[doc. web no. 9839018]

Injunction against the Order of Surgeons and Dentists of the Province of Cagliari - November 24, 2022

Register of measures

no. 385 of 24 November 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 which repeals 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 individuals 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 Prof. Pasquale Stanzione;

WHEREAS

1. Introduction.

With a complaint presented on the XX date pursuant to art. 77 of the Regulation, a professional registered with the Order of Surgeons and Dentists of the Province of Cagliari (hereinafter, the "Order") and employee of the Health Protection Agency -

ATS Sardegna (hereinafter, the " Company"), in service as Medical Director, represented to this Authority, through his lawyer, that the Order would have received from the aforementioned Company both the provision for ascertaining the absence of the vaccination requirement pursuant to art. . 4 of the legislative decree 1 April 2021, no. 44, adopted by the Company as an investigating body, and the provision adopted by the same Company, as employer of the complainant, with which the suspension from the service of the latter was ordered.

The complainant complained that subsequently the Order, with note prot. no. XX of the XX, sent to the interested party and, in copy for information, "to the authorities and bodies referred to in art. 2 of Presidential Decree 221/50", as well as "to the Presidents of the orders of Surgeons and Dentists", in violation of the provisions of art. 4 of the legislative decree 1 April 2021, no. 44, would have "transmitted to all the subjects referred to in articles 49 and 2 of Presidential Decree 221/1960 not only the Urgent Determination of acknowledgment of the mandatory suspension pursuant to art. 4 DL 44/2021 but also the annexes [...] deeds of the S.C. Hygiene and Public Health and of the Extraordinary Commissioner of ATS Sardinia", which contain data belonging to particular categories (see Article 9 of the Regulation), as well as personal data pertaining to the employment relationship between the interested party and the Company, with particular regard to the information of the suspension from the service.

2. The preliminary investigation.

In response to a request for information from the Authority (note prot. n. XX of XX), the Order, with note prot. no. XX of the XX, declared, in particular, that:

"[the Company], on the 20th date, transmitted to the Order, by PEC, the note Prot. XX of the XX [...] by which, given the communication [from the Company's Prevention Department] (which it attached), relating to the verification of non-compliance with the vaccination obligations referred to in Legislative Decree 1 April 2021, no. 44, converted with amendments with Law 28 May 2021, n. 46 (hereafter "Decree"), by the [complainant], once the impossibility of assigning him to tasks, even inferior, other than those exercised and which do not involve interpersonal contacts or do not involve, in any other form, the risk of spreading the infection from Sars-Cov-2, ordered that, after five days from receipt of the communication, the aforementioned doctor was suspended from service";

"[...] [the Company], in relation to the proceeding carried out against the [complainant], has sent the Order a single PEC message, with the aforementioned Prot. XX of the XX attached, together with the communication from the Cagliari ASSL - SC

Hygiene and Public Health-Department of Prevention [...]; the latter has no date and protocol and has never been notified individually to the Order, despite this Body being indicated among the recipients of the same";

“the President of the Order, with his own Emergency Determination n. XX of the XX (ratified by the Board of Directors on the XX date), took note of the suspension from service and therefore from the exercise of the profession of surgeon of the [claimant], referred to in the note [from the Company] above, which is attached to the Determina was an integral part of it; he then provided for the annotation in the Register of Surgeons of the provision and the communication of the same to the healthcare professional and to the Authorities and Bodies referred to in art. 49, paragraph 2 of the Presidential Decree no. 221/50 and subsequent amendments, which establishes: "the provisions of suspension from professional practice and expulsion, when they have become definitive, are communicated to all the Orders or Colleges of the category to which the suspended or expelled healthcare professional belongs and to the authorities and entities to which the Register must be sent pursuant to art. 2";

"according to the interpretation of the art. 4, paragraph 7 of the Decree, provided by the Ministry of Health [...] with its own note of the XX [...] the activity entrusted to the Order consists of a mere information burden, i.e. the communication to the interested party, after acknowledgment deed by the Order itself, of the suspension pursuant to the law from the exercise of the profession following the deed of assessment by the competent Local Health Authority”;

“the Presidential Emergency Decision n. XX of the XX was, therefore, assumed by the Order on the basis of the provision adopted by the Sardinia ATS, and it is exclusively on it that the motivation of this Determination is based (pursuant to art. 3 of Law n. 241 /90 and subsequent amendments), given the absence of [the Order] any evaluation or decision-making autonomy on the matter";

"the Order, considering that the processing of personal data of the [complainant] was necessary in order to fulfill legal obligations, as well as to perform tasks of public interest with which [it] is invested (articles 6, paragraph 1, letters c ) and e) and 9, paragraph 2, letter g) of the Regulation [...]), finding the legal basis in art. 4 of the Decree and in art. 49, paragraph 2 of the Presidential Decree no. 221/50 and subsequent amendments, has evaluated how to fulfill the aforementioned obligations and tasks in compliance with the principles applicable to the processing of personal data, pursuant to art. 5 of the Regulation. As a result of this evaluation, the Order considered that all the personal data of the [complainant] contained in the communication sent to the Bodies referred to in the aforementioned art. 49, paragraph 2 of the Presidential Decree no. 221/50

and subsequent amendments were adequate, relevant and limited to what is necessary with respect to the purposes for which they were processed, i.e. suspending from the exercise of the profession a member who had not fulfilled the obligation to undergo vaccination against SARS-CoV-2, as well as communicating the relative provision to the subjects identified by law; provision of which, for the reasons illustrated above, the note of the ATS Sardegna forms an integral part";

"since the fact that the [claimant] had not undergone the vaccination constitutes the very basis of the provision of suspension from the exercise of the profession issued against him, it is clear that this data could not be omitted";

it is necessary to "highlight the circumstance that the addressees of the communication of the Emergency Presidential Resolution n. XX of the XX are public bodies or bodies governed by public law to which, for the duration of the emergency period, art. 17-bis of Legislative Decree 17 March 2020 no. 18, converted, with amendments, with Law 24 April 2020, n. 70".

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 Order, 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 articles 5, par. 1, lit. a) 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, in force at the time of the facts subject to the complaint), inviting the aforementioned Order to produce written defenses to the Guarantor or documents or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, of the law of 24 November 1981, n. 689).

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

"the processing of personal data that is the subject of a complaint and subsequent dispute is part of a complex historical period, characterized by the Covid-19 pandemic [...] [, characterized by] uncertainty about the reaction to the pandemic phenomenon and the correct application of rules that are often not very organic or harmonics to which were added - creating further confusion - the interpretations, FAQs and other provisions that often seem to want to subvert the scale of the sources of law";

"[...] the disputed treatment had been deemed necessary in order to fulfill legal obligations, as well as to perform public interest tasks with which [the Order] is invested, both on the basis of an assessment based on a faithful reading of the rules of Presidential Decree 221/1950, and on the basis of the indications coming – as already seen – from the interpretation of art. 4, paragraph 7 of the Decree, provided by the Ministry of Health with its own note of the XX then underlined by the further

communication of the XX";

"no relevance can be recognized, in the present case, to the circumstance according to which the Ministry of Health has - with a note dated XX1 - communicated that it "is of the opinion" that the communications relating to the suspension of the professional exercise following a breach of the vaccination obligation should not also be sent to the entities referred to in art. 49 (rectius art. 2) of Presidential Decree 221/1950 as they do not have a disciplinary nature. And the reason can be found, as well as in the posterior with respect to the communication object of the de quo proceeding, also in the fact that the ministerial interpretation in question is not an interpretation having the same force as a DPR nor can it, therefore, be qualified as a "interpretation authentic" (in the technical-legal sense)";

"the communications provided for by the aforementioned art. 49 do not necessarily result - and therefore cannot be qualified as "ancillary sanctions" of a possible disciplinary measure - to a disciplinary sanction, but find their rationale in the need (remember that Presidential Decree 221 is from 1950) to keep "synchronized" and " current" the indications contained in the professional registers already previously communicated to the authorities pursuant to art. 2 of Presidential Decree 221/1950 (the same referred to in Article 49). Despite this, the Order immediately adapted to the indications of the Ministry of Health of 28 December 2021";

"the [complainant] certainly made no secret of the non-compliance with the vaccination obligation, who [...] made manifestly public [...] the information relating not only to the non-compliance with the vaccination obligation but also of the reasons for the same non-compliance. Therefore, the groundlessness of the complainant's claims regarding personal data which he has manifestly made public is evident";

"as regards the circumstance that the [complainant] could not be "used for even lower tasks..." the reference to the legislative provision is clear. This is a circumstance that immediately follows from the rules that led to the suspension from work of the [complainant] for non-compliance with the vaccination obligation";

"as regards, however, the aspect relating to the data of the existing relationship between the [complainant] and ATS, [it should be noted] [...] the publication of the same data on the LinkedIn profile [...] of the same [complainant] (which presents itself to the public as "Medical Director [...], ASL [...], Center [...]") it could be objected that the same data are public pursuant to Legislative Decree 33/2013 (so-called "Transparency Decree") so much that the ASL itself also publishes its income and other information";

"finally, as regards the circumstance that following the communication of the Order he would have been suspended from work until the vaccination obligation was fulfilled, also in this case it is a consequence immediately attributable to the rule [, or to art . 4 of the legislative decree 44/2021]. In any case, this information has also been manifestly made public by the interested party/complainant";

"the violation, if deemed to exist, must certainly be considered in its culpable nature (in the degree of slight negligence)".

During the hearing, requested pursuant to art. 166, paragraph 6, of the Code and held on the XX date (minutes prot. n. XX of the XX), the Order declared, in particular, that:

"the Order acted in the extremely delicate context of the pandemic emergency, characterized by a high degree of legal complexity";

“the clarification provided by the Ministry in relation to the Presidential Decree of 16 May 1950 was, in fact, received after the facts which are the subject of the complaint. The Order therefore acted in total good faith, in the belief that it was fulfilling a legal obligation, with respect to which no clarifications or guidelines were provided at the time to be followed with regard to the suspension provisions relating to the failure to fulfill the obligations vaccinate them”;

"the aforementioned decree provides that the entire suspension provision must be communicated to the public entities indicated by the law, in order to guarantee the coordination and consistency of the various public registers and registers. The provision must therefore be sent in full version, complete with justification and attachments”;

“the data subject had already made their personal data manifestly public, having
declared on his Twitter account the failure to fulfill the vaccination obligation and had referred to the consequent adoption of a suspension measure against him ";

"the consequences in the employment relationship, deriving from the suspension provision, were in any case implicit in the sector standard itself and, therefore, widely foreseeable by anyone";

"the complainant held the role of Manager and, therefore, his curriculum vitae is subject to mandatory publication pursuant to art. 14 of Legislative Decree 33/2013, also with regard to the data relating to the relative position. Therefore, pursuant to art. 7 of the same decree, these are public data”.

3. Outcome of the preliminary investigation.

Public subjects may process personal data, also relating to particular categories of data (see Article 9, paragraph 1 of the

Regulation), if the processing is necessary "to fulfill a legal obligation to which the data controller is subject" or " for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (art. 6, paragraph 1, letters c) and e), as well as art. 9, par.2, lett. g) of the Regulation and 2-ter and 2-sexies of Legislative Decree no. 196 of 30 June 2003 - Code regarding the protection of personal data, hereinafter, the "Code").

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 communication of personal data to third parties, 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 the event that the data subject to communication belong to particular categories, see articles 9 of the Regulation and 2- sexies of the Code).

The data controller is, in any case, required to respect the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "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).

With regard to the processing of personal data relating to the anti SARS-CoV-2 vaccination, the legislator - with art. 4 of the legislative decree 1 April 2021, no. 44, converted into law 28 May 2021, n.76 - established that vaccination is an "essential requirement for the exercise of the profession and for the performance of work" for health professionals and operators of health interest expressly indicated From law.

The art. 4, paragraph 6, in the text in force at the time of the events which are the subject of the complaint, provided that "once the terms for certifying compliance with the vaccination obligation have elapsed [...], the competent local health authority ascertains non-compliance with the obligation vaccine and, after acquiring any additional information from the competent authorities, immediately notifies the interested party in writing, the employer and the relevant professional association. The adoption of the assessment deed by the local health authority determines the suspension of the right to perform services or

tasks that involve interpersonal contacts or involve, in any other form, the risk of spreading the infection from SARS-CoV-2 " .

The subsequent paragraph 7 specified that "the suspension referred to in paragraph 6 is immediately communicated to the interested party by the professional order to which he belongs".

In this context, following discussions between this Authority, the national federations of the health professions orders and the Ministry of Health, the latter had addressed to the national federations the interpretative note of XX1 (prot. n. XX), with the subject " Art. 4 of the decree law 01 April 2021, n. 44 converted with amendments by law 28 May 2021, n. 76. Fulfillments by the Orders", taking up and integrating the previous indications provided with a note of the XX (prot. n. XX).

In particular, in the aforementioned interpretative note of the XX, it was specified that the art. 4, mentioned above, is "in the intention of the legislator, an essential requirement for them to be considered suitable for carrying out their professional activity, as well as a legitimizing condition for the exercise of the same, in any legal form". This with the consequence that "the Order's activity envisaged by [...] paragraph 7, consists of a mere information burden, i.e. the communication to the interested party [...] without any merit assessment, of the suspension deriving ex lege from the deed of assessment of the ASL, reporting the relative annotation in the register, in compliance with the rules on the protection of the confidentiality of personal data".

Therefore, non-compliance with this professional requirement "can only derive for the healthcare professional [...] the suspension ex lege from the exercise of the professional healthcare activity tout court".

In the premise that the aforementioned regulatory framework had been subsequently reformed by the legislator (see Article 4, paragraph 4, of Legislative Decree No. 44 of 1 April 2021, as replaced by Article 1, paragraph 1, letter b) , of the d.l. 26 November 2021, no. 172, which envisaged a different procedure for verifying the vaccination requirement by the professional orders through the respective national federations), it should be noted that the various subjects involved (employers, regions, healthcare companies, professional orders), in carrying out the treatments in question (which find their legal basis in the aforementioned regulatory provision) were required to ensure compliance with the principles of data protection (Article 5 of the Regulation) as well as, to process the data through authorized and duly trained personnel in this regard access to data (articles 5 and 4, paragraph 10, 29, 32, paragraph 4, of the Regulation), also taking into account the particular delicacy of the same (art. 9, paragraphs 2 and 4, as well as art. 4, point 15, and recital 35 of the Regulation).

In the system of the Regulations and the Code, these sector rules constitute the legal basis for the processing operations necessary for verifying the existence (or otherwise) of the professional requirement, defining, in a uniform manner at national

level, the scope of the processing permitted to each of the institutional subjects involved in the verification process (see the numerous provisions of the Guarantor in the emergency period and, in particular, the opinions given on the implementing provisions of the aforementioned framework, including, in particular, provision no. 430 of 13 December 2021 , web doc. n. 9727220). As traditionally stated by the Guarantor, in particular in an equally delicate working context such as that of passenger air transport, the treatments carried out for the purpose of ascertaining the requirements for accessing and carrying out certain professions envisaged by specific legal provisions must be carried out in strict compliance with the limits and conditions established by this reference framework (see provision no. 194 of 27 April 2016, web doc. no. 5149198).

In the present case, with note prot. n.XX of the XX, sent to the complainant and, for information, "to the Authorities and Bodies referred to in art. 2 of Presidential Decree 221/550" and "to the Presidents of the Orders of Surgeons and Dentists", the Order informed the aforementioned recipients of its decision to register the claimant's suspension provision in the Register, attaching a copy of the "Decision d urgency of the President n. XX", in which reference is made to the "note of the Health Protection Authority-ATS Sardinia Prot. n. XX of the XX" and to the circumstance that, as emerges from this note, "the Sardinia ATS communicates that it has suspended the [complainant] from service, until the fulfillment of the vaccination obligation or, failing that, until the completion of the vaccination plan nationally and in any case no later than the 20th century".

The Order has also attached to this note of the XX also a copy of the integral version of the aforementioned note of the Azienda Tutela Salute-ATS Sardegna, which mentions:

of the circumstance that "[...] it is not possible to assign [the complainant] to tasks, even inferior, other than those performed and which do not involve interpersonal contacts or do not involve, in any other form, the risk of spreading the infection from SARS-CoV -2";

the tasks performed by the complainant;

of the circumstance that "after the term of 5 days from receipt of this letter, [the complainant] is suspended [o] from the service, until the fulfillment of the vaccination obligation or, failing that, until the completion of the national vaccination plan and in any case no later the XX";

of the fact "that, for the entire duration of the suspension [...], the person concerned is not owed remuneration or other compensation or emolument [...]".

The note from the Prevention Department of the same company was also attached, with which the non-existence of the

vaccination requirement for the complainant was ascertained.

Preliminarily, it should be noted that, on the basis of the regulatory framework referred to above, as in force at the time in which the facts object of the complaint occurred, the Company - as the body that proceeded to ascertain the lack of vaccination and not instead in the capacity of employer - should have communicated to the Professional Order only the outcome of the assessment in question.

The Company, as an employer, has, however, communicated to the Order the measures adopted in the context of the employment relationship as a result of the assessment carried out by the Department of Prevention, as well as other information relating to the employment relationship (duty carried out by the complainant; circumstance that the same could not be employed for other tasks; possible suspension of the person concerned from the service without pay), of which the Order, by virtue of the aforementioned regulatory framework, was not entitled to become aware.

In fact, on the basis of the aforementioned regulatory framework, the Order could only know, and therefore process, for the purposes of the due annotations on the professional register, the information relating to the non-compliance with the professional requirement, with consequent suspension of the interested party pursuant to the law from the exercise of the medical profession (and not also the information relating to suspension from service, a hypothesis that is only possible due to the possibility for the professional to be used for alternative tasks, based on the assessments of the employer), informing the interested party (cf. art. 4, paragraph 7, of Legislative Decree No. 44 of 1 April 2021, in the text in force at the time when the facts object of the complaint occurred).

With reference to the circumstance that the Order has sent the note prot. no. 003754P of 24 August 2021 also "to the Authorities and Bodies referred to in art. 2 of Presidential Decree 221/550" and "to the Presidents of the Orders of Surgeons and Dentists" it should be noted that, based on art. 49, paragraph 2 of the Presidential Decree no. 221/50, invoked by the Order, "the measures of suspension from professional practice and expulsion, when they have become definitive, are communicated to all the Orders or Colleges of the category to which the suspended or expelled healthcare worker belongs and to the authorities and entities to which the Register must be sent pursuant to art. 2".

In this regard, with note prot. no. XX of the XX, the Ministry of Health has, however, clarified - although subsequently to the facts object of the complaint - that, "taking into account that the deeds of assessment of the non-fulfillment of the vaccination obligation [...], from which the immediate suspension of the professional exercise, have no disciplinary nature, [the Ministry] [...]

is of the opinion that the relative communications must not also be sent to the entities referred to in article 49 of Presidential Decree 221 of 1950". Therefore, in the light of the clarifications that had arisen from the Ministry, the communication to the aforementioned bodies regarding the suspension of the professional was not due in this case.

Considering that the note of the Order of the XX is prior to the date on which the Ministry provided the aforementioned clarifications and taking into account the uncertainty of the legal framework of reference, it is believed that the communication to the subjects contemplated by the Presidential Decree 5 April 1950, no. 221 of the mere information relating to the suspension of the complainant does not constitute a violation of the law on data protection, lacking the subjective element of fault (cf. art. 3 of the law of 24 November 1981, n. 689).

However, it should be considered that the Order has also communicated to the aforementioned recipients the additional personal data of the complainant, contained in the documentation sent by the Company, relating to the specific employment relationship with the same (task performed by the complainant; circumstance that the same could be employed for other tasks; possible suspension of the person concerned from the service without pay). The communication of such data certainly goes beyond the scope of the art. 49, paragraph 2, of the Presidential Decree 5 April 1950, no. 221 and, therefore, this circumstance must be taken into consideration for the purposes of assessing the conduct of the Order.

Nor does the Order's reference to the provisions of art. 17-bis of the legislative decree 17 March 2020 no. 18, given that the processing of personal data in question was envisaged by a specific regulatory framework for the sector, which governs in detail the data flows between the various subjects involved for the purposes of ascertaining the existence of the professional requirement (employers, regions , healthcare companies, professional associations). In any case, the art. 17-bis of the legislative decree 17 March 2020, no. 18, while providing that the subjects identified by the law can process personal data that are necessary for the performance of the functions assigned to them in the context of the emergency caused by the spread of Covid-19, without prejudice to the need for such treatments to be carried out by adopting appropriate measures to protect the rights and freedoms of the interested parties and in compliance with the principles set forth in art. 5 of the Regulation, including the principle of data minimization, according to which data must be "adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter c) of the Regulation; v. provision 11 November 2021, n. 400, doc. web no. 9726426; 15 April 2021, no. 140, doc. web no. 9587053; 13 May 2021, no. 202, doc. web no. 9678535). In the present case, the communication of the complainant's personal data to the aforementioned bodies,

for the reasons set out above, was in any case not necessary not only to fulfill a legal obligation or to exercise a public power or a task in the public interest, but also , on a general level, for the purpose of containing the SARS-CoV-2 pandemic, which is an indispensable condition for the regulation in question to be applied.

As for the defensive thesis put forward by the Order, according to which some of the personal data communicated had in any case been made manifestly public by the interested party or had been subject to mandatory publication for another purpose in the "Transparent Administration" section of the Company in fulfillment of legal obligations regarding transparency pursuant to Legislative Decree 14 March 2013, n. 33, it is noted that public subjects, such as the Order, can communicate personal data to third parties only when the conditions of lawfulness established by the legislation on data protection are met, noting that the same data have already been disclosed by the same interested party or by third parties for other purposes and in different contexts (on this point, albeit with regard to the operation of dissemination of personal data, see provv.ti March 10, 2022, n. 82, web doc. n. 9761383; January 13, 2022 , n. 7, web doc. n. 9745807; 13 February 2020, n. 35, web doc. n. 9285411).

In the light of the foregoing considerations, the communication to the aforementioned bodies of the complainant's personal data relating to the existing employment relationship between him and the Company therefore took place in a manner that did not comply with the principle of "lawfulness, correctness and transparency" and in the absence of a legal basis, in violation of articles 5, par. 1, lit. a) 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, in force at the time of the events subject to the complaint).

Although the definition of "data relating to health" (art. 4, paragraph 1, n. 15) also includes the provision of health services, it must, in the present case, be observed that, contrary to what is claimed by the complainant, the information on the non-vaccination against Covid-19, without specific references to the reasons for exemption or deferral (connected to past or current, temporary or permanent morbidity), does not in itself constitute personal data on the health of the interested party. For these reasons, it is believed that the communication that is the subject of the complaint did not concern personal data relating to the health of the interested party.

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 overcoming the findings notified by the Office with the act of initiation of the procedure

and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the Regulation of the Guarantor n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Order is noted, for having communicated the complainant's personal data to third parties in the absence of a legal basis, in violation of articles 5, par. 1, lit. a), 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, in force at the time of the events subject to the complaint).

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.

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 College [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 aforementioned elements, it was considered that the violation occurred due to the negligent conduct of the Order, which in making the communications deemed due pursuant to the aforementioned Presidential Decree 5 April 1950, no. 221, attached a full copy of the documentation sent by the Company, without making any assessment regarding the pertinence of the personal data contained therein, as well as the legal basis of the processing.

On the other hand, the fact that the Order's conduct took place in the emergency context due to the SARS-CoV-2 pandemic was taken into consideration, in which it, like other Administrations, had to make complex decisions in rapid issues, in the face of a particularly complex and constantly evolving emergency regulatory framework (moreover, the professional requirement of vaccination is no longer required for healthcare personnel starting from 1 November 2022, as a result of Legislative Decree No. 162 of 31 October 2022 ). It was also considered that some of the personal data object of the communication (the circumstance that the interested party could not be used for other tasks; possible suspension from the service without remuneration) concern eventualities in any case abstractly contemplated by the regulatory framework of the sector referred to above in the event of non-existence of the vaccination requirement and as such at least foreseeable by anyone who was aware of the suspension of the complainant. It was then taken into account that the violation concerned only one interested party and did not concern the violation of personal data relating to particular categories. Furthermore, there are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

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 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), as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account that the communication in question had as its object personal data relating to the working sphere of the interested party, 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 treatment carried out by the Order of Surgeons and Dentists of the Province of Cagliari for violation of articles 5, par. 1, lit. a), 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), 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 Order of Surgeons and

Dentists of the Province of Cagliari, with registered office in Via Dei Carroz, 14 - 09131 Cagliari (CA), Tax Code 80000050924, to pay the sum of 3,000.00 (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 Order, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of 3,000.00 (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, 24 November 2022

PRESIDENT

station

THE SPEAKER

station

THE SECRETARY GENERAL

Matthew