[doc. web no. 9039227]

Injunction against ANSORGE LOGISTICA ITALIA S.r.l. - June 28, 2018

Register of measures

no. 397 of 28 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 “ANSORGE LOGISTICA ITALIA S.r.l." (hereafter the “Company), with registered office in Bressanone (BZ), Via Elvas 8, postal code 39042 and secondary operational headquarters in Dubino (SO), Via Spluga 130, postal code 23015, tax code and VAT number 02298740214, carrying out the activity of transporting goods by road, formalized in the report of operations carried out on 25 October 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, whose share capital is wholly owned by ANSORGE VERWALTUNGS Gmbh located in Biessenhofen (Germany), was established in 2002 and was involved in "(...) intermodal transport of goods until June 2016, without vehicles by road and subsequently began the activity of road freight transport for third parties (…)”; (see report of operations carried out of 25 October 2017, point 1, page 2);

- the Company, to carry out this activity, "(...) until December 2016 used ten vehicles of SPEDITION ANSORGE Gmbh & Co.KG (and) subsequently they were nationalized with Italian registration plates after stipulating a contract leasing agreement with SCANIA FINANCE ITALY S.p.A. of Trento (...)" (see report of operations carried out on 25 October 2017, point 1, page 2);

- " (...) All the vehicles in use have been installed with geolocation devices from the TIS LOG of Bocholt (Germany) called TISLOG Mobile Smart (...)" (see report of operations carried out on 25 October 2017, point 1, page . 2);

- the staff assigned to drive these vehicles (13 drivers) is made up of Company employees;

- " (...) the processing of data relating to the location of the vehicles used by the Company began in July 2016, following the installation of the GPS devices provided by the TIS LOG (...)" (see report of operations carried out on 25 October 2017, point 2, page 3);

- the geolocation system allows the detection " (...) in non-continuous mode, of the vehicle's position on a geographical map. The data relating to the trips, by system setting, remain in the memory up to the previous seven days. The data from the driver's tachograph card flows into the GPS system management software, imported directly via the tracking device on the vehicle (…)". Therefore, " (...) Within the TIS LOG mobile smart application, it is possible to view the data relating to all the vehicles in the company fleet, including the license plate, the driver's name, the tablet's internal code, the time of the last GPS detection, geographic track of the vehicle and data relating to the driver's tachograph card (...)" (see report of operations carried out on 25 October 2017, point 2, page 3);

- " (...) the purposes, for which it was necessary to install the localization system, are identified for safety needs in the workplace, protection of company assets and organizational and/or production needs (...)" (see report of operations carried out on 25 October 2017, point 2, page 3);

- the Company applied to the Territorial Labor Department of Sondrio and obtained from the latter, on 27 June 2016, 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 the face of the processing of personal data implemented through the geolocation system installed on board company vehicles driven by its employees, has failed, as data controller, to make prior notification to the Guarantor, pursuant to the 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. 2 of 9 January 2018 with which "ANSORGE LOGISTICA ITALIA S.r.l.", with registered office in Bressanone (BZ), Via Elvas 8, postal code 39042 and operational and secondary office in Dubino (SO), Via Spluga 130, postal code 23015 was challenged , Tax Code and VAT

number 02298740214, the administrative violation envisaged by article 163 of the Code ("Omitted or incomplete notification") for failure to fulfill the obligation to notify the Guarantor 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;

HAVING REGARD TO the written defense dated 9 February 2018, formulated pursuant to art. 18 of the law n. 689/1981 with reference to the disputes referred to in the aforementioned report no. 2 of 9 January 2018, with which the Company intended to represent its position by deeming:

a) " (...) that no objection could and/or can be made against Ansorge Logistica Italia S.r.l., having the same proceeded to install the geolocation system (...) several months after the entry into force of the General Regulation on the protection of data (EU) 2016/679". This is because, according to the lawyer of the party, it is to be considered " (...) incorrect (...) that in the transitional phase of the two years from the entry into force of the RGPD, the old national disciplines that are in contrast with the (…) (mentioned above) regulation (…); the dispute report was notified on 01.11.2018, i.e., over a year and a half after the entry into force of EU Regulation no. 2016/679, a period within which the Italian State could have easily adapted its regulatory framework, eliminating all the provisions repealed as a result of the aforementioned Community regulation such as, for example, the prior notification to the Guarantor in the case of geolocation. Consequently, the company Ansorge Logistica Italia S.r.l. could not and / or should not be contested the violation of art. 37 of Legislative Decree no. 196/2003";

b) that the hypothesis in question would fall within the cases envisaged by the Guarantor in 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 are exempt from the notification obligation pursuant to articles 37 and 38 of the Code, the processing of data indicating the geographical position of means of air, sea and land transport, carried out exclusively for the purposes of "safety" of transport;

c) the inapplicability of art. 37 of the Code in the alleged absence of the requirement of "continuity" of data collection - required by the Provision of the Guarantor of 23 April 2004 (web doc. 993385 traceable at www.gpdp.it) for which the "location must be notified when it allows to identify continuously - even with possible intervals - the location on the territory or in certain geographical areas (...)" - since there is "the possibility for the employee-driver to deactivate the system at any time and, therefore, the recording of the data that indicate its geographical location";

d) the existence, on the part of the Company, of an excusable error; this "(...) in consideration of the fact that the company had legitimately believed that it had fulfilled all the obligations prescribed by law (...)" and because "(...) in the unified form of the application for authorization to install satellite localization on board company vehicles, made available by the Ministry of Labour, (against the indication of all the other obligations) there is no trace of the need - even if only if any - to carry out the preventive notification pursuant to Article . 37 legislative decree. n. 196/2003(...)" and because the Company had asked the DTL of Sondrio whether or not it had implemented all the obligations required for the installation of the geolocation system, "(...) obtaining as an answer that it had fully fulfilled the prescribed by law (...), as well as considering that it falls within the exemption hypotheses contemplated by the aforementioned provision of the Guarantor of 31 March 2004 and also for the product characteristics which, based on what the Company deems, do not allow continuous localization.

Lastly, the Company considered that the disputed violation, in consideration of the fulfillment of all other obligations - except that relating to notification pursuant to articles 37 and 38 of the Code - relating to the installation of the geolocation system envisaged by the legislation protecting personal data, as well as the short period of data retention by the system due to its characteristics and having proceeded promptly (before the notification of the complaint report) to the notification of the treatment pursuant to articles 37 and 38 of the Code, can only be considered less serious.

Therefore, the Company's lawyer requested, primarily, the dismissal of the sanctioning procedure; alternatively, the application of the minimum limits established by art. 163 of Legislative Decree no. 196/2003 - pursuant to art. 164-bis, paragraph 1, of the same legislation - in an amount equal to two fifths; in a further subordinate way, to abide by the application of the sanction - pursuant to art. 11 of the law n. 689/1981 - at the statutory minimum of € 20,000.00.

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. 2 of 9 January 2018 are not suitable for determining the closure of the sanctioning procedure.

With reference to the proposed inapplicability of articles 37 and 38 of the Code due to the fact that the installation and use of the geolocation system took place in the transitional phase of the two years following the entry into force of the RGPD in which the Italian State "(...) could easily have adapted its regulatory discipline, eliminating all the provisions abrogated by effect of the aforementioned Community regulation such as, for example, the prior notification to the Guarantor in the case of geolocation (...)", it should be noted that the provision of art. 99, paragraph 2, of the GDPR for which the Regulation applies from 25 May

2018, excludes that before that date the legislation contained in the Code could be considered repealed.

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 expressly provided for 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 fact, as highlighted above, the Company itself, during the inspection, declared that "(...) the purposes, for which the installation of the localization system was necessary, are identified for safety needs in the workplace, protection of company assets and organizational and/or production needs (...)" (see report of operations carried out on 25 October 2017, point 2, page 3)

With reference, then, to the inapplicability of articles 37 and 38 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 suitability to identify the concerned, please note the following.

As for the alleged absence of the requirement of continuity, it is specified that, on the basis of the provision mentioned above 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 trace the path taken by the geolocated vehicle regardless of the possibility or otherwise of constant automatic tracking and also when the reconstruction of this path is particularly laborious, also considering any interruption "intervals". In this sense, it cannot be considered relevant for the purposes of the applicability of articles 37 and 38 of the Code "the possibility for the employee-driver to deactivate the system at any time and, therefore, to register the data indicating his geographical position". The fact that the device is switched on during the working period with the possibility of being switched off, only at moments, by the worker, does not exclude the possible monitoring, even with intervals, of the movements of the vehicle, being able in this case to easily trace also the identity of the employee driving it. Therefore, the fact that the device can be turned off by the employee does not exclude the existence of the geolocation activity falling within the scope of the aforementioned rules.

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 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 know the applicable rules and their interpretation, including the obligation to proceed with the 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.

VERIFIED that the Company, following the inspection by the Special Privacy Unit of the Guardia di Finanza and before the notification of the dispute report no. 2/2018, fulfilled the notification obligation pursuant to articles 37 and 38 of the Code dated 7 November 2017, as shown in the Register of Treatments;

NOTING that the Company as data controller 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 prior 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";

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) with regard to 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 alleged violations, pursuant to art. 163 of the Code, it is believed to present the characteristics of less seriousness;

b) for the purposes of assessing the work performed by the agent, it should be noted that the Company has notified the Guarantor pursuant to articles 37 and 38 of the Code on 7 November 2017;

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) 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 REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981, n. 689 and subsequent amendments 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 “ANSORGE LOGISTICA ITALIA S.r.l.", with registered office in Bressanone (BZ), Via Elvas 8, post code 39042 and operational and secondary office in Dubino (SO), Via Spluga 130, post code 23015, Tax Code and VAT number 02298740214, to pay the sum of 8,000.00 (eight thousand) euros, as a pecuniary administrative sanction 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, 28 June 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia