

Injunction against Charly Mike s.r.l. - November 26, 2020

Register of measures

no. 256 of 26 November 2020

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, Prof. Geneva Cerrina Feroni, vice president, the lawyer. Guido Scorza and Dr. Agostino Ghiglia, components, and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter, the "Regulation");

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

GIVEN the report presented to the Guarantor by XX, concerning the processing of personal data carried out through a video surveillance system installed at the Hotel Olimpo of Charly Mike s.r.l.;

HAVING EXAMINED the documentation in the deeds;

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

SPEAKER Dr. Agostino Ghiglia;

## WHEREAS

1. Reporting against the company and preliminary investigation.

1.1. Mr. XX submitted a report to the Authority on 19 February 2019, complaining about alleged violations of the regulations on the protection of personal data by the Hotel Olimpo di Charly Mike s.r.l. (hereinafter, the company), located in Alberobello, with reference to the processing of data carried out through the video surveillance system installed at the hotel. In particular, with the report it was complained that through "continuous" video surveillance activities the system was also used for employee control purposes through remote viewing of the images collected by the owner.

Given the nature of the alleged violations as well as the number of potential interested parties involved (employees, customers

and other subjects), the Office delegated the performance of the inspection which took place on 8 and 9 to the Special Unit for the Protection of Privacy and Technological Frauds October 2019 at the hotel and registered office of the company.

1.2. During the inspection it was ascertained that there were 17 fixed cameras and one with 360° shooting at the hotel, located inside and outside the structure. The system was found to work, with the images collected displayed on a monitor connected to the video surveillance system located at the reception. The auditors ascertained that there was no information sign relating to the video surveillance system at the facility (see report of operations carried out 8-9.10.2019, pp. 2-3).

During the verification, 16 cameras were found to be functional, while the seventeenth (located in the corridor on the 2nd floor), although installed, was not functional. It was also ascertained that the system "is configured only for shooting images and not also for their recording"; in this last regard, even after accessing the video surveillance system control panel from the hotel systems management server, located in a locked cabinet inside the manager's office, there was no no registration (see aforementioned inspection report, p. 4). Finally, at the end of the verification activity, the detection of the audio by the system was not found (see aforementioned inspection report, pp. 3-4).

The hotel manager, Mr. XX, declared to the tax inspectors that:

- "the signs signaling the video surveillance system were posted both inside and outside, until before the last painting which took place in the spring of 2019; as proof of what I am declaring, I show you the signs that I have placed here in the locker and which, due to forgetfulness, we have not repositioned; I will do my best to reposition everything as soon as possible" (see aforementioned inspection report, p. 4);
- "the control panel can only be accessed from the fixed location [...] and not from apps or external connections" (see aforementioned inspection report, p. 4);
- "the installation of the video camera in the kitchen dates back to 31 July 2019, the date coinciding with the replacement of other video cameras and the DVR hard disk" (see aforementioned inspection report, p. 6);
- the monthly estimate of the guests of the structure is equal to approximately 1,100 units for 2017; around 1,200 units for 2018 and around 1,250 units up to 30 September 2019 (see aforementioned inspection report, page 7);
- "the system was installed about ten years ago and is still up and running today; [...] due to default settings, the system is set up for viewing images only and not for recording" (see aforementioned inspection report, p. 8);
- as for the purposes of the processing, "the video surveillance system was installed in order to monitor the guests of the

facility who often accessed areas not permitted to them; [...] although [the facility has] never suffered thefts or robberies, the installation of the cameras also took place for security reasons; [...] the only camera installed due to critical issues related to employee behavior is the one positioned in the kitchen, as, in a particular period, we noticed some food shortages; [...] to date there has been no dismissal of employees caused by episodes detected through the plant in question" (see aforementioned inspection report, p. 8).

During the inspection, the hotel manager proceeded to affix 11 signs bearing the minimum information on the existence and purpose of the video surveillance system, after having "absent [...] to buy the aforementioned signs" (see aforementioned inspection report, p. 7).

The auditors examined the documentation provided relating to the contracts of the company's employees, noting that there are currently 6 permanent employees (see aforementioned inspection report, page 4).

1.3. In resolving the reservations raised during the investigations, with a note received on 23 October 2019, the legal representative of the company declared that "part of the video surveillance system [...] was installed in 2009 (14 cameras)" and sent, inter alia, the following documentation: 1. Copy of a disclosure relating to the video surveillance system, dated 10.02.2009 and signed by eleven workers (see note 10.23.2019 cit., Attachment 5); 2. Copy of two information relating to the video surveillance system, dated 11.5.2018 and 4.1.2019 and signed by two employees, given, respectively, to "the only employee hired in 2018" and "to the only employee hired in 2019" (see note cited, Annexes 6 and 7); 3. The technical report on the management and use of the video surveillance system, dated 10.21.2019 (see cited note, Annex 2); 4. The "Report of agreement on the use of audiovisual systems and equipment and for the purposes of art. 4 of law 300/70" dated 18.9.2009 (see cited note, Annex 4); 5. The copy of the purchase and installation invoice dated 31.7.2019, of the n. 3 cameras including - as stated - the one located in the kitchen area.

1.4. On 19 December 2019 (prot. n. 44708/135492) the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification to the company of the alleged violations of the Regulation found, with reference to articles 5, par. 1, lit. a) and 13 of the Regulation, art. 114 of the Code and art. 88 of the Regulation.

On January 18, 2020, the company sent its defense writings stating that:

as already declared during the inspections, the company had posted the information signs at the time of installation of the system, and yet "for mere forgetfulness, due to the painting works dating back to the spring of 2019 and given the subsequent

installation of new cameras (end of July 2019), the signs in question were removed and placed in the wardrobe - as demonstrated during the inspection";

with reference to the extended information provided to employees, a copy of the information delivered to three employees that had not previously been provided to the Authority has been attached;

the video surveillance system, since 2009, has been installed for the sole purpose of "protecting one's assets and any vandalism" and in relation to the "protection of the health and safety of workers", this also in relation to the installation of the additional camera in the kitchen on 7.31.2019; "the installation of this camera [...] does not have any different purpose from the others, nor that of monitoring the work of the employees"; "over the years 2018 and 2019 [the company] had [...] suffered numerous thefts of foodstuffs and these events prompted [...] to proceed with the installation of the camera according to the methods prescribed in the authorization however acquired in the year 2009 "; moreover it was specified in this regard that "the kitchen located inside the hotel structure [...] has an additional passage [...] which also allows guests and/or external staff to access inside and, therefore, this installation was made necessary in order to protect the assets of the company".

2. The outcome of the investigation and of the procedure for the adoption of corrective and sanctioning measures.

2.1. Following the examination of the statements made to the Authority during the proceedings as well as the documentation acquired, provided that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents and is liable pursuant to art. 168 of the Code ("False statements to the Guarantor and interruption of the execution of the duties or the exercise of the powers of the Guarantor"), it emerges that the company has installed and used a video surveillance system since 2009, inside and outside the accommodation facility which he manages as data controller, failing to affix, before the range of action of the cameras, information signs suitable for informing customers, employees and suppliers of the existence and essential characteristics of the video recording activity . Despite what has been declared, in fact, the company has not provided any suitable elements to prove that the information signs had been duly affixed, removed during the painting of the structure in April 2019 and then no longer relocated "due to mere forgetfulness" (e.g. . photographic documentation; invoices for the purchase of the signs; indeed, in this last regard it is noted that during the inspection the director had to arrange to purchase the information signs before posting them near the cameras). In any case, it emerged - and the circumstance is not disputed by the owner - that the area subjected to video surveillance was devoid of information to the interested parties at least from

April 2019 (the date on which the cleaning operations would have taken place) to 8 October 2019 (date of access to the facility by Nucleus staff). As for the extended information provided to employees, it is noted that, as an attachment to the defense briefs, the company has provided the documentation relating to the information provided to three employees who were previously missing.

The processing of personal data carried out through the video surveillance system was, therefore, carried out in the terms set out above in the absence of the required information starting from 2009 (on an unspecified date) until 9 October 2019, the date on which the owner provided – on the occasion of the control activity carried out by the Guarantor – to fulfill the obligation to affix the simplified information.

This is in contrast with the provisions of art. 13 of Regulation (EU) 2016/679, on the basis of which the owner is required to provide the interested party - before the start of the processing - with all the information relating to the essential characteristics of the processing. In the context of the employment relationship, the obligation to inform the employee is also an expression of the general principle of correctness of processing, contained in art. 5, par. 1, lit. a) of the Regulation.

2.2. With regard to the alleged violation of art. 114 of the legislative decree lgs. 30.6.2003, no. 196 and of the art. 88 of the Regulations, with the defense briefs the company clarified that, despite what was declared by the hotel manager during the inspections relating to the specific purposes for which an additional video camera had been installed in the kitchen rooms, this too is aimed at protecting "patrimonial assets" and ensuring the "protection of the health and [...] safety of workers" (see "Minutes of agreement on the use of audiovisual systems and equipment and for the effects referred to in art 4 of law 300/70", of 18.9.2009). The aforementioned agreement expressly provides that the plant "is not aimed" at control and "cannot lead to the establishment of disciplinary procedures and the measurement of individual productivity". Even the extended information given to employees indicate that the video surveillance system is installed for "security reasons and monitoring the integrity of the corporate structure". In this regard, the company also represented that an external door opens in the kitchen, with the possibility of accessing the goods stored there.

Therefore, there are no grounds for adopting sanctions in relation to the violation of articles 114 of the legislative decree lgs. 30.6.2003, no. 196 and 88 of the Regulation, contained in the notification of violation dated 19 December 2019 which it is therefore believed to file in the part concerning this specific profile subject to dispute.

2.3. With reference to the methods of treatment carried out with the video surveillance system, it also emerged that the system

does not make any recordings, neither of the images nor of the audio. Furthermore, it did not emerge that the images can also be viewed remotely via an application, as proposed with the complaint.

3. Conclusions: illegality of the treatment. Sanction measure pursuant to art. 58, par. 2, Regulation.

For the aforementioned reasons, the processing of personal data carried out by the company through the video surveillance system is unlawful, in the terms set out above, in relation to articles 5, par. 1, lit. a) and 13 of the Regulation.

Therefore, given the corrective powers attributed by art. 58, par. 2 of the Regulation, in the light of the circumstances of the specific case:

- a pecuniary administrative sanction is ordered pursuant to art. 83 of the Regulation, commensurate with the circumstances of the specific case (Article 58, paragraph 2, letter i) of the Regulation).

4. Injunction order.

Pursuant to art. 58, par. 2, lit. i) of the Regulation and of the art. 166, paragraphs 3 and 7 of the Code, the Guarantor orders the application of the pecuniary administrative sanction provided for by art. 83, par. 5 of the Regulation, through the adoption of an injunction order (art. 18, l. 11.24.1981, n. 689), in relation to the processing of personal data carried out by the company through the aforementioned video surveillance system, in relation to the articles 5, par. 1, lit. a) and 13 of the Regulation, following the outcome of the procedure pursuant to art. 166, paragraph 5.

Considering it necessary to apply paragraph 3 of the art. 83 of the Regulation where it provides that "If, in relation to the same treatment or related treatments, a data controller [...] violates, with willful misconduct or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction does not exceed amount specified for the most serious violation", the total amount of the fine is calculated so as not to exceed the maximum prescribed by the same art. 83, par. 5, fixed at the sum of 20 million euros or, for companies, at 4% of the annual worldwide turnover of the previous year where higher.

With reference to the elements listed by art. 83, par. 2 of the Regulation for the purposes of applying the administrative fine and the relative quantification, taking into account that the fine must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), it is represented that, in the present case, the following circumstances were considered:

- a) with reference to the intentional or negligent nature of the violation and the degree of responsibility of the owner, the

negligent conduct of the company and the degree of responsibility of the same was taken into consideration which did not comply with the data protection regulations in relation to a plurality of provisions;

b) the number of interested parties involved, taking into account the flow of customers hosted by the structure (between 1,100 and 1,250 in the last three years) and of the company's employees;

b) the absence of specific precedents (relating to the same type of treatment) against the company;

c) the company's cooperation with the Authority in order to remedy the violation and mitigate its negative effects.

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness with which the Authority must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), in firstly the economic conditions of the offender, determined with reference to the financial statements for the year 2019 with respect to which the company recorded a loss for the year.

In the light of the elements indicated above and the assessments made, it is believed, in the present case, to apply against Charly Mike s.r.l. the administrative sanction of the payment of a sum equal to 3,000.00 (three thousand) euros.

In this context, it is also considered, in consideration of the type of violations ascertained that concerned the general principles of treatment and the obligation to provide suitable information to the interested party, who pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision must be published on the Guarantor's website.

It is also believed that the conditions pursuant to art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

ALL THAT BEING CONSIDERED, THE GUARANTOR

declares pursuant to articles 57, par. 1, lit. f) and 83 of the Regulation the illegality of the processing carried out in the terms of which in the motivation by Charly Mike s.r.l., for the violation of the articles 5, par. 1, lit. a) (principle of correctness) and 13 of the Regulation;

DETERMINE

to file the dispute adopted against Charly Mike s.r.l., in the person of its pro-tempore legal representative, with deed dated 19 December 2019, limited to the violation of articles 114 of the Code and 88 of the Regulation;

ORDER

pursuant to art. 58, par. 2, lit. i), of the Regulations to Charly Mike s.r.l., in the person of its legal representative, with registered office in Alberobello (BA), Via Liberatori della Selva 4b, tax code 04753890724, to pay the sum of 3,000.00 (three thousand) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

then to the same Company to pay the aforementioned 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 deeds pursuant to art. 27 of the law no. 689/1981. It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph 8, of the Code);

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, and believes that the conditions set forth in art. 17 of regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to art. 78 of the Regulation, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to the ordinary judicial authority may be lodged against this provision, with an appeal lodged with the ordinary court of the place identified in the same art. 10, within the term of thirty days from the date of communication of the measure itself, or sixty days if the appellant resides abroad.

Rome, 26 November 2020

PRESIDENT

Station

THE SPEAKER

guille

THE SECRETARY GENERAL

Matthew