

[doc. web no. 9852741]

Injunction against the Municipality of Calvi Risorta - 20 October 2022

Register of measures

no. 337 of 20 October 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, the lawyer Guido Scorza, member, and dr. Claudio Filippi, deputy secretary general;

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 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO 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 the lawyer Guido Scorza;

WHEREAS

1. The complaint.

With a complaint presented on the XX, subsequently integrated with notes of the XX, Mr. XX complained about the publication

"on XX [...] on the personal Facebook page [of] the councilor for social policies of the Municipality of Calvi Risorta, of a report [presented previously by the complainant and] addressed to the Prefecture of Caserta and the Campania Region [...] with which he exposed [a] the repeated violation [...] of the Ordinance of the Campania Region No. 23 of 25 March 2020" by the aforementioned councilor and other municipal administrators.

In particular, according to what was represented by the complainant, the report published on the aforementioned Facebook profile of the commissioner "reports [...] the entry protocol of the Prefecture of Caserta as well as my name, surname, residence" and the same had been "addressed and sent exclusively to the Prefecture of Caserta and the Campania Region and never to the Municipality of Calvi Risorta or to the councilor [...]".

The complainant also represented that the aforesaid post of the Councilor's XX "was shared on the Facebook page of the Mayor of the Municipality of Calvi Risorta [...] who, in this way incurred the same violations", and that the same post would have been "viewed, commented and shared, for about 15 days, by hundreds of people".

With a subsequent supplementary note to the complaint, the complainant represented that "the Prefecture of Caserta erroneously sent the report [of the complainant] to the municipality of Calvi Risorta, rather than to the Carabinieri Command of Caserta, to which the same should have been addressed. A few hours later, the Prefecture notified the municipality of the mistake made, but the Mayor, even before registering the note erroneously received from the municipality, proceeded to send a copy to the councilor [...] who published the same on his profile Facebook, public and open".

2. The preliminary investigation.

In relation to the aforementioned complaint, the Office, with note dated XX, prot. XX, invited the Municipality and the Prefecture-Territorial Office of the Government of Caserta to provide any useful information in relation to the matter represented above, pursuant to art. 157 of the Code.

Since no reply was received, the request for elements from the Municipality was reiterated with a note of the XX, prot. XX and, subsequently, with a note of the XX, prot. XX, with which the Municipality was also notified of the violation of art. 157 of the Code, communicating pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions referred to in article 58, par. 2, of the Regulation.

In response to this last request, the Municipality of Calvi Risorta, with note of the XX, prot. XX, stated that:

- the Mayor "received on the XX date a copy of the complainant's report with the XX date from the municipal protocol office.

Following the reading of the report, which reported the name of the Councilor [the Mayor] proceeded to address the mail to the latter. The Councilor [...], after receiving a copy of the report, published a post on Facebook, obscuring the sensitive data of the complainant [...]" ;

- "Until the publication of the post on Facebook, neither the [Mayor] nor the Councilor were aware of the second PEC of the Prefecture, which arrived only at a later time and only after the [Mayor] had finished sorting the mail, the which indicated the error in sending the report to the PEC of the Municipality of Calvi Risorta instead of that of the Carabinieri Command, to which it was addressed. From the moment the error became known, the Councilor [...] proceeded to eliminate the post on Facebook, without leaving any trace";

- "Following the episode that is the subject of the complaint, internal checks were made, which showed that the report was sorted by mere error, without noting that the Municipality of Calvi Risorta was not among the recipients of the PEC by the Prefecture" ;

- "In relation to the matter which is the subject of the complaint, the Data Protection Officer was not involved".

In response to the request of the Guarantor, the Prefecture of Caserta, with note prot. XX of the XX, represented that "the document [...], sent for mere clerical error to the certified e-mail address of the municipality of Calvi Risorta on the XX date at 17.50 clearly indicated the Provincial Command of the Carabinieri of Caserta as the only recipient; immediately after, at 17:57 with prot. no. [...] the clerical error was communicated to the municipality of Calvi Risorta". The aforementioned Prefecture, with note of the XX, prot. XX, specified that he had requested clarifications on what happened to the Municipality, which would also have represented that "[following the episode subject of the complaint, internal investigations were made, which showed that the report had been sorted by mere error, without noting that among the recipients of the PEC by the Prefecture, there did not appear to be the Municipality of Calvi Risorta ".

In order to define the investigation, with notes of the XX, prot. XX and XX, the Office requested clarifications directly from the Mayor and Councilor in order to acquire definitive elements, in particular, regarding the legal basis and the purposes of the processing carried out through the publication of the document (elements not supplied with the note of the Municipality of the XX, prot. XX), the timing of the receipt of communications from the Prefecture by the aforementioned administrators, the duration of the publication and the effective date of the effective removal of the posts from the social network, taking into account the short period of time elapsed between the two prefectural communications and what was represented by the

complainant regarding the circumstance that the post would have been "viewed, commented on and shared, for about 15 days, by hundreds of people". In the absence of a response, these requests were reiterated on XX.

In response to the Guarantor's request for elements, the Assessor with note of the XX, prot. XX, and the Mayor, with note of the XX prot. XX (with which it refers in full to what was represented by the Councilor with the note of the XX cited) declared that:

"what the [complainant] disputes is the dissemination on my personal Facebook page of his report [...] - received from the Prefecture of Caserta and for information to the Municipality - addressed to the local Carabinieri station [...] on a date not earlier than XX (date of receipt of the same to the municipal protocol) [...]";

"With reference to the circumstances, timing and methods with which the undersigned acquired a copy of the report, as already reported in a note of the XX [of the Municipality] prot. XX, it was sent by the Prefecture to the Municipality of Calvi Risorta and the protocol officer - once registered under no. XX of the XX - assigned it to the Mayor who - referring the report to the writer - forwarded it to me unaware - in the first instance - of the Prefecture's mistake".

"the matter was the subject of a complaint in criminal proceedings by the same [claimant] which ended with the dismissal provision by the GIP n. XX."

With reference to the conduct of the Municipality of Calvi Risorta, the Office, based on the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Municipality, 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:

with act of the XX, prot. XX, in relation to the failure to respond within the established deadlines to the request for information formulated by the Office with note dated XX, reiterated on XX, in violation of art. 157 of the Code;

with act of the XX, prot. XX, in relation to the dissemination on the Facebook pages of the Councilor and Mayor of the Municipality, of the notification of the complainant of the XX to the Prefecture, received in the protocol of the Municipality and showing the personal data of the complainant, in the absence of a suitable regulatory prerequisite and of the disclosure to the interested party, in violation of the principles of lawfulness, correctness and transparency, in violation of articles 5, par. 1, lit. a) and 6, par. 1, lit. e), 13 and 14 of the Regulation, and of the art. 2-ter, paragraphs 1 and 3, of the Code (as in force at the material time).

With the aforementioned deeds, the Municipality was invited to produce defense writings 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 24 November 1981, n. 689).

With note of the XX, prot. no. XX, the Municipality presented a defense brief, declaring, in particular, that:

"The role of the municipal offices in the affair [was limited] to the registration in the computer protocol of the prefectural letter and its transmission to the political-administrative top of the institution.

In particular, the note from the Prefecture of Caserta reporting the report of the [complainant] was sent by the Prefecture to the Municipality of Calvi Risorta and the protocol officer - once registered [...] - assigned it to the Mayor who, referring the report to the assessor [...], forwarded it to him unaware that the aforementioned note should not reach the Municipality [...].

With an immediately subsequent note [...] the Prefecture specified that the same had been sent to the municipality "for information" [...] and not by mistake, therefore the municipal offices could never have imagined that it was a matter of confidential information received by the Municipality for error and that, therefore, the same should be trashed.

Therefore, what is reported in the note of dispute [...] that is that "immediately afterwards, at 17.57 with prot. no. XX the material error was communicated [by the Prefecture] to the Municipality of Calvi Risorta" does not appear correct as the Prefecture of Caserta has never communicated any error but, only, that the note had been sent to the Municipality "for information" . Circumstance which suggests - to each operator on average trained in document management - that the data could be processed [...].

Therefore, it can be considered that the regulatory premise on the basis of which the treatment took place is the art. 53 of Presidential Decree 445/2000 which regulates the "protocol registration". It is believed to have occurred according to the principles of lawfulness, correctness and transparency as the municipal activity limited itself to registering a letter not transmitted "by mistake" but "for information" in the computer protocol.

3. Outcome of the preliminary investigation.

3.1. The regulatory framework.

The processing of personal data must take place in compliance with the applicable legislation on the protection of personal data and, in particular, with the provisions of the Regulation and of the Code.

"Personal data" means "any information relating to an identified or identifiable natural person ("data subject")". Furthermore,

"an identifiable natural person is one who can be identified, directly or indirectly, with particular reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more characteristic elements of his physical, physiological, genetic, psychic, economic, cultural or social identity" (Article 4, paragraph 1, no. 1, of the Regulation).

The processing of personal data carried out by public subjects is, as a rule, lawful only if 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" (Article 6, paragraph 1, letters c) and e), of the Regulation). It is also provided that "Member States may maintain [...] more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), by determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (art. 6, paragraph 2, of the Regulation), with the consequence that art. 2-ter, of the Code, in the text prior to the changes made by Legislative Decree 8 October 2021, no. 139.

In this context, public subjects can disclose personal data if this operation is provided for "by a law or, in the cases provided for by law, a regulation" (Article 2-ter, paragraphs 1 and 3, of the Code, in the text in force at the material time; see also provision no. 243 of 15 May 2014, containing the «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 bodies», in the Official Journal no. 134 of 12 June 2014 and in www.gpdp.it, web doc. no. 3134436). The data controller, even in the presence of a condition of lawfulness, is then, in any case, required to respect the principles regarding the protection of personal data, including, the principles of "lawfulness, correctness and transparency" and "purpose limitation" (art. 5, par. 1, lett. a) and b), of the Regulation), on the basis of which the data must be "processed in a lawful, correct and transparent manner in relation to the data subject", as well as "collected for specified, explicit and legitimate purposes, and not further processed in a way that is incompatible with those purposes".

The Supervisory Authority, within the scope of the tasks and powers assigned by the Regulation, ensures, among other things, the application of the Regulation and deals with complaints by carrying out the appropriate investigations, including on the correct application of the data protection regulations by of the owners (art. 57 par.1, lett. a), f) and h) and 58 of the Regulation). For this purpose, the Authority has the power to order the data controller to provide any information required for the performance of its duties (Article 58, paragraph 1, letter a), of the Regulation).

The art. 157 of the Code also provides that, in relation to the powers pursuant to art. 57 of the Regulation and for the performance of its duties, the Guarantor may request the owner, the manager, the representative of the owner or manager, the interested party or even third parties, to provide information and to exhibit documents and that the failure to reply to this request, within the indicated term, it renders applicable the pecuniary administrative sanction envisaged by art. 83, par. 5 of the Regulation (see art.166, paragraph 2, of the Code).

3.2. Failure to respond to the Guarantor's request for information, pursuant to art. 157 of the Code.

With regard to the dispute relating to the violation of art. 157 of the Code for the failure of the Municipality of Calvi Risorta to respond to the request for information from the XX Office, reiterated with a note of the XX, the holder has not presented defense briefs in relation to the objection formulated with a deed of the XX, prot. XX.

In this regard, it should be noted that, also in the light of the general principles of good performance, efficiency, effectiveness and cost-effectiveness of the administrative action (Article 97 of the Constitution, as well as Article 9, paragraph 1 and 10, paragraph 3, of the Internal Regulation of the Guarantor no. 1/2019 of 4 April 2019, web doc. no. 9107633), the response to the request for information from the XX Office, reiterated with a note from the XX, was received after the deadlines set for the Guarantor's request - in particular, only after the start of the procedure for the adoption of the corrective and sanctioning measures of the XX, prot. XX. This delay has therefore affected the completeness and speed of the preliminary investigation, resulting, therefore, ascertained the violation of art. 157 of the Code.

3.3. The processing of the complainant's data by the Municipality.

Based on the elements acquired and the facts that emerged following the preliminary investigation, with reference to the reconstruction of the story, with the memory of the XX, the Municipality declared that "the note from the Prefecture of Caserta reporting the report of the [complainant] was sent from the Prefecture to the Municipality of Calvi Risorta and the protocol officer - once registered [...] - assigned it to the Mayor who, referring the report to the councilor [...], forwarded it to him unaware that the aforementioned note should not reach the Municipality " .

With the aforesaid defense brief, the Municipality also declared that "The role of the municipal offices in the affair [was limited] to recording the prefect's letter in the computer protocol and its transmission to the political-administrative top of the institution. [...] Therefore, it can be considered that the regulatory basis on the basis of which the treatment took place is the art. 53 of Presidential Decree 445/2000 which regulates the "protocol registration". It is believed to have occurred according to the

principles of lawfulness, correctness and transparency since the municipal activity limited itself to registering a letter not transmitted "by mistake" but "for information" [...].

In the light of what was declared by the Municipality with the statement of the aforementioned XX, having acknowledged that the municipal offices limited themselves to processing the complainant's data for the sole purpose of registering the Prefecture's letter in the IT protocol and forwarding it to the political summit -administrative, the violations contested with the act of the XX are not attributable to the behavior of the Municipality of Calvi Risorta, in relation to which, with independent proceedings in progress, it reserves the right to ascertain the relative responsibilities.

4. Conclusions.

In the light of the assessments reported 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 □ make it possible to overcome the findings notified with the document of the XX, while they are not produced in briefs in relation to the findings notified by the Office with the document of the XX, prot. XX, with regard to the dispute relating to the violation of art. 157 of the Code for the failure of the Municipality of Calvi Risorta to respond to the request for information from the Office of the XX, reiterated with a note of the XX. In relation to this last finding, therefore, it is not possible to proceed with the archiving of the present proceedings, since none of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019. Therefore, the preliminary assessments of the Office are confirmed and the violation of article 157 of the Code by the Municipality of Calvi Risorta is noted in relation to the failure to respond to the request for elements formulated by the Guarantor with a note of the XX, reiterated with a note of the XX.

Violation of the aforementioned provision renders 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 referred to by art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, 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; art. 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 present case, the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction 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 which the following is observed.

The delay, incompleteness and contradictory nature of the feedback provided to the Guarantor's requests negatively affected the completeness and speed of the preliminary investigation.

On the other hand, the Municipality of Calvi Risorta does not have previous pertinent violations committed or previous measures referred to in art. 58 of the Regulation and the culpable nature of the violation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction, in the amount of 2,000 (two thousand) euros for the violation of articles 5, par. 1, lit. a), 6, para. 1, lit. e), as well as articles 2-ter, paragraph 1 (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021, converted, with amendments, by Law No. 205 of 3 December 2021) and 157 of the Code as a pecuniary administrative sanction deemed, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the behavior of the Municipality in the context of the preliminary investigation i, 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 by art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it is believed 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.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f), of the Regulation, declares the conduct held by the Municipality of Calvi Risorta to be unlawful, described in the terms referred to in the justification, consisting in the violation of Article 157 of the Code.

ORDER

To the Municipality of Calvi Risorta, with headquarters in Piazza Municipio, 1, Calvi Risorta (CE), Tax Code 80008970610 - pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation and of the art. 166, paragraph 2, of the Code, to pay the sum of 2,000 (two thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

To the Municipality of Calvi Risorta, to pay the sum of 2,000 (two thousand) euros according to the methods indicated in the annex, 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. In this regard, it is recalled 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 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also art. 10, paragraph 3, of Legislative Decree no. 150 of 09/01/2011);

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code;
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.

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, 20 October 2022

PRESIDENT

Station

THE SPEAKER

Zest

THE DEPUTY SECRETARY GENERAL

