

[doc. web no. 9437853]

Injunction order against the Municipality of Montevago - 10 June 2020

Register of measures

no. 100 of 10 June 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Augusta Iannini, vice-president, Prof. Licia Califano and Dr. Giovanna Bianchi Clerici, 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 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 the "Code");

CONSIDERING the general provision n. 243 of 15/5/2014 containing the «Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged bodies», published in the Official Gazette no. 134 of 12/6/2014 and in www.gpdp.it, doc. web no. 3134436 (hereinafter "Guidelines of the Guarantor on transparency");

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, 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;

Supervisor Prof. Licia Califano;

WHEREAS

1. Introduction

This Authority has received a report from Mrs. XX (hereinafter "the whistleblower") regarding the illegitimate dissemination of her personal data online by the Municipality of Montevago.

In particular, as verified on the basis of the preliminary investigation carried out by the Office, it emerged that on the institutional website of the aforementioned Municipality, from the area dedicated to the online praetorian register, section "XX", it was possible to download, by filling in the specific form search mask, the attachment to the XX having as object: «XX».

The aforementioned note published online contained XX, with clear indication of the relative name and surname, as well as the fact that XX, therefore, the administration would have XX.

The Municipality of Montevago replied to the request for information from the Office and with a note dated XX confirmed the removal of the reporting person's personal data from the institutional website.

2. Applicable legislation.

Pursuant to the GDPR, the processing of personal data carried out by public entities (such as the Municipality) is lawful only if the processing is 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).

It is also foreseen 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, GDPR) with the consequence that the provision contained in art. 19, paragraph 3, of the Code, in force at the date of the facts, where it establishes that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when required by law or of regulation.

3. Preliminary evaluations of the Office on the processing of personal data carried out.

From the checks carried out on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the Municipality, by disclosing the personal data of the whistleblower - contained in the annex to the XX concerning: "XX", published on the institutional website - has carried out a treatment of personal data that does not comply with the relevant regulations on the matter of personal data protection contained in the GDPR. Therefore, with the same note the violations

carried out were notified to the Municipality (pursuant to article 166, paragraph 5, of the Code), communicating the initiation of the procedure for the adoption of the measures referred to in article 58, par. . 2, of the GDPR and inviting the aforementioned Municipality to send the Guarantor defense writings or documents and, possibly, to ask to be heard by this Authority, within the term of 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).

4. Defensive memories and hearing.

With the note prot. no. XX of the XX the Municipality of Montevago sent its defense writings to the Guarantor in relation to the notified violations.

In this regard, it should be specified that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code, entitled «False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor».

Specifically, in relation to the disputed facts, the Municipality highlighted that "the municipality of Montevago, over the years, has computerized all the municipal offices to make a total transition to digital, standardizing the whole system in order to simplify the administrative activity and render a better service to the citizen. This efficiency improvement process has required, and still requires, adequate training of personnel who, even due to their advanced age, are not easily inclined to implement IT innovations. [...] The administration can only regret what happened and [...] has activated all the procedures to avoid the repetition of similar cases".

As for the conduct held, it was highlighted that the treatment concerned only one interested party and did not concern particular data. Furthermore, the culpable nature of the violation is evident. The entity also represented that it had immediately taken steps to obscure the part of the measure subject to the report.

On the 20th date, the hearing requested by the Municipality of Montevago pursuant to art. 166, paragraph 6, of the Code on the occasion of which the Municipality represented, in addition to what has already been reported in the documentation sent, that «the Municipal Administration has been informed of the termination of the Guarantor's proceeding, subject to contesting the violation. From that date, therefore, the terms set forth in art. 14 of law 689/1981, today widely elapsed, without revealing any other preliminary activity, since the dispute already occurred in July of the XX and, in any case, it is reiterated, declared

extinguished in September XX".

5. Outcome of the investigation relating to the report presented

In the specific case submitted to the examination of the Guarantor, the object of the complaint by the whistleblower appears to be the dissemination of personal data online by the Municipality of Montevago contained in the annex to the XX published on the institutional website.

The aforementioned note published online contained XX

In relation to the contested matter, the Municipality objected - preliminarily - to the lateness of the dispute due to the expiry of the ninety-day deadline set by art. 14, paragraph 2, of the law n. 689 of 11/24/1981, as the Municipality had already been the recipient of the note containing the "outcome of the preliminary investigation" prot. no. XX of the XX (date which according to the Municipality would correspond to the «assessment»), while the contestation of the violation would have taken place with the note prot. no. XX of the XX.

Nonetheless, it is not possible to accept the exception presented by the Municipality regarding the expiry of the ninety-day term provided for by art. 14, paragraph 2, of the law no. 689/1981, as it is not applicable to the case in question. In fact, it must be remembered that on 19/9/2018 the new art. 166 of the Code (as amended by Legislative Decree no. 101 of 10/8/2018), which, in paragraph 7, precisely in relation to the adoption of the sanctioning measure, no longer provides for the application of art. 14 of law 689/1981 as not expressly referred to.

In the present case, relating to the violation of the provisions contained in the RGPD, the art. 166, paragraph 5, of the Code (reformed by Legislative Decree no. 101/2018) in the light of which, with note prot. no. XX of the XX, steps were taken to ascertain the conduct held in violation of the RGPD by notifying the offender of the violations carried out with the simultaneous initiation of the procedure for the adoption of the measures referred to in article 58, par. 2, of the GDPR; exactly, therefore, in the ways, forms and terms provided for by the provisions referred to.

As for the merits, in relation to the conduct held, even if some observations of the Municipality are worthy of consideration, it is not possible to completely overcome the findings notified by the Office with the deed of initiation of the procedure, as they are not sufficient to allow the archiving of this proceeding, since none of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019.

In this regard, in fact, confirming the preliminary assessments of the Office, the unlawfulness of the processing of personal

data carried out by the Municipality of Montevago is noted, as the dissemination on the institutional website of the reporting person's personal data contained in the annex to the XX having subject: «XX» published on the institutional website occurred in the absence of suitable regulatory conditions, in violation of art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3 of the Code in force since 19/9/2018), and of the art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR.

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

Considering, however, that the conduct has exhausted its effects, as the Municipality has taken steps to remove the personal data of the whistleblower described above, without prejudice to what will be said on the application of the pecuniary administrative sanction, the conditions for the adoption of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

6. Adoption of the injunction order for the application of the administrative fine (articles 58, paragraph 2, letter i; 83 GDPR)

The Municipality of Montevago appears to have violated the art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the RGPD as well as of the art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3, of the Code).

In this regard, the art. 83, par. 3, of the GDPR, provides that «If, in relation to the same treatment or related treatments, a data controller or a data processor violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction will not exceeds the amount specified for the most serious violation".

In this 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 GDPR, which therefore applies to the present case.

It should also be taken into account that, although the document covered by the report, published online, dates back to XX, in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - given the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the XX in which the GDPR became applicable.

Indeed, the preliminary investigation documents revealed that the illicit online dissemination ceased in XX (the month in which the Municipality declared that it had removed the whistleblower's personal data from the institutional website).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR as well as art. 166 of the Code, has the corrective 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, depending on the circumstances of every single case". In this framework, «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).

The aforementioned pecuniary administrative sanction imposed, according to 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 GDPR.

In relation to the aforementioned elements, the reported conduct in violation of the regulations on the protection of personal data concerned the dissemination of personal data not belonging to particular categories or to criminal convictions or crimes (articles 9 and 10 of the GDPR) of a single interested party and which lasted for just over a year. The Municipality of Montevago is a small local entity with less than 3,000 inhabitants and the administration promptly took action to remove the personal data object of the report, collaborating with the Authority during the preliminary investigation of the present proceeding in order to remedy the violation - the nature of which, given what the Municipality has stated, appears to be culpable - mitigating its possible negative effects. There are no previous relevant GDPR violations committed by the Municipality of Montevago

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine pursuant to art. 83, para. 2 and 3, of the RGPD, the amount of the pecuniary sanction, provided for by art. 83, par. 5, of the RGPD, in the amount of 2,000.00 (two thousand) euros for the violation of articles 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the RGPD as well as of the art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3 of the Code), as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same GDPR.

In relation to the specific circumstances of the present case, relating to the dissemination of personal data on the web in the absence of a suitable regulatory basis, it is also believed that the ancillary sanction of the publication of this provision on the

institutional website of the Guarantor must be applied, envisaged by art. . 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation 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

having detected the illegality of the treatment carried out by the Municipality of Montevago pursuant to articles 57, par. 1, lit. f), and 83 of the GDPR, as well as art. 166 of the Code for the violation of the articles 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the RGPD as well as of the art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3 of the Code),

ORDER

pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the RGPD, and 166, paragraph 2, of the Code, to the Municipality of Montevago, in the person of its pro-tempore legal representative, with registered office in Piazza Della Repubblica, 4 - 92010 Montevago (AG) – Tax Code 92006330846, to pay the sum of 2,000.00 (two thousand) euros as an administrative fine for the violations referred to in the justification;

ENJOYS

to the same Municipality to pay the sum of 2,000.00 (two thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law no. 689/1981.

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

HAS

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

delegated to the Guarantor.

Pursuant to art. 78 of the GDPR, of the articles 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, 10 June 2020

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia