institutional website, in the Register section , the determination n.742 of 16 October 2019, containing the information of the dismissal of the complainant, identified with his matriculation number.

Although, as argued by the Municipality, the determination in question did not expressly mention the name and surname of the complainant, the latter was in any case identifiable through his matriculation number, having therefore to consider the

information contained in the determination, relating to the complainant , as "personal data" pursuant to art. 4, par. 1, no. 1, of the Regulation.

In fact, "personal data" means "any information relating to an identified or identifiable natural person", having to consider "identifiable the natural person who can be identified, directly or indirectly, with particular reference to an identifier such as [...] a number identification [...]" (Article 4, paragraph 1, no. 1) of the Regulation) as the registration number which, in the case of determination no. 742 of 16 October 2019, is uniquely associated with the interested party. The registration number is, therefore, to be considered an identification number certainly suitable for allowing the identity of the interested party to be traced, not only by authorized personnel of the Municipality, but also by any third parties, with whom the interested party has been able, over time, to share this number (think, for example, of colleagues and family). Furthermore, the pseudonymisation carried out by the Municipality by entering the registration number constitutes a mere technical measure which allows, in any case, to trace the identity of the interested party, even if indirectly and/or through the use of additional information (see art.4 par.1 n.5 of the Regulation and in this regard also see Recital n. 26 of the Regulation on the basis of which personal data subjected to pseudonymisation must be considered information on an identifiable natural person).

As specified by the Municipality itself, this identification number was not generated exclusively to indicate the complainant in correlation to the determination object of publication, but constituted an identifier associated with the interested party in the context of the employment relationship, also "for the purposes of providing the economic treatment" (see note from the Municipality of the XX cited above).

In any case, the Municipality has not proved the existence of a specific legal provision which obliges the entity to publish the determination of acknowledgment of the disciplinary dismissal of an employee, recalling in the defense writings the national discipline relating to publications on the praetorian register of local authorities (article 124, paragraph 1, of legislative decree no. 267 of 18 August 2000). In this regard, it should be remembered that this Authority, on several occasions, has clarified that even the presence of a specific advertising regime cannot lead to any automatism with respect to the online dissemination of personal data and information, nor a derogation from the principles regarding the protection of personal data (see provision of 25 February 2021, n. 68, web doc. 9567429). On the other hand, this is also confirmed by the personal data protection system contained in the Regulation, in the light of which it is envisaged that the data controller must "implement adequate technical and organizational measures to ensure that they are processed, by default, only the personal data necessary for each specific

purpose of the processing" and must be "able to demonstrate" - in the light of the principle of "accountability" - that he has done so (articles 5, paragraph 2; 24 and 25, paragraph 2, regulation). In numerous decisions regarding the obligations deriving from art. 124 of Legislative Decree 267/2000, invoked by the Municipality, in fact, the Guarantor reiterated that all the limits established by the principles of data protection with regard to the lawfulness and minimization of data also apply to publications in the online praetorian register (see part II, paragraph 3.a. of the "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public entities and other obliged entities").

In the resolution to be published, therefore, no personal data of the complainant should have been reported (in the present case, the serial number), which could in any case have allowed the identification of the same, resorting, if necessary, to the technique of "omission" or other data anonymisation measures (see, on this point, provisions of 27 January 2021, n. 34, web doc. n. 9549165, 2 July 2020, n. 118, web doc. n. 9440025 and 2 July 2020, n. 119, web doc. n. 9440042).

The publication of the determination in question, with this expedient, would not have compromised the principle of conclusion of the procedure pursuant to art. 2 of the law 241/1990, since the full version of the same would have remained, in any case, in the records of the Municipality and would have been accessible, by qualified subjects, in the ways and within the limits established by law.

Nor can the provisions of the National Collective Labor Agreement for Local Functions of 05.21.2018 (and other internal provisions relating to the organization of the municipal offices), reported in the defensive writings of the Municipality, also be considered pertinent, also with regard to the quality and content of the source. These provisions, which in any case do not meet the requirements of an appropriate legal basis pursuant to art. 2-ter, paragraphs 1 and 3 of the Code in the text prior to the amendments made by Legislative Decree 8 October 2021, no. 139, in fact, limit themselves to indicating the cases and methods of the disciplinary procedure, but do not provide for, nor could they justify, the online dissemination of the resolution acknowledging the disciplinary dismissal of an employee.

The dissemination of the complainant's personal data, contained in determination no. 742 of 16 October 2019, therefore, took place in a manner that did not comply with the principles of data protection and in the absence of an appropriate legal basis, in violation of articles 5, par. 1, lit. a) and c), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021).

4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller during the preliminary investigation □ the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code □ although worthy of consideration, do not allow the findings notified by the Office to be overcome with the act of initiation of the proceeding and are insufficient to allow the dismissal of the present proceeding, since none of the cases envisaged by the art. 11 of the Regulation of the Guarantor n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Municipality is noted, for having disseminated, through online publication, the determination n.742 of 16 October 2019, containing personal data relating to the dismissal of the complainant for disciplinary reasons, in the absence of a legal basis, in violation of articles 5, par. 1, lit. a) and c), 6 of the Regulation as well as article 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021). On the other hand, given the absence of personal data in the press release, it is believed that the profile regarding the publication of the same should be archived.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 3, of the same Regulation, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects - given that the dissemination of data ceased on 31 October 2019 - the conditions for the adoption of further 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 specific case the violation of the aforementioned provisions is subject to the application of the administrative fine 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, it was considered that the identified conduct concerned the dissemination of personal data relating to events connected with the employment relationship referring to a disciplinary proceeding against an employee, despite the numerous indications given by the Guarantor to all public entities since 2014 with the guidelines referred to above (see also "Guidelines on the processing of personal data of workers for the purpose of managing employment relationships in the public sector" of 14 June 2007, web doc. no. 1417809).

On the other hand, it was favorably taken into consideration that the violation did not concern particular categories of personal data and that it involved only one interested party. Furthermore, the publication in the Praetorian Register of the determination in question took place for a short period of time and without any indexing on generalist sites. Furthermore, there are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

The Municipality of Thiene falls within the demographic size of just over 23,000 inhabitants.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction in the amount of 3,000 (three thousand) euros for the violation of articles 5, par. 1, lit. a) and c), 6, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021), as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account that the deed being disseminated online contained references to a delicate personal matter of the interested party, concerning the dismissal for disciplinary reasons, 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.

ALL THIS CONSIDERING THE GUARANTOR

declares, pursuant to art. 57, par. 1, lit. f), of the Regulation, the illegality of the processing carried out by the Data Controller for violation of the articles 5, par. 1, lit. a) and c), 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the

amendments made by Legislative Decree No. 139 of 8 October 2021), in the terms referred to in the justification;

ORDER

pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, to the Municipality of Thiene, in the person of its pro-tempore legal representative, with registered office in Piazza Ferrarin 1 - 36016 Thiene (VI), Tax Code 00170360242, to pay the sum of 3,000 (three 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 aforementioned Municipality, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of 3,000 (three thousand) euros according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law no. 689/1981;

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code (see art. 16 of the Guarantor's Regulation no. 1/2019);

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lit. u), of the Regulation, of the violations and of the measures adopted in accordance with art. 58, par. 2, of the Regulation (see art. 17 of the Guarantor Regulation n. 1/2019).

Pursuant to articles 78 of the Regulation, 152 of the Code and 10 of Legislative Decree no. 150/2011, 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, 15 September 2022

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

Matthew