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Injunction against Gedi Gruppo Editoriale S.p.A. - February 25, 2021

Register of measures

no. 85 of 25 February 2021

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 (hereinafter, the "Regulation");

HAVING REGARD TO the Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 (legislative decree 30 June 2003, n. 196, as amended by legislative decree 10 August 2018, n. 101, hereinafter "Code");

HAVING REGARD to the Deontological Rules relating to the processing of personal data in the exercise of journalistic activity (Official Gazette of 4 January 2019, No. 3, hereinafter "Deontological Rules");

HAVING DETECTED that it had been disseminated on 25 October 2019 on the website www.repubblica.it, attributable to Gedi Gruppo Editoriale S.p.A. (hereinafter Gedi), of images portraying two subjects who, placed in custody in relation to a serious news event that took place in Rome on 24 October 2019, appear to have been taken in an evident state of physical constraint; CONSIDERING the provision of 25 October 2019 with which the President of the Authority, by virtue of the powers conferred on him by art. 5, paragraph 8, of Regulation no. 1/2000, urgently ordered the measure of the temporary limitation of the treatment with regard to Gedi, pursuant to art. 58, par. 2, lit. f), referring to any further dissemination, including online, of images having the characteristics identified above, or any other similar images attributable to the same owner, as they lack adequate measures aimed at limiting the visibility of non-essential details to be considered detrimental to the dignity of the subjects filmed; this provision was then ratified by the Board in the meeting of 31 October 2019;

CONSIDERING that the aforesaid provision was adopted taking into account that:

the art. 137, paragraph 3, of the Code provides that in the event of dissemination or communication of personal data for

journalistic purposes, the limits of the right to report to protect the rights and freedoms of persons remain unchanged and, specifically, the limit of the essentiality of the information about facts of public interest;

the art. 8 of the Code of Conduct provides that, without prejudice to the limit of the essentiality of the information, the journalist does not provide news or publish images that may be detrimental to the dignity of the person;

the art. 114, paragraph 6-bis, of the criminal procedure code prohibits "the publication of the image of a person deprived of personal freedom taken while the same is subjected to the use of handcuffs or other means of physical coercion, unless the person allows you";

the art. 42-bis, paragraph 4, of the law of 26 July 1975, n. 354 states that "suitable precautions are taken in translations to protect the translated subjects from the curiosity of the public and from any kind of publicity, as well as to avoid unnecessary inconvenience to them...";

the widespread image, at first analysis, appeared suitable, also by virtue of its visual impact, to be in contrast with the dignity of the interested party, taking into account the particularity of the situation being filmed;

HAVING REGARD to the note dated 25 October 2019 with which the aforementioned provision for limitation of treatment was sent to Gedi, asking him to communicate, within fifteen days following the notification, the initiatives undertaken in order to implement the provisions by the Authority;

GIVEN the note of February 25, 2020 with which the Authority, on the basis of the evidence that emerged, and in the absence of any response from the data controller to the note of October 25, 2019, communicated to the latter the initiation of the procedure pursuant to art. 166, paragraph 5, of the Code for the possible adoption of corrective and sanctioning measures pursuant to art. 58, par. 2, of the Regulation, notifying the alleged violations of the law identified, in the specific case, in the detected dissemination of personal data of the subjects taken in an evident state of physical constraint; also contesting the violation of the provisions of the Authority with the provisional limitation provision, as well as of the articles 58, par. 1 of the Regulation and 157 of the Code which provide for the obligation to provide the Authority with the information required for the execution of its duties;

HAVING REGARD to the note dated 27 May 2020 with which the data controller, in requesting to be heard by the Authority, stated that:

failure to formally reply to communication prot. 36749 of 25 October 2019 and the related provision would have been

attributable to an involuntary and accidental internal communication error, and not to a desire to evade the order of the Authority;

in fact, Gedi's legal office would have immediately notified, with an internal communication dated 25 October 2019, the editorial staff of the masthead of the limitation measure in question, however due to a mere oversight the editorial staff would not have read the communication from the legal office and would therefore not have been able to execute the request to remove the images;

all the companies of the Gedi Group, over the years, have always maintained a relationship of loyal collaboration with the Authority, providing an immediate response to the reports and requests for information received, adapting to all the provisions of the Guarantor;

on 25 February 2020, when the Gedi company realized the error it had made, it removed the images;

the images in question were in any case correct since, before their diffusion, they had been the subject of a pixellating operation aimed at preventing the handcuffs from being seen;

the black news story with reference to which the arrest of the two people in question was ordered had a vast echo and resonance not only in the city of Rome, but throughout the country, so much so that all the media followed with the maximum attention to this case and its investigative developments;

even the masthead published by Gedi, when the news of the arrest of the two suspects of the murder in question appeared, published a series of articles relating to the progress of the investigation, together with some photographic images accompanying the visuals, including those in exam, which resumed the moment of conduct of the two accused of murder at the Regina Coeli prison, in a substantially similar form to what was published by all the editorial mastheads that dealt with the matter;

the images had been the subject of a diffusion via video published by the Arma dei Carabinieri, confirming the particular importance of the story linked to the commission of a heinous crime capable of arousing a particular social alarm;

the photographs published, even if they portrayed the arrest of the two young accused, did not present visual elements of violence or particularly dramatic nature such as to constitute an infringement of the dignity of the subjects portrayed or harm the sensibility of the reader, also because the part of the image reproducing the handcuffs had been fuzzy; therefore, although from these images it could be understood that the two young men arrested were subjected to the use of handcuffs on their

wrists, however they were not detained by resorting to the use of force by the PS agents; on the contrary, the two young men clearly showed their faces to the cameras and cameras with a proud and at times mocking attitude;

therefore, the choice of the data controller to proceed with the publication of these images would be justified by the prevailing reasons of public interest connected to the peculiarity of the case in question, and therefore respectful of the provisions of art. 137 of the Privacy Code, of the articles 6 and 8 of the Deontological Rules, of the general principles of lawfulness and correctness of the data processing pursuant to art. 5, par. 1, par. a, as well as of the art. 85 of the Regulation, also in the light of certain jurisprudential orientations (civil Cassation Section I is referred to, sentence of 14 February 2008, n. 7261, which would have excluded the existence of a ban on the publication of the photo of a suspect for murder who had been placed under arrest with handcuffs on his wrists, so that the handcuffs were not directly visible);

it could not be argued that the need to protect the dignity of the alleged perpetrators of this murder should prevail over the legitimate needs of social denunciation of what was a violent attack, all the more so given that the foreseeable long sentence that the two subjects will have to serve excludes that the diffusion of their images, in the immediacy of the fact, could harm them or jeopardize their future social reintegration;

HAVING REGARD TO the minutes of the hearing held on 30 July 2020, during which the data controller, in addition to recalling the arguments raised in the defense brief already filed, requested the dismissal of the proceedings initiated against him, deeming non-existent, in the case in point, the details of a violation of the relevant regulations on the protection of personal data;

CONSIDERING that the limitation imposed on the data controller, also taking into account the characteristics of the specific procedure used for its adoption, consists of a provision of a temporary nature which, in order to consolidate the relative effects, must be followed by a further provision which, on the basis of an examination carried out on the merits, establishes in a stable manner the lawfulness and correctness of the processing carried out;

NOTING that in the course of the proceedings, no new elements emerged such as to modify the preliminary assessments already expressed by this Authority in the aforementioned provision of 25 October 2020, taking into account that:

- the images in question, which portray subjects in a state of constraint, are likely to harm their dignity and, as they do not contain information of an essential nature, are published in violation of art. 137, paragraph 3, of the Code and the prohibition pursuant to art. 8, paragraph 1, of the aforementioned deontological rules, specifically referring to the dissemination of images

of subjects involved in news events; this also considering what was affirmed by the Court of Cassation (Civil Cassation, section III, sentence 6 June 2014, n. 12834), according to which «the publication in a newspaper of a photo of a person in chronological coincidence with his arrest must respect, for the purposes of its legitimacy, not only the limits of essentiality to illustrate the content of the news and the legitimate exercise of the right to report [...] but also the particular precautions imposed to protect the dignity of the person portrayed by art. 8, first paragraph, of the deontological code of journalists, which constitutes a source of supplementary legislation»; in the same ruling, the Court of Cassation also noted that "the investigation into compliance with the aforementioned limits in the publication of the photo must be conducted with greater rigor than that relating to the simple publication of the news, taking into account the particular potential harmful to the dignity of the connected person to the typical emphasis of the visual instrument, and of its greater suitability for a decontextualized diffusion and insusceptible to control by the person portrayed»;

- the prohibitions pursuant to art. 114, paragraph 6-bis, of the criminal procedure code and pursuant to art. 8, paragraph 3, of the Deontological Rules, both refer to the reproduction of images of "people", forbidding them to be disseminated with irons or handcuffs, unless there is the consent of the interested party or this is necessary to report abuse ; considering that in the present case it is undisputed that there was no consent from the arrested and that no abuses were reported, the mere pixilation of the handcuffs and wrists of the arrested persons, whose faces are instead clearly visible, is evidently not sufficient to ensure compliance by the data controller with the aforementioned prohibitions;

CONSIDERING that the principle affirmed by the sentence cited by the data controller (Civil Cassation, section I sentence 14 February 2008, n. 7261) is not applicable to the present case, since in the photo in question the handcuffs are clearly visible on the wrists of the arrested, and indeed they are placed in the center of the image, unless they have been "pixelated": having covered the image of the handcuffs alone is therefore an insufficient expedient to guarantee compliance with the aforementioned legislation which, as interpreted by the Court of Cassation, requests the publication "in a pose in which the handcuffs are not visible";

NOTING, therefore, that, in the present case, the diffusion of the images portraying the interested parties in an evident state of physical constraint is to be considered in contrast with the art. 5, par. 1, lit. a), of the Regulation, with the art. 137, paragraph 3, of the Code, as well as with art. 8, of the deontological rules, and that the related treatment, as carried out with the aforementioned methods, is to be considered unlawful;

NOTING, moreover, that the data controller, following the notification of the provisional limitation measure of 25 October 2019:

- has not provided the Authority with the requested information in the 15 days following notification of the same;
- did not remove the images from the aforementioned website, as shown in the deeds and by admission of the same company, on the website in question at least until February 25, 2020;

CONSIDERING that the reasons given are not sufficient to prevent the application of the sanctions envisaged, given that:

- the mere "oversight" by the editorial staff could well have been matched by a new intervention by the Company's Legal Department which could not fail to worry about the feedback to be provided to the Authority;
- that similar "oversights" cannot be taken into consideration in terms of exemptions, having regard to the relevance and activity carried out by the owner who, due to the well-known principles of accountability and privacy by design introduced by the Regulation (articles 24 and 25) is required to adopt the appropriate technical and organizational measures in order to meet the requirements of the legislation on the protection of personal data and protect the rights of the interested parties;
- newspapers belonging to the same editorial group, such as "La Stampa" and "Secolo XIX" - which, moreover, on the website attributable to Gedi Gruppo Editoriale S.p.A., are indicated as newspapers published by the latter, albeit within the scope of relative privacy information is indicated, as data controller, Gedi News Network S.p.A. – proceeded to implement the measures required by the provisional limitation measure immediately after the notification of the latter, despite not having provided the Authority with a formal reply due to an internal problem;
- this leads us to reasonably assume that the intervention of the Guarantor regarding the images to be published was a circumstance known to today's respondent taking into account, however, that in any case the measures taken by the Authority, in addition to being published in full on the website of the Guarantor, were accompanied by a specific press release, taken up and re-launched by almost all the national press agencies;

NOTING, moreover, also in confirmation of the previous observations, that the measures imposed by the Authority are still systematically eluded by the company, given that, up to the date of the last assessment (February 18, 2021), on the same website and with reference to the same each other, images referring to subjects identified in conditions of evident physical constraint are still found (see e.g. <https://...>);

CONSIDERED therefore:

- to adopt in this regard vis-à-vis Gedi Gruppo Editoriale S.p.A. a specific order-injunction pursuant to articles 166, paragraph

7, of the Code and 18 of the law n. 689/1981, for the application of the pecuniary administrative sanction provided for by the combined provisions of 166, paragraph 2, of the Code, and 83, par. 3, 5 and 6 of the Regulation e

- to have to dispose, towards the same owner, pursuant to art. 58, par. 2, lit. f), of the Regulation, the measure of the prohibition of further processing of the images object of the present proceeding or, of any other similar images attributable to the same owner, as they lack adequate measures in order to exclude the visibility of non-essential details detrimental to the dignity of the subjects portrayed, such as the state of constraint in which they were found, except for the mere conservation of the same for the purpose of its possible use in court;

RECALLING that, in the event of non-compliance with the measure of this prohibition of treatment ordered by the Guarantor, the criminal sanction referred to in art. 170 of the Code, in addition to the administrative sanction pursuant to art. 83, par. 5, letter. e), of the Regulation;

NOTING that for the determination of the amount of the pecuniary sanction, it is necessary to take into account the elements indicated in art. 83, par. 2 of the Regulation and that in the present case it is necessary to take into consideration, on the one hand:

a) the duration of the violation, which lasted due to the failure to respond to the Authority's requests, for approximately four months, and due to the non-compliance with the limitation provision relating to the specific photos of the two interested parties at least until 25 February 2020 and in relation to other similar images up to at least February 18, 2021;

b) the particular harm to the dignity of the persons concerned deriving from the treatment in question and its continuation for the period indicated above;

c) the relevant conditions on the organisational, economic and professional level of the offender;

d) the contrast between the declarations made to the Authority regarding the non-compliance and the behavior also subsequently held;

and, on the other:

e) the purposes pursued by the owner, attributable to the exercise of the right to report and freedom of information and, therefore, the need to ensure in this context the relative balance with the fundamental right to the protection of personal data of the interested parties, as established by the Regulation (art. 85) and by the Code (articles 136 et seq.);

f) the absence of specific precedents:

CONSIDERING the above parameters and the principles of effectiveness, proportionality and dissuasiveness indicated in art. 83, par. 1, of the Regulation;

CONSIDERING that, on the basis of all the elements indicated above, the pecuniary administrative sanction should be applied in the amount of Euro 20,000.00 (twenty thousand);

CONSIDERING also - also in consideration of the scope of data dissemination and the time span that elapsed from the moment of dissemination of the aforementioned images until their removal - that, pursuant to articles 166, paragraph 7, of the Code, and 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, it is necessary to proceed with the publication of this provision on the website of the Guarantor, by way of ancillary sanction;

HAVING DEEMED that the conditions exist for proceeding with the annotation in the internal register of the Authority pursuant to art. 57, par. 1, lit. u), of the Regulation, in relation to the measures adopted in the specific case in compliance with art. 58, par. 2, of the same Regulation;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Prof. Pasquale Stanzione;

ALL THE ABOVE, THE GUARANTOR:

a) pursuant to art. 58, par. 2, lit. f), of the Regulations, provides against Gedi Gruppo Editoriale S.p.A. the measure of the prohibition of further processing of the images object of the present proceeding or, of any other similar images attributable to the same owner, as they lack adequate measures in order to exclude the visibility of non-essential details to be considered harmful to the dignity of the subjects filmed, such as the state of constraint in which they were, except for mere conservation for the purpose of their possible use in court;

b) arranges for this provision to be sent to the National Council of the Order of Journalists for forwarding to the competent Regional Council.

ORDER

pursuant to articles 58, paragraph 2 lett. i) and 83 of the Regulation to Gedi S.p.a. to pay the sum of 20,000.00 (twenty thousand) euros as an administrative fine for the violations indicated in the justification, representing that the offender,

pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute, by paying, within the term of thirty days, an amount equal to half of the fine imposed;

ENJOYS

To Gedi, in the event of failure to resolve the dispute pursuant to the aforementioned art. 166, paragraph 8, of the Code, to pay the sum of 20,000.00 (twenty 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 deeds pursuant to art. . 27 of the law n. 689/1981.

HAS

pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and believes that the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

The Guarantor invites, pursuant to articles 157 of the Code and 58, par. 1, lit. a), of Regulation (EU) 2016/679, Gedi Gruppo Editoriale S.p.A., within 30 days from the date of receipt of this provision, to communicate what initiatives have been undertaken in order to implement the provisions therein and in any case to provide adequate feedback documented. Please note that failure to respond to the above request is punished with the administrative sanction pursuant to articles 166 of the Code and art. 83, par. 5, letter. e), of Regulation (EU) 2016/679.

Pursuant to art. 78 of the Regulation, as well as the articles 152 of the Code and 10 of Legislative Decree lg. 1 September 2011, no. 150, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal filed, alternatively, with the court of the place where the data controller resides or has its registered office or with the court of the place of residence of the interested party within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 25 February 2021

PRESIDENT

station

THE SPEAKER

station

THE SECRETARY GENERAL

Matthew