

[doc. web n. 9590711]

Order injunction against TECNOMEDICAL S.r.l. - March 25, 2021

Record of measures

n. 109 of 25 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 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / CE, "General Data Protection Regulation" (hereinafter, "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 bearing the "Code regarding the protection of personal data", containing provisions for the adaptation of national law to the Regulation (hereinafter the "Code");

GIVEN the Regulation n. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved by resolution no. 98 of 4/4/2019, published in the Official Gazette n. 106 of 8/5/2019 and in www.gpdp.it, doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

Having seen the documentation in the deeds;

Given the observations made by the secretary general pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and operation of the Office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Speaker prof. Pasquale Stanzione;

WHEREAS

1. The Complaint

On 4 March 2020, Mr. XX, through his lawyer, exercised against TECNOMEDICAL S.r.l. (hereinafter the "Company") with registered office in Casale Monferrato (AL), Via Sosso n. 12, CAP 15033 - Tax Code / VAT No. 01874630062, the right referred to in art. 15 of the Regulation, requesting access to personal data in order to obtain a copy of the medical record and medical documentation related to the osseointegrated dental implant surgery to which he underwent "in December 2008 and

January 2009 (...) at the local unit of Arquata Scrivia (AL) of TECNOMEDICAL S.r.l. ".

This request was not followed by any response within the terms indicated in art. 12, par. 3, of the Regulations and, following this, the interested party, on 14 April 2020, through his lawyer, submitted, pursuant to art. 77 of the Regulations, formal complaint to this Authority.

2. The preliminary activity.

With note prot. n. 19185 of 26 May 2020, the health facility was formally invited by the Office to adhere to the complainant's requests no later than 20 days from receipt of this invitation.

By e-mail dated July 16, 2020, the complainant, through his lawyer, informed this Authority that he had not received any feedback within the terms indicated in the aforementioned invitation to join.

On 10 August 2020, with note prot. n. 30287, the Office then notified the health facility, as data controller, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulations, having ascertained that the health facility had not provided an answer to the request for access to data made by Mr. XX, nor found the invitation formulated by the Office in the context of the procedure relating to the complaint presented by the interested party pursuant to art. 77 of the Regulation; this, in violation of art. 12, par. 3, and art. 15 of the Regulation.

With a note dated 2 September 2020, the health facility, through its lawyer, sent its defense writings in relation to the notified violation, representing, in particular, that:

- "The rights (...) claimed by the complainant are in any case prescribed both pursuant to art. 2043 of the Italian Civil Code that pursuant to Article 2946 of the Italian Civil Code, referred to by law no. 24 of 08/02/2017 "Gelli Law", having passed both the five-year and ten-year deadlines for the request given that, as specified by Mr. XX, the last intervention operated by my client dates back to January 2009, as specified both in the letter sent by the lawyer of the XX, who in the notification of the sanction that initiated today's proceeding (...) ";

- "(...) it is important to underline that pursuant to art. 4.3 D.M. 14/02/97, determination of the modalities so that the radiological and nuclear medicine documents and the existing reports are promptly made available for subsequent medical needs, pursuant to art. 111, paragraph 10, of the legislative decree n. 230, which refers to art. 3 letter a) of the decree itself, the radiological and nuclear medicine documents that consist of the iconographic documentation produced following the diagnostic investigation used by the specialist doctor, as well as that produced in the context of radiodiagnostic activities complementary

to clinical practice, must be maintained for a period of not less than ten years; a term which therefore passed at the time of the request for documentation dated 18 September 2019 ";

- "(...) These certain elements are also suitable to precisely circumscribe and exclude the existence of any harm to the complainant as a result of the exponent's delay in providing him with the required documentation, only partially in a legitimate way, for reasons of set out below. The only complaint of which Tecnomedical S.r.l. can take charge against his will, is attributable to a whole series of problems / misunderstandings with his accountant, as a result of which he has not carried out a correct use and control of the Certified E-mail tool, only to realize upon receipt of the complaint of your Authority, of the development that the affair was taking on. As proof of the preceding statement and of the good faith of the legal representative of the exponent, as well as of the collaborative will and the transparency of the conduct of the same (...), all the documentation in possession is attached to these observations (doc. 4), which will be sent at the same time to the defender of the XX ".

The Company has not requested to be heard by this Authority pursuant to art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, from l. n. 689 of November 24, 1981.

On 15 September 2020, the lawyer of the complainant wrote to the Authority, notifying that "Tecnomedical S.r.l. on 02/09/2020 he found only partially - and well beyond the deadline set in the invitation to join of 25/05/2020 - the request for delivery of the entire medical record and any other documentation related to the surgery osseointegrated implant dentistry carried out on the person of my client in December 2008 and January 2009 at the local unit of today's company ".

3. The legislation on the protection of personal data

The Regulation, in Articles 12 and ss. providing for the "rights of the interested party", provides for the right of the latter to obtain from the data controller the information requested pursuant to Articles from 15 to 22 of the same Regulation (in the specific case, pursuant to art. 15 and Recital 63), without undue delay and, in any case, at the latest within one month of receipt of the request. This, unless one of the cases of limitation of the rights of the interested party occurs, strictly indicated in art. 23 of the Regulation and 2-undecies of the Code, which are not conferring with respect to the matter in question.

If he does not comply with the request of the interested party, the data controller informs the latter without delay, at the latest within one month of receiving the request, of the reasons for the non-compliance and of the possibility of proposing a complaint to a supervisory and propose a judicial appeal (Article 12, paragraph 4, of the Regulation). In the same sense, Recital 59 of the Regulation itself provides that "the data controller should be required to respond to the requests of the interested party (...) and

to justify any intention not to accept such requests".

4. Outcome of the preliminary investigation

In light of the aforementioned assessments, it is noted that the statements made by the data controller in the defense writings ☐ whose truthfulness may be called upon to answer pursuant to art. 168 of the Code ☐ although worthy of consideration, they do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the filing of this procedure, however, none of the cases provided for by the art. 11 of the Guarantor Regulation n. 1/2019.

In the case in question, in fact, the aforementioned Company, as the data controller, did not respond to the request for access to data made by Mr. XX on 4 March 2020, nor represented the reasons for this non-compliance; moreover, it did not respond to the invitation to join formulated by this Authority with note prot. n. 19185 of 26 May 2020. Only following the opening of the procedure aimed at the adoption of the measures referred to in art. 58, par. 2, of the Regulations, the Company responded to the complainant, on 2 September 2020, or 182 days from the date on which the interested party had exercised his right of access to the data, therefore, well beyond the deadline set by art. 12 of the Regulation.

This response was deemed unsuitable by the complainant, as it was not exhaustive with respect to all the documentation requested. In particular, in response to the access request pursuant to art. 15 of the Regulations to the "complete medical record of the osteointegrated implant surgery performed by the staff of Tecnomedical S.r.l. on the person of the applicant in December 2008 / January 2009 (including anamnesis, informed consent, preventive, clinical diary, implant passport 1.5, photographs and anything else contained therein), as well as any documentation (pre and post-operative) relating intervention in question ", the data controller has provided the interested party with the following documentation:

- "Radiography of 21/05/2009
- Estimate of the interventions to be carried out dated 01/12/2008
- Radiography of 11/20/08
- Registration and Medical History Form and Declaration of Consent "(see note dated 2 September 2020).

In relation to the latter documentation, it appears, however, from the documents, that it is the only documentation in the possession of the Company, as in the defense brief presented to this Authority pursuant to art. 166, paragraph 6, of the Code, the data controller, through his lawyer, declared that "(...) all the documentation in possession, (...) will be simultaneously sent to the defender (...) (of the complainant)".

In light of the above, the violation of the aforementioned provisions is therefore confirmed; this violation makes the administrative sanction provided for by art. 83, par. 5 of the Regulations, as also 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 the corrective measures referred to in art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (Articles 58, paragraph 2, letter i), and 83 of the Regulations; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i), and 83 of the Regulations, as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary 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 each single case "and, in this context," the College [of the Guarantor] adopts the injunction order, with which it also disposes with regard to the application of the ancillary administrative sanction of its publication, in whole or in excerpt, on the website of the Guarantor pursuant to Article 166, paragraph 7, of the Code "(Article 16, paragraph 1, of the Guarantor Regulation no. 1/2019).

In this regard, the violation of the aforementioned provisions is subject to the application of the pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation.

The aforementioned administrative fine, imposed according to the circumstances of each individual case, must be determined in the amount taking into account the principles of effectiveness, proportionality and dissuasiveness, indicated in art. 83, par. 1, of the Regulation, in light of the elements provided for in art. 83, par. 2, of the Regulation. In relation to these elements, it is considered that the causes determining the repeated non-response by the Company - both to the request for access to the data advanced by the interested party in the exercise of the rights and to the invitation to adhere formulated by this Authority - consisting , on the basis of what was declared by the Company itself, in "a whole series of problems / misunderstandings with his accountant, as a result of which (the owner) has not carried out a correct use and control of the Certified E-mail tool, to realize only upon receipt of the complaint of your Authority, of the development that the affair was taking on ", do not exclude, nor mitigate, the responsibility of the data controller. However, it is taken into account that the Company, having become aware of the proceeding in question, has sent to the complainant all the documentation which the Company has declared to be in possession of and that there are no previous relevant violations committed by the latter or previous provisions pursuant to art.

58 of the Regulation charged to the same.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction, in the amount of 7,000.00 (seven thousand) euros for the violation of art. 12, par. 3 and art. 15 of the Regulation.

It is also believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is noted that the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

WHEREAS, THE GUARANTOR

ORDER

to TECNOMEDICAL S.r.l. with registered office in Casale Monferrato (AL), Via Sosso n. 12, CAP 15033 - C.F./P.IVA 01874630062 pursuant to art. 58, par. 2, lett. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 7,000.00 (seven thousand) euros as a pecuniary administrative sanction for the violation indicated in the motivation; 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 sanction imposed;

INJUNCES

to the same Company to pay the sum of 7,000.00 (seven 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 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 l. n. 689/1981;

HAS

the publication of this provision on the website of the Guarantor 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, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation.

Pursuant to art. 78 of the Regulation, of art. 152 of the Code and 10 of the legislative decree 1 September 2011, n. 150, against this provision, it is possible to 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 applicant resides abroad.

Rome, March 25, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei