

Injunction against SECCHI Elettroservice S.r.l. - June 6, 2018

Register of measures

no. 380 of 6 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 privacy unit of the Guardia di Finanza, in execution of the request for information no. 31540/114083 of 3 October 2017, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, bearing the Code regarding the protection of personal data (hereinafter the "Code"), carried out checks at SECCHI Elettroservice S.r.l. (hereinafter the "Company") Tax Code and VAT number 00657210142 with legal and operational headquarters in Valdisotto (SO) in Via al Forte n. 4, exercising the economic activity of retail trade of household appliances, formalized in the report of operations carried out on 7 and 8 November 2017, in order to verify the lawfulness of the processing of personal data carried out by the company by means of a system of geolocation aimed at detecting the geographical position of one's vehicles through an electronic communication network, with particular reference to the methods with which the notification obligation pursuant to articles is fulfilled 37 and 38 of the Code;

CONSIDERING that, on the basis of the statements made during the inspections and the documentation sent by the company to resolve the reservations formulated during the inspections, it was found that:

- the Company has been operational since January 1972 and deals with the sale and assistance of household appliances in the municipalities of the upper Valtellina;
- the Company is the owner of four vans used by employees to carry out the assistance and/or repair service for household appliances at customers' premises;
- on one of these vehicles, registered as DM 035 AM, in October 2013 the Company installed a "geolocation" system called "REMOTE ANGEL", supplied by the company "MAC&NIL S.r.l." based in Gravina di Puglia (BA), for which, following the authorization prot. no. 12113 of 18 December 2013 issued, pursuant to art. 4 of the law n. 300 of 1970, by the Territorial Labor Directorate of Sondrio, carried out a treatment of data indicating the geographical position of people or objects through an

electronic communication network since, through the service provided by "Telecom Italia SpA", through of the website www.localizzaweb.com, was able, at any time, to proceed with the "geolocation" of the above-mentioned company vehicle;

- the system allows you to view the geolocated vehicle on the map, indicating the latitude and longitude data at the time of the query and, as supported by the Company, to "know the exact position of the vehicle, check the kilometers travelled, check fuel consumption " (see report of operations carried out of 7 November 2017, point no. 2, page 3);

- as claimed by the party, "the purpose of the geolocation treatment carried out is to better manage appointments during interventions at the homes of (...) customers. In particular, following telephone requests from the latter, the Company is able to verify the position of the vehicle at that moment and, via a telephone call to the technician who is on board the van in question on the occasion, manage the interventions to be carried out faster and more functional" (cf. report of operations carried out of 7 November 2017, point no. 2, page 4);

- 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 activity;

- the Company, in the face of the processing of personal data implemented through the geolocation system, 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, before the start of the treatment;

CONSIDERING the report n. 91 of 8 November 2017 with which the Special Privacy Unit of the Guardia di Finanza challenged the Company, in the person of its pro-tempore legal representative, for the administrative violation envisaged by art. 163 of the Code, for having carried out the processing of personal data pursuant to art. 37, paragraph 1, lett. a), of the Code (processing of data that indicate the geographical position of persons or objects via an electronic communication network), by failing to notify the Guarantor according to the methods indicated by art. 38, paragraph 1 and 2, of the same Code;

NOTING that from the Administrative Report prepared by the aforementioned Unit 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 defense brief dated 6 December 2017 in which the party's lawyer, after describing the functioning of the "Remote Angel" system, intended to demonstrate the non-existence of the disputed violation by deeming that "(...) no processing is carried out through the system of personal data and therefore there is no obligation to notify". According to the lawyer of the parties, in fact, "the system (...) does not carry out any processing of personal data, nor is there any archive

(paper or computerized) at Secchi Elettroservice with references to the people who, on a daily basis, used the vehicle in question. In fact, the vehicle was used by all the employees and the daily assignment of the same took place on verbal indications from the owner, without the name of the employee who owned it being recorded on any type of support. The information collected through the aforementioned system, therefore, refers only to the vehicle with the DM 035 AM license plate and it is not possible, in any case, to identify the employee who owned it at a specific time".

The Company, in support of the above, argued that this is "also expressly reported by the officials taking the minutes on page 5 of the report of 11.07.2017 (...) (for which) "on the other hand, there is no information on the personal data of the employees in the system of Secchi Elettroservice S.r.l.. In particular, the "User" field, following the various simulations carried out, has always remained empty".

Furthermore, the Company, in order to highlight its diligence and good faith, pointed out that before installing the geolocation system, it punctually fulfilled all the required legal obligations and, in particular, requested authorization from the use of the "Remote Angel" device, pursuant to art. 4 of the law n. 300 of 1970, to the DTL of Sondrio, also complying with all the instructions given by it. In this regard, he also represented that "(...) none of the provisions of the Territorial Labor Directorate indicates the obligation to notify the Guarantor.

This obligation, moreover, could not have existed in the present case since, as mentioned above, no processing of personal data is carried out".

Lastly, the Company's lawyer requested, in the event that the reasons argued were not accepted, the application, in the alternative, "(...) of the provision pursuant to art. 164 bis of Legislative Decree 196/03 (reduction of the sanction for less serious cases) (...) taking into account that the (...) (Company) has in any case made the communication to the Territorial Labor Directorate, has given the information to the employees and has applied the prescribed indications to the vehicle". Furthermore "(...) Secchi Elettroservice S.r.l., despite being a limited liability company, is a family business of modest dimensions (...)" taking into account the turnover and the small number of employees.

READ the minutes of the hearing of 20 March 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party, reiterating what had already been declared and requested in the defense brief, communicated, as a new fact, that the Company "(...) promptly took steps to uninstall the geolocation system, as further proof of the absolute good faith in one's conduct (...)" also producing documentation in support of this statement;

CONSIDERING that the arguments put forward are not suitable for determining the annulment of the dispute report and the closure of the sanctioning procedure.

In fact, as regards the argument that "the system (...) does not process any personal data, nor is there any archive (paper or computer) at Secchi Elettroservice with references to the people who used the vehicle on a daily basis issue" as also "expressly reported also by the officials taking the minutes on page 5 of the report of 7.11.2017 (...)" it should be noted that the absence, in the system, of the names of the employees from time to time driving the geolocatable vehicle is irrelevant, since what is relevant is the possibility of tracing these names in any case, in consideration 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 (...)". During the investigations, the Company itself, through a shareholder who intervened to respond to requests for information made by the military of the Guardia di Finanza, declared that "(...) I manage the assignment of vehicles on a daily basis based on the interventions to be carried out, therefore I am always aware who is the employee/reference technician who is driving the geolocated vehicle on that particular day (...)". Moreover, although the Company does not use the geolocation system to monitor employees, however, being able to trace the identity of the driver in this way, it could know the location of the same at any time. For these reasons, not surprisingly, the Company has fulfilled the obligations required by art. 4 of the law n. 300 of 1970, since these are tools from which, even indirectly, the possibility of remote control of workers derives.

As for the proposed good faith, it should be noted that, taking into account that art. 3, paragraph 2, of the law n. 689/1981, in establishing that "in the event that the violation is committed by mistake in the fact, the agent is not responsible when the error is not caused by his fault", establishes a presumption of guilt in relation to the fact forbidden to charged to the person who committed it, reserving the burden of proving that he has acted innocently to the latter. The guilty error on the fact that it concerns the assumptions of the violation can only be detected in the presence of a positive element, extraneous to the author of the infringement, capable of generating in the same "inexperienced author" the innocent opinion of the legitimacy of his own actions and only if the same agent has done everything possible to observe the law and no reproach can be leveled against him, so that the error is innocent, i.e. not susceptible to being prevented by the interested party with ordinary diligence (ex multis, Cassation civ. May 11, 2017, No. 11584, Civil Court of Cassation, October 18, 2016, No. 21052, Civil Court of Cassation, October 2, 2015, No. 19759). This positive element cannot be found in the failure to indicate the existence of the

notification obligation by the Territorial Labor Directorate of Sondrio, as the Company, in consideration of the professional activity carried out, was required to know the relevant regulatory provisions.

NOTING, therefore, that the Company, on the basis of the considerations set out above, appears to have committed, in its capacity as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, the violation pursuant to articles 37, paragraph 1, lett. a), and 38, paragraphs 1 and 2, of the Code, for having processed data indicating the geographical position of persons or objects via an electronic communication network without having submitted the notification to the Guarantor;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

CONSIDERING the art. 163 of the Code which punishes the violation of articles 37, paragraph 1, letter a) and 38 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, for the purposes of determining the amount of the pecuniary sanction, 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) as regards the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violation is not characterized by specific elements, also having regard to the concrete methods of use by the geolocation system company;

b) with reference to the work performed by the agent to eliminate or mitigate the consequences of the violation, the offender subsequently removed the geolocation system;

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

d) with regard to the economic conditions of the agent, the elements of the ordinary financial statements for the year 2016 were taken into consideration;

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";

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

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981 and subsequent amendments and additions;

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 Prof. Licia Califano;

ORDER

to SECCHI Elettroservice S.r.l. (hereinafter the "Company") Tax Code and VAT number 00657210142 with legal and operational headquarters in Valdisotto (SO) in Via al Forte n. 4 to pay the sum of 8,000.00 (eight thousand) euros as an administrative fine for the violation indicated in the justification;

ENJOYS

to the same company to pay the sum of 8,000.00 (eight 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 of 24 November 1981, n. 689.

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, 6 June 2018

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia