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Injunction order against the Municipality of Tivoli - 7 November 2019

Register of measures

no. 209 of 7 November 2019

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of prof.ssa Licia Califano and of dott.ssa Giovanna Bianchi Clerici, members and of dott. Giuseppe Busia, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE, “General Data Protection Regulation” (hereinafter GDPR);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data" (hereinafter "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").

NOTING that Mr. XX complained about the online dissemination of personal data and information, also concerning the news of the pending criminal proceedings against him (later archived), contained in the resolution of the City Council n. XX of the XX, concerning «XX», published on the praetorian register of the institutional website of the Municipality of Tivoli;

CONSIDERING that from the preliminary investigation carried out by the Office on the 20th date, it turned out that the aforementioned resolution of the City Council was visible and freely downloadable from the online praetorian register of the institutional website of the aforementioned Municipality, as well as by typing the url https://. ..;

NOTING that the Secretary General of the aforementioned Municipality represented, among other things, that:

- «The Municipality of Tivoli, as soon as it received the [...] request for information, immediately involved the Data Protection Officer appointed by the undersigned Municipality, as required by articles 37 and 38 of EU Regulation 2016/679, with which it analyzed the violation that emerged and planned concrete actions to ensure compliance with the legislation on the protection

of personal data with specific reference to the violation [...] reported and more generally for avoid the recurrence of such anomalies';

- «The Secretary General immediately contested [...] the malfunctioning of the online Praetorian Register program to the company managing the program»;

- "The Municipality of Tivoli has already taken steps, at the time of transmission of this acknowledgment note, to cancel, by blacking out, any trace of Mr. XX's personal data and information, disclosed in violation of the legislation on the matter";

CONSIDERING that pursuant to the GDPR, which became applicable from 25/5/2018, the processing of personal data carried out by public subjects (such as the municipal body) is lawful only if necessary «to fulfill a legal obligation to which the data controller is subject treatment» 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);

CONSIDERING also 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 the treatment and other measures aimed at guaranteeing a lawful and correct treatment [...]", with the consequence that the provision contained in the art. 19, paragraph 3, of the Code, repealed today but in force at the time of the facts and moreover reconfirmed in its contents by art. 2-ter of the Code amended by Legislative Decree no. 101/2018, where it provided that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is allowed only when required by a law or regulation;

CONSIDERING that the sectoral state legislation applicable to billposting on the municipal notice board provides that "All the resolutions of the municipality and the province are published by means of publication on the notice board, at the headquarters of the institution, for fifteen consecutive days, except for specific provisions of law» (art. 124, paragraph 1, of Legislative Decree no. 267 of 18/8/2000);

NOTING that the Guarantor in provision no. 243 of 15 May 2014 (web doc. n. 3134436) 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 subjects and other entities obliged» also highlighted that, even in the presence of an obligation to publish, the subjects called to implement it cannot in any case disseminate excessive or irrelevant personal data (see second part, paragraphs 1 and 3.a.). In the same provision it is specified that «from the stage of drafting the deeds and

documents to be published, in compliance with the principle of adequate motivation, "excess", "irrelevant", "non-essential" personal data should not be entered (and , least of all, "forbidden"). Otherwise, it is necessary, however, to provide for the relative obscuration» (see part two par. 1). Furthermore, it is envisaged that «once the publication period envisaged by the individual reference disciplines has elapsed [e.g.: art. 124 of the legislative decree lgs. no. 267/2000] if the local authorities want to continue to keep the published deeds and documents on their institutional website, for example in the sections dedicated to the archives of the deeds and/or regulations of the entity, they must take the appropriate precautions for the protection of personal data. In such cases, therefore, it is necessary to obscure in the published documentation the data and information suitable for identifying, even indirectly, the interested parties" (ibid., par. 3.a);

CONSIDERING that the data controller is in any case required to comply with data protection principles, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in lawful, correct and transparent manner in relation to the data subject» 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, letters a and c, of the GDPR);

NOTING that from the checks carried out on the basis of the elements acquired, also through the documentation sent by the Municipality, and the facts that emerged following the preliminary investigation activity, as well as the subsequent evaluations, the Office has ascertained that the Municipality of Tivoli has published in the register pretorio online the resolution of the City Council n. XX of the XX, containing unnecessary personal data, such as the existence of a criminal proceeding (however archived), against the reporting municipal employee which continued on the institutional website of the Municipality of Tivoli at least until the verification carried out by the Office in date XX (i.e. after the date of 25/5/2018 on which the GDPR became applicable), for a period of time, therefore, exceeding the fifteen days provided for by sector legislation (prot. note n. XX of XX);

CONSIDERING that these conducts constitute a violation of the rules for the protection of personal data and, specifically:

1) failure to comply with the principles of "lawfulness" and "minimization" of processing, in violation of art. 5, par. 1, lit. a) and c) of the GDPR;

2) absence of a suitable regulatory prerequisite, for the period exceeding the publication times envisaged by art. 124, paragraph 1, of Legislative Decree lgs. 267/2000, in violation of art. 19, paragraph 3, of the Code (in force at the material time) and art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR;

NOTING that the Municipality of Tivoli has been notified, 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, paragraph 2, of the GDPR and the aforementioned Municipality was formally invited to send the Guarantor defense writings or documents and, possibly , request to be heard by this Authority, within 30 days (article 166, paragraphs 6 and 7, of the Code; as well as article 18, paragraph 1, of law no. 689 of 11/24/1981);

CONSIDERING, as a preliminary point, that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or attests news or circumstances or produces false deeds or documents, is liable pursuant to art. 168 of the Code "False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor";

CONSIDERING that the defense briefs and the mayor's hearing did not produce elements such as to exclude the unlawfulness of the processing and that the alleged occurrence of a technical problem, specifically a failure to update the maintenance of the online Praetorian Register, is of no relevance to the purposes of disclaimer;

CONSIDERING that the effects of the illicit conduct have been removed through the cancellation of the first publication and the contextual new publication of the deed without personal data and the reference to the pending criminal proceedings and that, therefore, the conditions for the adoption do not exist of measures, of a prescriptive or inhibitory type, pursuant to art. 58, par. 2 of the GDPR;

NOTING that although the violation began in June 2017, in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law n. 689 of 11/24/1981 which, in providing that «Laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», asserts the recurrence of the principle of tempus regit actum. The application of these principles determines the obligation to take into consideration the provisions in force at the time of the violation committed. In the case in question - considering the permanent nature of the disputed offense - it must be identified at the moment of cessation of the unlawful conduct, which from the preliminary investigation documents appears to have lasted at least until the verification carried out by the Office on the institutional website on XX, i.e. after 25/5/2018 in which the GDPR became applicable;

HAVING ACKNOWLEDGED, therefore, that the violation of articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the GDPR, 124, paragraph 1, of the d. lgs. 267/2000, caused by the conduct implemented by the Municipality of Tivoli, is subject to the application of the administrative fine pursuant to art. 83, par. 5, letter. a) of the GDPR;

CONSIDERING that the Guarantor, pursuant to art. 58, par. 2, lit. i) of the GDPR, has the corrective power to «impose an administrative fine pursuant to Article 83, in addition to the [other] [remedial] measures referred to in this paragraph, or instead of such measures, depending on the circumstances of each individual case";

TAKING INTO ACCOUNT that the aforementioned pecuniary administrative sanction imposed, according to the circumstances of each individual case, must be determined in the amount taking due account of the elements envisaged by art. 83, par. 2, of the GDPR;

CONSIDERING, in relation to the aforementioned elements, that the unlawful conduct of dissemination of personal data concerned judicial data of a single interested party, relating to a criminal proceeding already closed and lasted for over a year; that the seriousness of this behavior cannot be balanced by the justifications provided by the data controller regarding the fact that the violation was caused by an error of assessment by the person in charge of the procedure and by an IT error committed by the appointed company, even though it positively evaluate the immediate removal of data from the website, and the collaboration offered to this office during the investigation, the non-malicious behavior of the violation, the various technical and organizational measures implemented pursuant to art. 25-32 of the RGPD, the absence of any previous violations of the relevant RGPD committed by the Municipality of Tivoli;

CONSIDERED, on the basis of the aforementioned elements, evaluated as a whole, to have to determine pursuant to art. 83, par. 2, of the RGPD - also taking into account the phase of first application of the sanctioning provisions pursuant to art. 22, paragraph 13, of Legislative Decree lgs. no. 101 of 08/10/2018 – the amount of the pecuniary sanction, provided for by art. 83, par. 5, letter. a) of the GDPR, in the amount of 6,000.00 (six thousand) euros for the violation of articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the GDPR, 124, paragraph 1, of the d. lgs. 267/2000, as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same RGPD;

CONSIDERED, in consideration of the methods of conduct as described above, the type of personal data being processed, as well as the period of time during which the processing in question continued, which, pursuant to art. 166, paragraph 7, of the Code, and of the art. 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, this provision must be published on the Guarantor's website;

CONSIDERING, also, 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;

HAVING REGARD to the documentation in the deeds;

GIVEN the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, in www.gpdp.it, doc. web no. 1098801;

SPEAKER Dr. Augusta Iannini;

ALL THIS CONSIDERED

notes the unlawfulness of the processing of personal data carried out by the Municipality of Tivoli in the terms set out in the justification.

ENJOYS

to the same Municipality to pay the sum of Euro 6,000.00 (six thousand) according to the methods indicated in the attachment, 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 no. 689/1981.

Pursuant to art. 166, paragraph 8, of the Code, informs the aforementioned Municipality that «Within the term referred to in article 10, paragraph 3, of legislative decree no. 150 of 2011 envisaged for the filing of the appeal, the offender and the parties jointly liable may settle the dispute by adapting to the provisions of the Guarantor, where given, and by paying an amount equal to half of the fine imposed».

Pursuant to art. 78 of the GDPR, of the articles 152 of the Code and 10 of Legislative Decree no. 150/2011, communicates that against this provision it is possible to lodge an appeal before the ordinary judicial authority, within thirty days from the date of communication of the provision itself or within sixty days if the appellant resides abroad, under penalty of inadmissibility.

Rome, November 7th 2019

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia