[doc. web no. 9444865]

Injunction against Azienda Pluriservizi Macerata S.p.A. - June 18, 2020

Register of measures

no. 105 of 18 June 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Augusta Iannini, vice-president, Dr. Giovanna Bianchi Clerici and Prof. Licia Califano, members, and Dr. Giuseppe Busia, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and repealing 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 natural persons 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");

Given 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 Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Dr. Augusta Iannini;

WHEREAS

1. The complaint.

A trade union organization filed a complaint on behalf of an employee of Azienda Pluriservizi Macerata S.p.A., concessionaire of the local public transport service in the Municipality of Macerata, complaining that the Company, as an internal practice,

posted the document relating to the drivers' duty shifts, also containing information relating to some causes of employee absence. In particular, it was represented that the Company made available, in these ways, a document containing detailed information relating to the "daily service of all chauffeurs [which shows] the state of illness, injury, leave [pursuant to] law 104/92, of leave for serious health reasons [...] of its workers". This allegedly happened, despite the repeated objections raised by trade union organizations and employees, who raised profiles of violation of data protection regulations.

2. The preliminary investigation.

In response to the specific requests formulated by the Office, the Company declared that (cf., note of the XX, prot. n. XX)

- "the mod. XX [called] XX" was in use "until the last XX" and was aimed "solely at the organization of the urban public transport service" in order to allow the "drivers assigned to the guide to verify the correct application of the assignment criteria driving shifts, with particular regard to possible substitutions or changes";
- "it was considered, in fact shared with the personnel concerned, that this method related to pertinent and not excessive data in relation to the work performed";
- "the organization of the urban public transport service provides for the guarantee of continuity in the provision of the same, with the consequent need to reorganize work shifts in the event of absences of the originally assigned personnel";
- "in order to avoid possible conflicting situations, it was therefore decided to provide general indications that highlight the aspects impacting the organization of the daily service [and therefore] in addition to the service shifts, the information relating to the reasons for absence (with the individual names of the drivers indicated below)";
- the company confirmed that among the reasons for absence indicated were, in particular, those due to illness and use of the benefits deriving from law no. 104 of 1992 ("Absence due to illness" [...] "Absence for law 104" […]";
- "this information was posted on the bulletin board only in paper form in the room reserved for drivers, inside the tpl depot and, in no way, was communicated [...] or disclosed to third parties other than personnel authorized to drive the buses";
- on 18 June 2019 "the form in question was revised also with a view to adapting it to the requirements of EU Regulation 2016/679 and on the basis of the principle of minimizing the data communicated";
- the new model reports "only the identification data of the workers on duty and the related assigned shift [...] in order to provide the drivers on duty with mere information regarding the absence of colleagues, or the need to provide for any replacement for any of them".

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired from the checks carried out and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, notified the Company, pursuant to 'art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in article 58, paragraph 2, of the Regulation, inviting the aforesaid holder 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 law n. 689 of 11/24/1981).

In particular, the Office has found that the Company has periodically posted on company premises, up to the XX, prospectuses bearing personal data relating to the reasons for the absences of the drivers relating to the health conditions of the employees or their family members and cohabitants in violation of the principles of "lawfulness, correctness and transparency" as well as "minimization" of the treatment, art. 5, par. 1, lit. a) and c), of the Regulation, and of the articles 6 and 9 of the Regulation as well as art. 2 sexies of the Code.

With note of the XX (prot. XX) the Company sent its defense briefs, representing, among other things, that:

- "the local public transport service has its own headquarters [...] where the vehicle depot is located and from where the service and the operating operators depart [...] only the LPT operators";
- access "is forbidden to non-employees - therefore also to other company workers [...]" and the notice board "is placed in a sheltered place and not directly visible unless specifically known"; "this bulletin board is at the service of the activities relating to the drivers assigned to the LPT and only these employees can reach it since it is located inside the room with selected access, limited to only this part of the employees, and is intended for the communication of company provisions on the organization of the work of that specific department, not of others";
- local public transport requires the manager to fulfill a "series of obligations aimed at conforming the performance of the activity to standards of continuity, regularity, capacity and quality and, also in the light of European legislation, it falls on the concessionary companies, among the others, "the operating obligation" or rather that of "ensuring [...] a service that complies with certain standards of continuity, regularity and capacity";
- “the service contract (institution regulated by art. 19 of Legislative Decree 422/1997 and by European Regulation no. 1370/2007 [...] has specific obligations also related to planning and programming which are prerogatives that Legislative Decree no. 42271997 entrusts the Region with a regulatory function"; "the granting body must be assured certain standards of

service operation and the obligations of continuity, non-interruption, punctuality of the service [...] have been incorporated in the service charter [of the Company]";

- "in order to ensure maximum regularity of service [...] the company has adopted] tested organizational models [...] to remedy emergency situations in the event of replacement or additional personnel needs for unforeseen and unforeseeable cases";

- "The Operations Manager is present in the operating unit [...] manages all the activities and makes decisions in case of extraordinary needs"

- "given the small size of the branch of activity in relation to the size of other regional public transport companies" the "so-called disposition shift for which the public transport operators take turns taking control functions [...] intervening in case it is necessary to replace a driver [...]";

- "the preparation of the duty shift [...] had the function of enabling the operator [...] to make an immediate choice of the colleague to contact and call back to service". In particular, "knowing the reasons for the absence, the worker could examine the problem and decide which of the various absent colleagues to call back based on the specific need of the moment" [...] without having to carry out further research and steps which would inevitably lead to a slower reaction or impossible if such data were only available to human resources";

- given that "the task of LPT operators also includes the specific one relating to the selection of personnel to be called back to service, they were certainly authorized to process" and therefore "in fact the requirement required by art. 29 of the GDPR, so that the LPT operators are recognized as employees/persons in charge of processing under the responsibility of the Data Controller - also - of the data on absences, given the above description regarding the tasks entrusted";

- the treatment was dictated by the need to "reduce intervention reaction times to a minimum with the aim of ensuring maximum continuity and punctuality in the urban line service";

- with regard to the modification of the shift document, this would have been carried out in "application of the principle of maximum caution and not, instead, so that the organizational purpose is equally achieved [...] without knowing the specifics of the absence, in fact [...] will have to refer the evaluation to a human resources worker, who may be absent, because the working hours are different from the LPT tape, or not prepared for the solution of the problem as he operates in a completely different field";

- "the organizational methodology was perfectly shared, so much so that no operator ever raised questions relating to their own

privacy or that of colleagues";

- the data presented were "minimal and completely aseptic" as well as knowable by "a limited circle of workers" and "on the other side of the balance there is the need to always ensure the regularity and continuity [...] of the service", therefore the Company "assessed in good faith that the slightest compression of the right to privacy of only workers assigned to LPT [...] could be reasonable, not a source of risk for workers [...and] in any case recessive in view of the public purpose pursued , ie the obligation to prevent prolonged interruptions or even just delays in the service [...]";

- in any case, the Company "did not display data relating to disciplinary proceedings or personnel assessments on the scoreboard, but rather data whose harmful potential [...] is concretely minimal to negligible";

- "it must be assessed [that] the APM has autonomously taken steps to change its conduct (since 06/17/2019) by eliminating the posting of the reasons for absence also by virtue of the fact that minimizing the use of data is a trend process […and] changes according to needs, organizational and technical measures";

- for these reasons, the Company requests that the conduct be assessed as a minor violation, also "in the light of the provision of 3 July 2014 [web doc 3325317] for which in a similar case only the administrative prescription was assessed as applicable".

3. Outcome of the preliminary investigation.

On the basis of data protection regulations, the employer can process the personal data of employees, also relating to particular categories of data - which also include "data relating to health" (cf. art. 9, paragraph 1 of the Regulation) - if the treatment is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks established by laws, by community legislation, by regulations or by collective agreements (articles 6, paragraph 1, letter c), 9, paragraph 2, lit. b) and 4; 88 of the Regulation).

In this framework, with regard to the particular categories of personal data, including those relating to health (in relation to which there is a general prohibition of processing, with the exception of the cases indicated in Article 9, paragraph 2 of the Regulation and, in any case a regime of greater guarantee compared to other types of data, in particular, due to the effect of article 9, paragraph 4, as well as article 2-septies of the Code), the processing is permitted, to fulfill specific obligations "in matters of labor law [...] to the extent that it is authorized by law [...] in the presence of appropriate guarantees" (Article 9, paragraph 2, letter b), of the Regulation), or, when "necessary for of significant public interest on the basis of Union or Member State law, which must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for

appropriate and specific measures to protect the fundamental rights and interests of the interest to" (art. 9, par. 2, lit. g), of the Regulation).

The national legislator has defined the public interest for the processing "carried out by subjects who perform tasks of public interest or connected to the exercise of public powers" as "significant" in the matters indicated, albeit not exhaustively, by art. 2-sexies of the Code, establishing that the related treatments "are permitted if they are provided for [...] by legal provisions or, in the cases provided for by law, by regulations which specify the types of data that can be processed, the operations that can be performed and the reason of significant public interest, as well as the appropriate and specific measures to protect the fundamental rights and interests of the data subject".

In any case, the data controller is required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letters a) and c), of the Regulation).

In the light of the foregoing reconstruction, it should be noted at the outset that, as shown by the statements made by the Company, up until the twentieth century, as a result of consolidated company practice, the document with the duty shifts was regularly posted on the bulletin board placed in rooms reserved for drivers ("in a sheltered place and not directly visible unless specifically known"), inside the deposit of the vehicles, access to which is in any case forbidden to other company workers. For this reason, in the present case, the personal data contained therein were made known on a daily basis in favor of a determined or, in any case, determinable group of subjects, i.e. the personnel with the duties of driver employed in the local public transport service (cf. the definition of "communication" of personal data contained in article 2-ter paragraph 4, letter a), of the Code). The Company has confirmed that among the reasons for absence indicated to you were, in particular, those due to illness and use of the benefits deriving from law n.104 of 1992.

In general, information strictly connected to the performance of work activities, such as, in particular, the specific reasons for the absence of employees - such as individual leave leave or absence from service in the cases provided for by law or by collective labor agreements - are lawfully processed by the employer on the basis of specific regulatory provisions which also provide for obligations to communicate and send a specific certification to the employer and, depending on the case, also to

social security institutions.

These obligations are functional not only to justify the regulatory and economic treatment due to the worker, but also to allow the employer, in accordance with the law, to carry out the necessary checks and take the consequent decisions, or in order to allow employees to enjoy the benefits of the law, such as in the case of the facilitations provided for assistance to disabled family members, paid leave and leave for serious family reasons (see, on this point, paragraph 6, Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship employed by private employers, no. 53 of 23 November 2006, web doc. no. 1364939 and, not otherwise, paragraph 8 of the Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector, of 14 June 2007, web doc. n. 1417809).

However, these treatments must take place through "authorised" and duly "instructed" personnel regarding access to the data (articles 4, paragraph 10, 29, 32, paragraph 4, of the Regulation), when the conditions of lawfulness are met indicated above, in relation to the functions performed and the instructions given (see, on this point, paragraph 6, Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship employed by private employers, no. 53 of 23 November 2006, web doc. no. 1364939), to the extent that the data are adequate and relevant to implement the employment relationship within the framework of the regulatory provisions applicable to employment relationships (see articles 5, paragraph 1, letter c) and 88 of the Regulation).

It follows that the personal data of employees processed by the employer for the purpose of managing the employment relationship cannot be made known to subjects other than those who are part of the contractual relationship (see definitions of "personal data" and "interested party ", contained in article 4, paragraph 1, 1) of the Regulation), nor can they be processed by those who, due to the tasks performed, are not authorized to access such data.

Therefore, also considering the definition of "third party" (contained in art. 4, paragraph 1, 10) of the Regulations) the other employees assigned to the transport service are not entitled to deal with detailed information on the absences of colleagues, since, based on the tasks assigned, they cannot be considered authorized to access that data for the management of staff absences, also in view of the planning of work shifts (cf., Provv.ti 3 July 2014, n. 341, doc. web no. 3325317; July 31, 2014, no. 392, web doc. no. 3399423, and, more recently, Provision No. 500 of December 13, 2018, web doc. no. 9068983 but see, formerly Guidelines on the subject of processing of personal data of workers for the purpose of managing the employment

relationship in the public sphere of 14 June 2007 (web doc. n. 1417809, see, in particular, paragraphs 5.1, 5.2 and 5.3).

In the case in question, this role is performed, as shown by the Company's declarations, by certain corporate functions according to their respective responsibilities. In particular, in addition to those in charge of general personnel administration, the management of service shifts is assigned, by organizational choice of the owner, to a specific company function, that of the Operations Manager - who, in the operating unit dedicated to transport local public, "makes decisions in case of extraordinary needs" in order to ensure continuity of service. Where this is absent, this task is entrusted to the person who carries out the relative function, in his place and on the basis of a specific "shift of disposition".

Therefore, even in the presence of internal practices or organizational choices which, as in the present case, provide for the other employees in the service to assume the functions of the Store Manager "in turn", it cannot be considered compliant with the regulatory framework on the protection of data the processing of colleagues' data indiscriminately and simultaneously by all drivers.

In conclusion, the Company in providing the local public transport service can, in compliance with data protection regulations and in an equally effective way, post only the summary document of the daily shifts in areas available to the service personnel.

In any case, in consideration of the difficulties represented during the preliminary investigation with regard to the limited workforce assigned to the service and the need to simplify the phases of finding the personnel available to quickly provide for any replacements, the Company could have, if case, make more detailed information available, in compliance with the data minimization principle (for example, only the period of prolonged absence, without specifying the reason), only to the Director of the service or to the employee who, from time to time, in on the basis of the disposition shift, he performed its functions.

For these reasons, as emerged from the preliminary findings, the Company has given rise, in the absence of a suitable prerequisite of lawfulness, to an illicit communication of personal data to unauthorized third parties (see the definition of "communication" of personal data contained in article 2-ter paragraph 4, letter a), of the Code) in violation of articles 6 and 9, paras. 1, 2 and 4 of the Regulation and art. 2-sexies of the Code and in violation of the basic principles of treatment (Article 5, paragraph 1, letter a) and c) of the Regulation).

4. Conclusions.

The violation of the personal data object of the preliminary investigation by the Company took place in full force of the provisions of the Regulation and of the Code, as amended by Legislative Decree 101/2018, and which, therefore, for the

purpose of determining the regulatory framework applicable in terms of time (art. 1, paragraph 2, of law 24 November 1981, n. 689), these constitute the provisions in force at the time of the committed violation, which in the present case lasted until 18 June 2019.

The violation of the aforementioned provisions makes it applicable, pursuant to articles 58, par. 2, lit. i), of the Regulation, the administrative sanction provided for by art. 83, par. 5 of the Regulation, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering that with a subsequent organizational act the Company gave the order to use, starting from the XX, a different form with "only the identification data of the workers in service and the related assigned shift" (cf. note of 9 July 2019, cit.), 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; article 166, paragraph 7, of the Code).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the Board [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 - also considering the reference contained in art. 166, paragraph 2, of the Code – 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 the aforementioned elements, the particular delicacy of unlawfully processed personal data was considered (data relating to health, art. 4, paragraph 1, no. 15 of the Regulation), the violations relating to significant organizational profiles inherent to the current legislation on the matter as well as the failure to comply with the indications that, for some time, the

Guarantor has provided to public and private employers with the Guidelines referred to above and with numerous decisions on individual cases, such as for example the provision of 3 July 2014 (web doc. n. 3325317), moreover already known to the data controller, and, as confirmed, most recently, with the Prescriptive Provision of 5 June 2019 (web doc. n. 9124510).

On the other hand, it was considered that the Company, in any case, took steps to remove and modify company practice and collaborated with the Authority during the investigation of this proceeding. There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction in the amount of 4,000 (four thousand) euros for the violation of articles 5, par. 1, lit. a) and c) as well as articles 6 and 9, paras. 1, 2 and 4, of the Regulation and art. 2-sexies of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the particular delicacy of the data disclosed, 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 art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted that the conditions pursuant to art. 17 of Regulation no. 1/2019 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

notes the illegality of the processing carried out by the Pluriservizi Macerata S.p.A. for violation of the articles of the articles 5, par. 1, lit. a) and c) as well as articles 6 and 9, paras. 1, 2 and 4, of the Regulation and art. 2-sexies, paragraph 8, of the Code, in the terms set out in the justification;

ORDER

to the Pluriservizi Macerata S.p.A. Company, in the person of its pro-tempore legal representative, with registered office in V.le Don Bosco, 34 - 62100 Macerata - VAT number 00457550432, pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated in the justification; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the fine imposed;

ENJOYS

to the same Company to pay the sum of 4,000.00 (four thousand) euros, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, 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;

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, believing that the conditions set out in art. 17 of the Regulation of the Guarantor n. 1/2019.

Pursuant to art. 78 of the GDPR, of the articles 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, 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, 18 June 2020

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia