[doc. web n. 9592133]

Order injunction against INPS - April 15, 2021

Record of measures

n. 139 of April 15, 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 / EC, "General Data Protection Regulation" (hereinafter the "Regulation");

GIVEN the Code regarding the protection of personal data, containing provisions for the adaptation of national law 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");

HAVING REGARD to regulation no. 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 available on the website www.garanteprivacy.it, doc. web n. 9107633 (hereinafter "regulation of the Guarantor no. 1/2019");

HAVING REGARD to the documentation on file;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000 on the organization and functioning of the Office of the Guarantor for the protection of personal data (web doc. No. 1098801);

Rapporteur the lawyer Guido Scorza;

WHEREAS

1. The complaint.

On the occasion of the complaint regularized on XX (prot. No. XX of XX) - with reference to the alleged communication to third parties of the personal data contained in his / her social security statement issued on XX - Mr. XX complained that the National

Social Security Institute (hereinafter "INPS") failed to reply to two letters sent via certified e-mail to the Provincial Directorate of Bolzano (to the address direzione.provinciale.bolzano@postacert.inps.gov. it), dated XX and XX, with which clarifications on the matter were requested, in particular "if these documents do not fall within the confidential information and / or subject to the protection of my privacy and, in any case, how it was possible that one or both of the persons named, have had access to these data and documents without my consent and without my knowing anything about it ".

With specific reference to the aforementioned profile concerning the failure to respond to the exercise of rights, the INPS, with a note of the XX (our prot. No. XX of the XX), sent a note of the Provincial Directorate of Bolzano of the XX, in which the director, apologizing "for the fact that the Bolzano office, in 2018, did not provide any response to Mr. XX", reported that "the non-reply was due to a mistake in the certified e-mail arriving".

In any case, the investigation also concerned the profile of the alleged communication to third parties of the data referring to the complainant and contained in the social security statement, in relation to which the Institute affirmed - with declarations of the truthfulness of which one can be called to respond pursuant to art. 168 of the Code - following specific requests for information sent pursuant to art. 157 of the Code (respectively, prot. N. XX of the XX, prot. N. XX of the XX), which:

- this contribution statement would have been produced by an employee serving at the Provincial Directorate of Bolzano and authorized, in August 2011, to access the applicants' contribution statements; he would have "performed, again during the reference period, service at the counter, where among other things, he issued, or at the request of the person concerned, with an identification document or on the basis of a proxy, extracts of contributions" (cited note of the XX);

- "The practice in use at the Institute provides that a copy of the documentation referring to the citizen requested at the counter can be provided only at the direct request of the interested party or by proxy presented by the delegated party, accompanied by a copy of the identity document of the delegating party and delegate. [...] In the event of a request for a copy of documentation at the counter by the interested party, the official does not keep a copy of the identity document, while, in the event of a proxy presented by a third party, the same is retained and stored in the acts ". In the present case, "The employee, who was assigned to the counter service and who appears to have printed the contribution statement, was consulted. He confirmed that it was customary to proceed as indicated above. He also stated that, after 9 years, it is not possible for him to help reconstruct the facts or circumstances that are the subject of the investigation. Therefore, there is no doubt that the document was provided directly to Mr. XX or to a person delegated by him "(note of the XX, our prot. No. XX).

2. The preliminary investigation.

The Office, with act no. XX of the XX (notified on the same date by PEC), which here must be understood as fully reproduced, has initiated, pursuant to art. 166, paragraph 5, of the Code, with reference to the specific situations of illegality referred to therein, a procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulation towards INPS, as the Institute has not provided feedback to the data subject with reference to the exercise, by the latter, of the data subject's right of access to information concerning the processing carried out on their personal data, in particular with reference to the creation of a copy and alleged communication of the same to third parties by the Provincial Directorate of Bolzano (which would have occurred on the XXth date), thus involving the violation of Articles 5, par. 1, lett. a), 12 and 15 of the Regulations.

With a note of the XX (our prot. No. XX of the XX), the INPS sent its defense briefs, pursuant to art. 166, paragraph 6, of the Code, where it represented, in particular, that:

- being the release of the contribution statement, which took place on the XXth date, "a certain, unequivocal and undisputed fact, given the date indicated on it [...] it follows that the Institute cannot be held liable for any administrative offense allegedly occurred more than 5 years prior to the date of dispute ", based on the provisions of art. 28 of the l. November 24, 1981, n. 689, considering, therefore, that there has been no violation of art. 5, par. 1, lett. a), of the Regulations (pp. 2 and 3);
- with reference to the conservation of documents suitable for proving the legitimacy of access to the complainant's contribution statement, "the Institute is obliged to verify and offer proof to this Authority of a fact (presence of delegate - possible delegation or presence of interested party - register accesses) through an act or document for which the legislation at the Institute, relating to the so-called mass of waste [...] provides, for activities at local structures, [...] that the acts relating to relations with citizens in URP area (Public Relations Office) therefore also at the counter of the Institute, must be kept for n. 5 years. It is quite clear that the Institute is unable to offer proof, after 9 years, regarding the fact that the complainant [...] has requested personally, or by proxy, the social security contribution statement in question [...] . Add to this that the same requests [...] sent to INPS on XX and XX, with which clarifications were requested on the matter - and not found by the Bolzano office only for a mere misunderstanding - could not have had any effect as regards 'subject of the request [...] as they refer to a previous 7-year event for which the conservation of documents and / or deeds and / or registers was no longer envisaged, based on current legislation and therefore for which the entity it could not be charged to the verification "(pp. 3 and 4);
- finally, with reference to the violation of articles 12 and 15 of the Regulations, "without prejudice to the mere inconvenience

regarding the receipt of the certified e-mail, since the any deed of delegation (paper) was no longer subject, at that time, to retention due to the provisions on the Discarded Mass [...], having passed more than 5 years "(p. 4).

3. Outcome of the preliminary investigation.

Art. 15, par. 1, of the Regulation establishes that "The interested party has the right to obtain from the data controller confirmation as to whether or not personal data concerning him is being processed and in this case" to obtain access to information concerning this treatment , including "the purposes of the processing" (letter a)), "the recipients or categories of recipients to whom the personal data have been disclosed" (letter c)) and "the retention period of the personal data provided" (letter d)).

Furthermore, pursuant to art. 12, para. 3 and 4, of the Regulation: "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 "; "If he does not comply with the data subject's request, the data controller informs the data subject without delay, and at the latest within one month of receiving the request, of the reasons for the non-compliance and of the possibility of proposing a complaint to a supervisory authority control and to propose judicial appeal ".

The data controller is then, in any case, required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency", according to which personal data must be "processed lawfully. , correct and transparent towards the interested party "(art. 5, par. 1, lett. a), of the Regulations).

The elements adduced in the defensive writings by the data controller, although worthy of consideration, do not allow to overcome the findings notified to INPS by the Office with the act of initiating the procedure, as it is ascertained that the requests for access to personal data submitted by the complainant on XX and XX, as also recognized by the Institute, the requested response was not provided, within the terms provided for by the aforementioned articles 12 and 15 of the Regulation. This taking into account that the feedback could, in any case, have been provided, even by declaring not to be in possession of the requested elements and representing the relative reasons to be traced, in the opinion of the Institute, to the specific rules on the retention times of deeds and documents.

As for the reasons for the non-response, attributable to a "mere misunderstanding in order to receive the certified e-mail", it is noted that the arguments do not allow to qualify the constituent elements of the discipline on excusable error referred to in art.

3 of the l. 689/1981, given that the error on the lawfulness of the fact, commonly referred to as good faith, can be found as a cause for exclusion of liability only when it is found to be innocent. To this end, that is, a positive element is needed to induce such an error, which cannot be remedied by the interested party with ordinary diligence, an element that cannot be found in the present case (see, ex multis, Civil Cassation, section . lav., 12 July 2010, n. 16320; Cass. civ., section II, 13 March 2006, n. 5426; Cass. civ., section I, 21 February 1995, no. 1873).

Failure to respond to requests for access to personal data also involves the violation of art. 5, par. 1, lett. a), of the Regulation as, in addition to representing a cause of non-compliance with the law (principle of lawfulness), it results in incorrect conduct by the data controller towards the data subject (principle of correctness) which prevents the latter from knowing the essential aspects of the processing of their personal data (principle of transparency).

Therefore, for the purpose of contesting the findings specifically notified by the Office with the act of initiation of the procedure of the XX, what is alleged in the defense writings regarding the non-violation of the principle of lawfulness of the treatment with reference to the expiry of the limitation period of five years from the day on which the violation was committed, provided for by art. 28 of the l. 689/1981 for the imposition of the order for payment.

In another respect, however, these arguments contribute to the filing of complaints relating to alleged violations related to access to personal data made by the employee of the Provincial Directorate of Bolzano on the 20th. For this specific purpose, in fact, it is necessary to take into account the considerable time span that has elapsed - even if only if we want to consider the seven years that have elapsed up to the moment in which the complainant has submitted an application for access to personal data (XX and XX) - also in light of the times of conservation of deeds and documents that would have prevented the Institute, according to what has been declared, from recovering the documentation suitable to prove the legitimacy of the access in question.

Furthermore, against the statement of the interested party contained in the note sent on XX (prot. No. XX) - in response to the request for clarification sent by the Authority on XX (prot. No. XX) - according to which "I do not it appears to have requested no access to the documents on the XXth date and not even in a similar period, nor to have conferred delegation or authorization ", we acknowledge what was declared by the data controller, pursuant to art. 168 of the Code, according to which "The practice in use at the Institute provides that a copy of the documentation referring to the citizen requested at the counter can be provided only at the direct request of the interested party or by proxy presented by the delegated party, accompanied

by a copy of the document identity of the delegating and delegated subject. [...] In the event of a request for a copy of documentation at the counter by the interested party, the official does not keep a copy of the identity document, while, in the event of a proxy presented by a third party, the same is retained and stored on file […]. [...] documents relating to relations with citizens within the URP and therefore also of the Institute's counter, must be kept for no. 5 years; The employee, who was assigned to the counter service and who appears to have printed the contribution statement, was consulted. He confirmed that it was customary to proceed as indicated above. He also stated that, after 9 years, it is not possible for him to help reconstruct the facts or circumstances that are the subject of the investigation. Therefore, there is no doubt that the document was provided directly to Mr. XX or to a person delegated by him "(note of XX).

4. Conclusions.

In light of the aforementioned assessments, taking into account the statements made during the investigation - the truthfulness of which is answered pursuant to art. 168 of the Code - it is noted that the elements provided in the defense briefs 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 entire procedure to be archived, however, there is no recourse to any of the cases provided for by art. 11 of the regulation of the Guarantor n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and it is noted that the INPS has violated Articles 5, par. 1, lett. a), 12 and 15 of the Regulation for failing to provide due feedback to the interested party within the terms of the law, with reference to the exercise of the right of access, carried out, by the latter, twice (on XX and XX).

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulation, pursuant to art. 58, par. 2, lett. i), and 83, par. 5, of the same Regulation.

On the other hand, it is believed that, in the terms described above, the conditions for the adoption of specific determinations with reference to the profiles relating to access to the contribution statement of the interested party, carried out on the XXth date, do not exist.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (Articles 58, paragraph 2, letter i), and 83 of the Regulations; 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 regulation of the Guarantor no. 1/2019).

In this regard, in the present case, 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 non-response concerned two access requests made by the interested party, and that the Institute has already been the recipient of other corrective measures by the Guarantor, albeit for heterogeneous violations.

On the other hand, it was favorably taken into account that the complaint was made to the Authority long after the period in which the interested party exercised his right towards the Institute, and that this request for access in any case concerned an episode that occurred significantly earlier in terms of time, which made it difficult to ascertain. Furthermore, the non-response is due to a mere mistake that occurred at a local INPS office.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the financial penalty in the amount of 12,000.00 (twelve thousand) euros for the violation of Articles 5, par. 1, lett. a), 12 and 15 of the Regulations, as an administrative pecuniary sanction, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account that the violation found in this provision relates to the failure to exercise the rights of the interested party, which represents one of the main guarantees that the Regulation recognizes to protect his rights and fundamental freedoms, it is also considered 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 regulation of the Guarantor n. 1/2019.

Finally, it is noted that the conditions set out in art. 17 of the regulation of the Guarantor n. 1/2019.

WHEREAS, THE GUARANTOR

detected the violation, by INPS, of articles 5, par. 1, lett. a), 12 and 15 of the Regulation, within the terms set out in the motivation,

ORDER

to the National Social Security Institute (INPS), in the person of the pro tempore legal representative, with registered office in via Ciro il Grande 21, 00144 Rome, Tax Code 80078750587, pursuant to art. 58, par. 2, lett. i), and 83, par. 5, of the Regulations, to pay the sum of € 12,000.00 (twelve thousand) as a pecuniary administrative sanction for the violations indicated in the motivation. 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

to the aforementioned Institute, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 12,000.00 (twelve thousand) 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 l. 689/1981;

HAS

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

b) pursuant to art. 17 of the regulation of the Guarantor n. 1/2019, the annotation in the internal register of the Authority of the violations and measures adopted, pursuant to art. 58, par. 2, of the Regulations, with this provision.

Pursuant to art. 78 of the Regulation, 152 of the Code and 10 of Legislative Decree 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 applicant resides abroad.

Rome, April 15, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei