[doc. web no. 9857587]

Injunction order against the Provincial Health Authority of Catania - 15 December 2022

Register of measures

no. 425 of 15 December 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;

Supervisor Prof. Geneva Cerrina Feroni;

WHEREAS

1. Introduction.

With a complaint presented to the Authority, Mr. XX complained about the publication in the online Praetorian Register of the Provincial Health Authority of Catania (hereinafter, the "Health Authority") of resolution no. XX of the XX, with which, following

an appeal by the complainant of a disciplinary measure, a freelancer was appointed to provide technical assistance in the related judgement.

This resolution contained not only information regarding events relating to the employment relationship between the Healthcare Company and the complainant, but also information relating to the disciplinary procedure against the interested party and to a criminal proceeding against him, including the indication of the number general register and the year of the proceeding.

2. The preliminary investigation.

With a note of the XX (prot. n. XX) the Healthcare Company, in response to a request for information formulated by the Office, declared, in particular, that:

- "proceeded with the publication of resolution no. XX of the XX for fifteen consecutive days and precisely from the XX" through the "Online Praetorian Register" application system;
- "it cannot be disregarded [...] the considerable number of deeds (determinations and resolutions) that are published daily by the Asp of Catania [...]", i.e. "XX" and "n. XX (to XX)";
- "the complete publication of the resolution constitutes an isolated case".

With a note of the XX (prot. n.XX), the Office, based on the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Data Controller, 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 5, par. 1, lit. a) and c), 6 and 10 of the Regulation as well as art. 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021) and 2-octies of the Code, inviting the aforesaid owner to produce written defenses or documents to the Guarantor 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 a note of the XX (prot. n.XX), the Healthcare Company presented a defense brief, declaring, in particular, that:

- “regarding the duration and methods of publication, art. 5 of the regulation for the management of the praetorian register, adopted with resolution no. XX of the XX, reads: "The publication of all the deeds/provisions lasts for fifteen consecutive days starting (1st day) on the day of online publication [...] and ending (15th day) on the day before the removal of the document from the Praetorian Register [...] except for a different duration established by law or regulation for a specific act [...] After this

period of publication they are removed from the Register to guarantee the right to oblivion of the interested parties... documents are published in the online Register so that the indiscriminate and unconditional availability of personal data on the internet is prevented, as well as to avoid the "decontextualisation" of the data by extrapolating it from the website and from the document in which it is contained.";

- "on this point, the official of the decision-making office, with note no. XX of the XX, [...], in response to the request made by this Directorate, on the facts that are the subject of the complaint, specified that: "... upon expiry of the foreseen publication deadline, all published documents automatically pass from the section " Publication documents" to the "Archived documents", allowing only the reading of the identification elements of the provision, but not the consultation of the same";

- "as regards the intentional or negligent nature of the conduct, it is believed that it can be excluded that the publication of the resolution that caused the violation was carried out intentionally. In fact, it was an isolated case, to which it is believed that due prominence cannot be given, also due to the pandemic contingencies which have resulted in part of the personnel, normally present in the Company, working in a smart working regime and part being absent . In the report of the Director of the UOC Legal Service, note no. XX of the XX, [...] refers that "in the present case, due to the very numerous proposals for resolutions and resolutions, drawn up every day, presumably for mere mistake, only the original paper copy in integral form was sent for publication and not the one bearing the encryption of identification data";

- "when [the Healthcare Company…] became aware of the alleged violation which occurred with the publication of the resolution containing sensitive data, the administrative document was no longer viewable on the website, just as foreseen by art . 5 of the regulation for the management of the praetorian register, referred to above";

- “the complete publication of the resolution in question constitutes an isolated case compared to the total number of deliberative acts subject to privacy, as mentioned, in the XX, 545 out of 3961 acts, with an incidence equal to approximately 14%; [...] the pandemic contingencies have meant that part of the staff, normally present in the Company, worked in a smart working regime and part was absent; [...] the Company has implemented every measure for data protection";

- "following the transmission by [the Guarantor] of the complaint that arises, the Company has, however, reminded all the company Structure Managers of the content of the provisions referred to in the General Regulations for the Protection of Personal Data (EU) 2016/679 and of the Company Regulations on the management of the online Praetorian register".

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The regulation of personal data protection provides that public bodies, in the context of the work context, can process the personal data of the interested parties, also relating to particular categories, if the treatment is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks established by law or by the law of the Union or of the Member States (Articles 6, paragraph 1, letter c), 9, par. 2, lit. b) and 4 and 88 of the Regulation). Furthermore, the treatment is lawful when it is "necessary for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (Article 6, paragraph 1, letter e), 2 and 3, and art. 9, par. 2, lit. g), of the Regulation; art. 2-ter of the Code, in the text prior to the changes made by Legislative Decree 8 October 2021, no. 139).

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 "dissemination" of personal data (such as publication on the Internet), by public entities, is permitted only when provided for by a law or, in the cases provided for by law, a regulation (see 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).

With specific regard to the processing of data relating to criminal convictions and crimes or to related security measures, it should be noted that the same can only take place under the control of the public authority or if the processing is authorized by the law of the Union or of the Member States which provides appropriate guarantees for the rights and freedoms of the interested parties (Article 10 of the Regulation), or only if the processing is authorized by a law or, in the cases provided for by law, a regulation (Article 2-octies, paragraph 1 and 5 of the Code).

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

3.2 The dissemination of personal data.

As can be seen from the deeds and declarations made by the data controller, as well as from the assessment carried out on

the basis of the elements acquired following the preliminary investigation and the subsequent evaluations of this Department, the Healthcare Company has published, on the institutional website, section praetorian register, determination n.XX of XX, containing information regarding the employment relationship between the Healthcare Company and the complainant, the disciplinary procedure against the same and indications, including the year and general register number, of a criminal proceedings against the complainant.

Although, as claimed by the Healthcare Company, the determination in question was published in the online praetorian register for only 15 days, the Company has not proven the existence of a specific law that obliges the institution to publish the full text of the determination to confer the assignment to a professional to carry out the defense in court, since the reference made in the defense writings to its own regulation for the management of the praetorian register is not sufficient, which does not satisfy, in any case, the requirements of a suitable legal basis pursuant to 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 this regard, it should be remembered that this Authority, on several occasions, has clarified that even the presence of a specific advertising regime cannot lead to any automatism with respect to the online dissemination of personal data and information, nor a derogation from the principles regarding the protection of personal data (see provision of 25 February 2021, n. 68, web doc. 9567429). On the other hand, this is also confirmed by the personal data protection system contained in the Regulation, in the light of which it is envisaged that the data controller must "implement adequate technical and organizational measures to ensure that they are processed, by default, only the personal data necessary for each specific purpose of the processing" and must be "able to demonstrate" - in the light of the principle of "accountability" - that he has done so (articles 5, paragraph 2; 24 and 25, paragraph 2, regulation). Indeed, in numerous decisions, the Guarantor has reiterated that all the limits established by the principles of data protection with regard to the lawfulness and minimization of data apply also to publications in the online praetorian register (see part II, par. 3. a. of the "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged bodies" of the Guarantor of 15 May 2014 web doc. n 3134436).

In the determination object of the publication in question, therefore, no personal data of the complainant should have been reported, resorting, where appropriate, to the "omissis" technique or other data anonymisation measures (see, on this point, provision ti dated 15 September 2022, n.299, web doc. n. 9815665 and dated 27 January 2021, n. 34, web doc. n. 9549165

and provisions referred to therein).

The dissemination of the complainant's personal data, also concerning information relating to criminal proceedings, such as, in particular, the indication of the general register number and the year of the proceeding, contained in determination no. XX of the XX, therefore, took place - although the Health Authority during the investigation declared that "presumably for a mere mistake, only the original paper copy in full form was sent for publication and not the one bearing the encryption of the identification data" - in a manner that does not comply with data protection principles and in the absence of an appropriate legal basis, in violation of articles 5, par. 1, lit. a) and c), and 6 and 10 of the Regulation, as well as article 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021) and 2-octies of the Code.

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 the findings notified by the Office to be overcome with the act of initiation of the proceeding and are insufficient to allow the dismissal of the present proceeding, since none of the cases envisaged 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 Healthcare Company is noted, for having disseminated, through online publication of the determination n. XX of the XX, personal data of the complainant, also referring to a criminal proceeding against the same, in the absence of an appropriate legal basis, in violation of articles 5, par. 1, lit. a) and c), 6 and 10 of the Regulation as well as article 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021) and 2-octies of the Code.

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.

In this context, considering, in any case, that the conduct has exhausted its effects - given that the dissemination of data has ceased - the conditions for the adoption of further corrective measures pursuant to art. 58, par. 2, of the Regulation.

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, the particular delicacy of personal data unlawfully disclosed by the Healthcare Company was considered, since these are data relating to events connected to the employment relationship referred to a disciplinary procedure and to indications also concerning a criminal proceeding against the same (art. 10 of the Regulation), despite the numerous indications given by the Guarantor to all public entities since 2014 with the guidelines referred to above (see also "Guidelines on the processing of personal data of workers for the purpose of managing the work in the public sector" of 14 June 2007, web doc. n. 1417809).

On the other hand, it was favorably taken into consideration that the violation involved only one interested party and the publication of the determination in question took place for 15 days and without any indexing on generalist sites. It was also taken into consideration that the violation took place during a particularly delicate phase (XX) in which the Healthcare Companies were committed to dealing with the specific needs deriving from the state of emergency. 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 5,000 (five thousand) euros for the violation of articles 5, par. 1, lit. a) and c), 6, 10 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) and 2-octies of the Code, as a pecuniary administrative sanction withheld, pursuant to 'art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the particular delicacy of personal data unlawfully disclosed by the Healthcare Company, it is also believed that the accessory sanction of publication on the Guarantor's website 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 processing carried out by the Data Controller for violation of the articles 5, par. 1, lit. a) and c), 6 and 10 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) and 2-octies of the Code, 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 Provincial Health Authority of Catania, in the person of its pro-tempore legal representative, with registered office in Via Santa Maria La Grande, 5, 95124 Catania (CT) C.F. 04721260877, to pay the sum of 5,000 (five 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 Health Authority, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of 5,000 (five 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, 15 December 2022

PRESIDENT

Station

THE SPEAKER

Cerrina Feroni

THE SECRETARY GENERAL

Matthew