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Injunction order - 11 March 2021

Record of measures

n. 94 of 11 March 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, Professor Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members and the cons. Fabio Mattei, general secretary;

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

GIVEN 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 therein;

GIVEN the report received on 24 March 2017, accompanied by specific documentation, according to which Dr. Gregorio Greco, born in XX and residing in XX, in via XX, C.F. XX, would have transmitted documentation relating to the operating cases, containing the list of surgical interventions carried out at some health facilities, where he had served (Division of Orthopedics of the Usl n.40 of the Lombardy Region - Hospital of Desenzano del Garda, Asl n . 15 of the Emilia-Romagna Region - Division of Orthopedics of Mirandola, Civil Hospital of Brescia, Asl n. 2 of the Calabria Region - Hospitals of Lungro and of San Marco Argentano, U.O.C. of Orthopedics-Traumatology of the Hospital of Cosenza), attached to the application to participate in the public notice, adopted by the Hospital of Cosenza, for the assignment of the management of a complex structure orthopedics and traumatology (see resolution of the Extraordinary Commissioner of December 17, 2015, n.373) . In particular, the aforementioned attached documentation contained personal data - in some cases even directly identifying (name and surname) - and relating to the health of patients (date of surgery, diagnosis, type of anesthesia administered and intervention performed);

GIVEN the requests for information from the Health and Research Department of this Authority, with which the Hospital of Cosenza (note prot. N. 00267 of 13 September 2018 and n. 0009205 of 15 March 2019) and Dr. Greco (prot.n.

TAKING NOTE of the declarations of the General Manager of the Hospital of Cosenza contained in the notes of 10 October 2018 and of 4 April 2019, according to which "the attachments, as declared, do not appear to be" Certification "by the Medical Director nor specific" certification " the director of a complex structure, but an unsigned sheet as a header with attachments to

the sheets showing the list of interventions (with name, surname and type of intervention) carried out, with only the initials and stamp of the Director of the Presidio Unico and of the Director of the Complex Structure, which certainly cannot be configured and considered neither as "certification" nor as "attestation" issued by the medical director and by the Director of the Complex Structure "(see note of 10 October 2018) and" the documentation of Dr. Gregorio Greco was released by this company through the Medical Direction of the Unified Presidium; Dr. Gregorio Greco has sent a formal request for consultation of operator registers of the years 2012/2013/2014 duly authorized on 16.02.2019 with prot. 488 "; "The stamps are those of the Medical Directorate of the Unified Presidium and of the Orthopedics Department" (see note of 4 April 2019);

NOTING, also, of the letter of 13 August 2018, with which Dr. Greco stated that the certification of the attestation of the services performed "is the deed of the Health Director of the Hospital of Cosenza affixed to the certificate issued by the Complex Structure to which he belongs, in the person of the Director" and that he could not "certainly tamper with and / or alter a document not really, but issued by the complex structure to which he belongs and certified by the medical director, under penalty of various hypotheses of crime against him, and therefore he had no other possibility, to be able to participate in the announcement, than to attach the document as issued by the Company Ospedaliera di Cosenza, the data controller, which (...) is also the hospital that issued the public notice ", also highlighting that the same" with reference to all the other documents attached to the request for participation in the notice public and, in particular, with reference to the operating cases of the interventions carried out at all other hospitals edaliere of Mirandola (Mo), Desenzano del Garda (BS), Brescia; Lungro (CS) and San Marco Argentano (CS), having proceeded with self-certification, and therefore with its own deed, has correctly listed in a strictly anonymous form and not attributable to any patient / interested party, and this because the writer does not hold or process any "Personal data", as this is not, in accordance with the law, the data no longer attributable to any interested party, who therefore is neither identified nor identifiable ";

GIVEN the note prot. n. 31903 of 20 September 2019 of the Health and Research Department, with which the procedure was defined, the reasons for which must be understood as fully referred to here, in which it is ascertained that:

- dr. Greco “had access to information on the health of patients undergoing surgery at the U.O.C. of Orthopedics-Traumatology of the Hospital of Cosenza and has produced, as part of the participation in public notice, the aforementioned documentation containing the following personal data of the patients: name, surname, date and type of intervention, diagnosis and type of anesthesia performed ";

- "the communication by the Company of the data on the health of patients contained in the aforementioned surgical case history was carried out in the absence of a suitable legitimating assumption (Articles 11, 20 and 60 of the Code, as in force at the time). For communication, in fact, on the basis of the definition referred to in art. 4, paragraph 1, lett. l) of the Code, means "giving knowledge of personal data to one or more specific subjects other than the interested party, in any form, including by making them available or consulting" ";

- "the same doctor carried out a communication operation - as part of the participation in public notice - of personal data relating to health, of patients undergoing surgery at the U.O.C. of Orthopedics-Traumatology of the Hospital of Cosenza, following the provision, by the Company, of the aforementioned documentation, which took place without a suitable legitimate basis ";

- "with reference to the documentation relating to data on the health of patients operated on at the health facilities of Mirandola, Desenzano del Garda, Brescia, Lungro and San Marco Argentano, (…) it was acquired by Dr. Greco, self-certifying its origin, without a formal request for access to health data to the structures concerned. Subsequently, the same documentation was produced for participation in the aforementioned public notice ";

- "the processing of the aforementioned data carried out by dr. Greco was connected to the pursuit of a personal purpose (that of participating in the public notice for the assignment of the aforementioned management position), not attributable to the treatment or administrative purposes related to the treatment, typical of the aforementioned hospital bodies ";

- "the fact that the information relating to the health of patients operated on by dr. Greco have left the availability (and therefore from the control) of the legitimate data controllers (hospital bodies) to be used by the same to participate in a selection and, therefore, have been transmitted to an administrative commission appointed by the (...) Hospital of Cosenza has no foundation in the legal basis that had originally legitimized the treatment ", with the consequence that" the treatment put in place by Dr. Greco was not carried out in compliance with the Code, in force at the time the facts covered by the report took place (articles 11, 13 and 26) ";

CONSIDERING that the facts covered by the report occurred in February 2016, therefore on a date prior to that in which Regulation (EU) 2016/679 became fully applicable (25 May 2018) and that, therefore, to the processing of personal data in question, the Code regarding the protection of personal data applies, in the version prior to the reformulation of the same carried out by means of Legislative Decree no. 101/2018;

GIVEN the deed prot. n. 0039727, adopted on November 18, 2019, with which Dr. Gregorio Greco the violation of the provisions of art. 13 and 26 of the Code, sanctioned, respectively, by art. 161 and 162, paragraph 2-bis of the same Code, for having carried out a processing of health data in the absence of suitable legitimizing conditions;

NOTING that the administrative report prepared pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment pursuant to art. 16 of law 689/81;

GIVEN the defense brief dated 17 December 2019, presented by Dr. Greco pursuant to art. 18 of the law of 24 November 1981 n. 689, in which it was stated that:

- "Considering the extremely limited time available, Dr. Greco presented a paper list, in self-certification, of the interventions carried out, bearing as the only reference to the interested parties only the initial bets, thus using a strictly anonymous form, as the initial bets, also in consideration of the protracted period of time elapsed by the interventions in question, are in no way attributable to any patient / interested party (….) ";

- with reference to the documentation issued by the A.O. of Cosenza, "the application for participation in the case in question was not presented to any third party, but rather to the Hospital of Cosenza", considering the definition of "communication", pursuant to art. 4 paragraph 1 letter. l) of Legislative Decree 196/2003;

- “on closer inspection, then, in the case he occupies there was no external communication, but the only transmission of data took place from the Hospital to Dr. Greco, and then, if anything, from the latter again to the same Hospital, without other third parties having become aware of the personal data in question. Therefore, no damage, neither concrete nor potential, can have been caused to the interested parties by the work of Dr. Greco, the personal data having been transferred again by him to the same Data Controller who had issued that document ";

- with reference to the personal data of patients of other health facilities, "in order to participate in the public notice in question, he has attached to the application a paper list of the interventions carried out, which he held in a strictly anonymous form, in his subdued way of see, as the only data referring to individual patients are the initials of the names. All other data are descriptive of the type of intervention in itself anonymous, such as date and degree of participation of the doctor, not attributable to a specific or determinable subject, as not even Dr. Greco is aware of or could trace the names of the patients (...). Having transmitted this list in this form means, in the specific case of examination, not having made the individual to whom the data refer identifiable in any way, as there is no way (not even for Dr. Greco!) To go back to the patient's name. Only the

Company of origin, the original Data Controller, is in possession of the clear names and can, therefore, associate those data with an identified or identifiable natural person. In other words, only those who are already in possession, upstream, of the list of interventions complete with full names (name and surname of the person), could identify the person concerned. (...) Not even in the case in question can, then, an unlawful communication of personal data be configured ", in light of the definition of" personal data "contained in art. 4 paragraph 1 letter. b) of the Code;

- "the writer does not ignore the provision cited by the same Office in the body of the provision that is the subject of this appeal (Provision of May 15, 2014 n. 243 - web doc. N. 3134436) which, however, refers to the different hypothesis of publication in the press or web by the P.A. required by the legislation on transparency to the online or printed publication of data that can be particularly delicate (subsidies, financial support, data of disabled people, etc.). Therefore, in the aforementioned provision, we refer to the hypothesis of publication in the press or web, that is to say "dissemination", which, pursuant to art. 4 paragraph 1 letter. K, Legislative Decree 196/2003, consists in "giving knowledge of personal data to undetermined subjects, in any form, including by making them available or consulting". The definition of "publication" is therefore very different from communication (consisting in the transmission of data to one or more specific subjects - art. 4 paragraph 1 letter. publication. In the case in question, which is completely different both for the type of operation carried out and for the extremely restricted scope of communication, the initials of the patients are linked to an intervention indicated in an abstract way and in itself not associated with a specific person (for hypothesis: A.B.- clavicle osteosynthesis intervention - date xx-xx-xxxx): in this case the initials, even if present, do not in any way make it possible for the recipient to trace the data. From another point of view, with particular reference to the violation referred to in Article 13, according to the disputed move, Dr. Greco should have sent an information notice to each of the data subjects, pursuant to art. 13 of the same legislative decree 196/2003, that is to say to each of the patients contained in the lists, to inform them of the purposes of the (new) treatment and of all the other elements provided for by the legislation in force at the time ";

- "With reference, then, to the names of the patients contained in the list issued by the Hospital of Cosenza, it is reiterated that the violation was, if anything, committed upstream by the Hospital itself, which, in allowing access to documentation precisely in order to participate in the public notice, could and should have informed the interested parties pursuant to Article 13 of the communication made to Dr. Greek; the doctor, who limited himself to receiving this list in the form prepared by his employer and returning it to the same hospital together with his request for participation, would never have been able to provide the

information to the interested parties, considering the number of subjects to be contact: the number of interested parties and the only data available (name, but absence even of the Municipality of Residence, address and / or any other contact) make the fulfillment objectively disproportionate and abnormal, in relation to the possibilities of the individual employee participating in the 'notice";

Considering that, on 11 February 2021, the hearing requested by Dr. Greco, during which, in highlighting that "with reference to the two disputed cases, the subjective and objective elements of the case of liability are lacking", it was reiterated that "with particular reference to the dispute relating to the Hospital of Cosenza", there would have been no disclosure of any data and that “the certification of the interventions represented an essential document to be presented, under penalty of exclusion. From the point of view of the interests involved, participation in a competition is not a purely private act, but has public relevance, with all that this entails regarding the processing of data. The foregoing also allows for the exclusion of the subjective element, as it cannot be attributed to Dr. Greco neither willful misconduct nor fault, as much as the observance of an obligation provided for by a public competition. With reference to the self-certified interventions, the mere indication of the initials, in the absence of further identifying elements, with regard to interventions very dating back, even 30 years earlier, effectively prevents any possibility of tracing the identity of the interested parties, not knowing , the same dr. Greco, to which subjects the aforementioned interventions referred ";

Given that, on November 14, 2019, it was proposed by Dr. Greco an appeal in opposition, pursuant to art. 152 of the Code and 10 of Legislative Decree 150/2011, against the aforementioned note of the Guarantor (of 20 September 2019, prot. N. 31903) with which the processing of sensitive data carried out by the same doctor was deemed unlawful;

Taking into account the ruling of the Court of Cosenza, with which the aforementioned opposition was rejected, in particular, highlighting that:

- "One cannot reasonably doubt, as the opponent's defense advocates, of the applicability, to this case, of the provisions of Legislative Decree lgs. n. 196/2003, since its art. 5 excludes this occurrence only when the processing is carried out by natural persons for exclusively personal purposes, but not certain if the data - as undoubtedly in the present case (...) - are intended for systematic communication or dissemination, however limited; in other words, the exemption is valid only for the use that the person makes of the data for himself, that is, for his exclusive knowledge and not for the communication to other subjects ";

- as to the "conduct relating to the data of the opponent's work within the A.O. di Cosenza "(...)" a certain violation of the

Privacy Code is found in terms of the completeness of the data according to their pre-eminent super-sensitivity, since in evidence associating a name to a health treatment constitutes a violation of the patient's privacy ";

- "the application form of dr. Greco, and its annexes, were addressed not to the A.O. of Cosenza but to the Examining Commission, which, due to the modalities of its formation and, above all due to the necessary autonomy from the Company, is certainly a different subject, albeit an extraordinary organ of the entity, whose legal personality, however, certainly distinct from the latter, as teach the principles of administrative law. This assumption is confirmed by the composition of that Commission, of which (...) not only the Medical Director of the A.O. of Cosenza, but also three other Complex Structure Directors drawn from a national list by name, extracted from the relative regional lists, and further a secretary chosen from among the administrative officials of a specific qualification ", for which" the documentation attached by Dr. Greco was concretely brought to the attention of a plural number of subjects that did not coincide with the A.O. of Cosenza, with potential possibility of its further diffusion ";

- "that conduct is characterized by clear evidence of ultroneity of the documentation with respect to what is required by the same announcement, which limited itself to providing for the allegation of only the type of interventions performed, without also requiring the indication of the names of the patients, so that it remains incomprehensible why that indication was given, and also with name and surname ";

- “such conduct certainly cannot remain attributable to the Hospital of Cosenza alone, which even had to reject the request presented by dr. Greco, as well as - contrary to the relative defensive assumption - to the latter, which materially contributed to the alleged violations, giving you cause and also using the illegitimately acquired data ";

- "the indication of only the initial letters of the names of the patients, unlike what the applicant assumes, does not appear to be suitable for making the data sufficiently" anonymous "; therefore "the conduct of Dr. Greco does not appear to be compatible with the aforementioned provision (Article 4, paragraph 1, letter n), as well as with the guidelines no. 243/2014 of the Guarantor, in which it is specified, in fact, that the replacement of the name and surname of the interested party with the initials alone is not in itself sufficient to anonymize personal data, as the risk of identification clearly exists, especially when, as in the present case, alongside the initial ones, there remain further contextual information (the type of health intervention performed), which in any case make the interested party potentially identifiable. And it is useless to invoke the reference of those guidelines to the sole dissemination of the data by press or web, since it would be extremely unreasonable not to apply the principle, which has an evident general scope, to similar cases of dissemination, where even on a small scale such as that to

today's attention "(sentence 19 January 2021);

CONSIDERING that the arguments put forward by Dr. Greco are not suitable to accept the requests formulated in the defense brief. In fact, in relation to the documentation produced with self-certification, with reference to the notion of personal data, it should be noted that, pursuant to art. 4, paragraph 1, lett. b) of the Code, in force at the time in which the facts covered by the report took place, "personal data" means any information relating to a natural person, identified or identifiable, even indirectly, by reference to any other information, including a personal identification number (see now also art.4, par.1, point 1 of Regulation (EU) 2016/679 and Recital nos. 26, 27 and 30); therefore, the fact that, in some cases, the names and surnames of the patients were not fully indicated, but only the initials, does not matter for the purpose of the alleged exclusion of the aforementioned information from the category of "personal data"; in fact, as already specified on several occasions by the Guarantor, also in the aforementioned note of 20 September 2019, "the practice (...) of replacing the name and surname of the data subject with initials alone is in itself insufficient to anonymize personal data (…). Furthermore, the risk of identifying the data subject is all the more probable when, among other things, additional contextual information remains alongside the initials of the name and surname, which in any case make the data subject identifiable "(see par. 3 of the Provv. 243 of 15 May 2014, containing "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public entities and other obliged entities", web doc. no. 3134436). This last assumption constitutes a clarification of the provisions in question, which, of course, find application in any situation in which it is necessary to apply the notion of personal data, regardless of the hypothesis of publication of data on the web; in relation, then to the alleged unsuitability of the conduct of Dr. Greco to carry out a dissemination / "external communication" of data on the health of patients operated on at the A.O. of Cosenza, based on the fact that the certification was produced and delivered to the same company and that such data would not have gone out of the availability of the health facility, it should be noted that the competition commission is a third party with respect to the administration that announces the competition selection , is also made up of subjects external to the same and assumes an autonomous ownership in the processing of the data collected for the completion of the selection procedure. Furthermore, as already represented in the note of 30 November 2019, the document that the public notice required, under penalty of exclusion, was only a "Certification of the Medical Director ... concerning the qualitative and quantitative type of services performed by the candidate" and not even a documentation containing the operating cases including the personal data of the patients; also, in the context of the attribution

of scores, reference was made to the "qualitative and quantitative type of services performed by the candidate also with regard to the activity / case history dealt with in the previous ones, measurable in terms of volume and complexity" (see also art . 4, paragraph 5, of the Ministerial Decree of 30 January 1992, no. 283). The doctor should therefore have diligently examined the applicable legislation concerning the production of the documentation required for the purposes of the evaluation by the examining commission and carefully considered which documents were required in the selection procedure, assuming that the transmission of documentation was not required. containing personal data on the health of patients in order to participate in the selection procedure; this, in compliance with the legislation on the protection of personal data, which, likewise, Dr. Greco should have known;

NOTING that, on the basis of the above considerations, Dr. Greco, on his own initiative and therefore as data controller, appears to have committed violations of the provisions of Articles 13 and 26 of the Code sanctioned, respectively, by articles. 161 and 162, paragraph 2-bis, of the same Code, for having carried out the processing of data, in part also suitable for revealing the health conditions of the interested parties, in the absence of suitable legitimizing conditions and, in particular, without having provided the information to the patients concerned and their specific consent acquired;

GIVEN art. 161 of the Code which punishes the violation of art. 13 of the same Code with the administrative sanction of the payment of a sum from € 6,000.00 (six thousand) to € 36,000.00 (thirty-six thousand);

GIVEN art. 162, paragraph 2-bis of the Code, which punishes the violations indicated in art. 167, including the violation relating to art. 26, of the same Code, with the administrative sanction of the payment of a sum from € 10,000.00 (ten thousand) to € 120,000.00 (one hundred and twenty thousand);

CONSIDERING that, for the purposes of determining the amount of the financial penalty, 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;

CONSIDERING that, in relation to the seriousness of the violation, the processing, despite also having as its object data on health, consisted in communicating them only to the examining commission appointed by the Hospital of Cosenza which adopted the public notice;

CONSIDERING, also, that the doctor produced the documentation containing personal data, in the erroneous belief that this was essential to avoid exclusion from the insolvency procedure;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that, if any of the violations referred to in Articles 161, 162, 162-ter, 163 and 164, is of lesser severity, the minimum and maximum limits are applicable to an extent equal to two fifths;

CONSIDERING, therefore, by reason of the aforementioned elements assessed as a whole, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction provided for by art. 161 of the Code, to the extent of € 6,000.00 (six thousand) for the violation of art. 13 of the same Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of lesser seriousness, for an amount equal to EUR 2,400.00 (two thousand four hundred), as well as the amount of the pecuniary sanction provided for by art. 162, paragraph 2-bis of the Code, to a minimum of € 10,000.00 (ten thousand) for the violation of art. 26 of the same Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of lesser seriousness, for an amount equal to Euro 4,000.00 (four thousand), for the total sum of Euro 6,400.00 (six thousand and four hundred);

GIVEN the documentation in the deeds;

HAVING REGARD to the observations of the Office made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000, adopted by resolution of June 28, 2000;

SPEAKER Attorney Guido Scorza;

ORDER

to dr. XX, born in XX on XX and residing in XX, in XX, C.F. XX, to pay the sum of € 6,000.00 (six thousand), provided for by art. 161 of the Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the same Code, for an amount equal to Euro 2,400.00 (two thousand four hundred), as a pecuniary administrative sanction for the violation of the provision referred to in art. 13 of the Code for failing to provide information to the interested parties, as well as the sum of € 10,000.00 (ten thousand) provided for by art. 162, paragraph 2-bis of the Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the same Code, for an amount equal to € 4,000.00 (four thousand), as a pecuniary administrative sanction for the violation of the provision referred to in Article 26 of the Code for failing to acquire consent of the interested parties, for a total amount of € 6,400.00 (six thousand and four hundred);

INJUNCES

to the same dr. Greco to pay € 4,000.00 (four thousand) and € 2,400 (two thousand four hundred), for the total sum of € 6,400.00 (six thousand and four hundred), according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to art. 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller resides, within thirty days from the date of communication of the provision itself. , or sixty days if the applicant resides abroad.

Rome, March 11, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE GENERAL SECRETARY

Mattei