

Injunction against Osimo Servizi s.p.a. - June 14, 2018

Register of measures

no. 385 of 14 June 2018

THE 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 dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

HAVING REGARD TO the proceeding initiated following a report, received by the Authority on 23 February 2016, in which the Authority was asked to verify the compliance with the legislation on the protection of personal data of a biometric type presence detection system used by the company PARK.O S.p.a. (now called Osimo Servizi S.p.a.), as well as a request for an opinion presented by the same company on 9 March 2016, aimed at obtaining information on the correct use of the biometric detection reader "in order to avoid incurring liability actions" ;

NOTING that the Special Privacy Unit of the Guardia di Finanza, in execution of the request for information no. 17204 of 12 May 2017 formulated pursuant to art. 157 of the Personal Data Protection Code – Legislative Decree 30 June 2003 n. 196 (hereinafter referred to as the "Code"), carried out the checks referred to in the reports of operations carried out on 26 and 27 June 2017 at Osimo Servizi S.p.a., with registered office in Osimo (AN), Piazza del Comune n. 1, tax code 02071990424 (hereinafter the "Company"). During these investigations, with reference to the "record of employee attendance", it emerged that:

to. on 4 February 2016, the Company purchased "n. 3 terminals, installed in three different locations, i.e. the first inside the company's administrative headquarters; the second at the vehicle depot (...) and the third at the maxi car park (...). The aforementioned three terminals are all connected to a single server (...). At present, the detection devices in question are active and functioning. In particular, through the same, it is possible to detect the presence of personnel in a double and alternative way, i.e. by means of a magnetic badge or with the detection of a fingerprint" (see minutes of 26 June 2017, page 2);

b. the presence detection system based on the processing of biometric data was installed to "increase the degree of security (...) also with the aim of preserving the entire heritage of public and private interest. In consideration of the hardware structure of the detection system used, Osimo Servizi S.p.a. deemed it likely to fall within the case referred to in the provision of 12 November 2014 where the presentation of the verification request to the Guarantor is not considered mandatory" (see the aforementioned report, page 3);

c. at present, the presence detection system "is entirely and fully functional. In fact, it is active only for the use of the magnetic badge", while with reference to the use of biometric detection, this is currently used, for experimental purposes, only by two employees (see report cited, page 4);

d. the biometric system used is designed to extract the so-called template from the footprint without any image storage. The biometric terminals associate the template with the code of the employee's personal badge and "in the case of acquiring presence with the biometric procedure, the terminals only send the code of the magnetic badge and not the template" (see report of 27 June 2017, page 7);

And. with reference to the notification obligation pursuant to art. 37, paragraph 1, lett. a), of the Code, "no notification was made to the Guarantor, as, on 7 March 2016, a specific request for an opinion concerning the lawfulness or otherwise of the use of the installed systems had been formulated to the Guarantor. In this regard, the requested Authority formulated, on 25 May 2016, a request for further information to which we did not reply. The Authority sent a further request for information via pec on 26 January 2017, to which a response was provided on 23 March 2017. In this period of time and to date, the trials have been carried out as per it was discussed, not deeming the use of temporarily acquired data worthy of attention in terms of the processing of biometric data" (cited report, page 8);

CONSIDERING the report no. 54/2017 of 10 July 2017, notified to the Company on 12 August 2017, which is understood to be referred to in full here, with which Osimo Servizi S.p.a., in the person of its pro-tempore legal representative, was charged with the administrative violation envisaged by art. 163 of the Code in relation to art. 37, paragraph 1, lett. a), of the Code, relating to the obligation to notify the Guarantor for the processing of biometric data, informing it of the right to make a reduced payment pursuant to art. 16 of the law n. 689/1981;

DETECTED from the report prepared by the Special Privacy Unit of the Guardia di Finanza, pursuant to art. 17 of the law n. 689/1981, that the reduced payment has not been made;

HAVING REGARD TO the written defense presented on 8 September 2017, pursuant to art. 18 of the law n. 689/1981, with which the Company observed that a "thorough assessment of the technical characteristics of the plant in question, allow it to be excluded from the scope of operation of the standard referred to in the dispute by the Finance Police, i.e. of art. 37, paragraph 1, lett. a), Legislative Decree 196/2003". According to the party, the type of system installed does not use the user's biometric data, but "exclusively a reference numerical code, processed by a mathematical algorithm". Therefore, no violation of the art. 37 of the Code can be charged to you. It was also reiterated that this system was "only being tested and tested by some employees" and that "the obligation envisaged by the legislation would only arise when said use was applied to all employees". Considering, then, that the notification envisaged by the law consists "in a declaration with which a public or private entity informs the Guarantor for the protection of personal data of the existence of an activity of collection and use of personal data (definition taken from the site www.garanteprivacy.it), without a doubt Osimo Servizi actually made this declaration when it spontaneously contacted the Authority, requesting a specific opinion regarding the correct use of the reader with biometric detection", thus respecting the rationale of the norm. Lastly, the Company requested the dismissal of the sanctioning procedure and, alternatively, the application of the mitigating factor pursuant to art. 164-bis, paragraph 1, in consideration of the very small number of subjects involved (only 2 out of 38 employees), as well as good faith and the circumstance that, even before the notification of the dispute report, it was decided to interrupt the testing and cancellation of any data collected;

NOTING that the arguments put forward are not suitable for excluding the liability of the party in relation to the disputed matter. A first and preliminary observation should be made regarding the technical characteristics of the attendance tracking system used by the company which, examined as a whole, do not allow it to be excluded from the scope of application of art. 37 of the Code. In fact, as has been repeatedly underlined by the Guarantor in its provisions (order n. 554 of 22 October 2015, web doc. 4630919, order n. 65 of 16 February 2017, web doc. n. 6460781), when the fingerprint of the data subject is acquired to then be transformed into an alphanumeric code, through a procedure called enrollment, and converted into a template, personal data processing is carried out pursuant to art. 4, paragraph 1, lett. b), of the Code, even if the data is not kept or memorized. Contrary to what was held by the party, it is noted that the preliminary verification request pertains to an obligation other than that of notification, as clarified in the aforementioned "Prescriptive general provision in the field of biometrics" no. 513 of 12 November 2014 (published in the Official Journal n. 280 of 2.12.2014, in www.garanteprivacy.it, web doc. n. 3556992). Here,

in fact, the Guarantor has identified the types of personal data processing (in biometric form) with respect to which it is not necessary to present the preliminary verification request pursuant to art. 17 of the Code and without prejudice to the further obligations, borne by the data controller, to "adopt the technical, organizational and procedural measures and devices (...), as well as to respect the conditions of legitimacy and the indications contained in the attached lines- guide (...)", which establishes the obligation for the data controller to notify the Guarantor, pursuant to articles 37, paragraph 1, lett. a), and 38 of the Code (point 4.5.2 of Annex a) to the aforementioned provision). Therefore, it is noted that the system used by the company, consisting in taking a fingerprint and transforming it into a numerical code, elaborated by a mathematical algorithm, carries out a treatment of biometric data for which it is necessary to present the notification to the Guarantor. Furthermore, regardless of the fact that the use of biometric data was still in an experimental phase and concerned a small number of employees, it should be noted that the treatment in any case started when the biometric data was acquired by the employees (so-called enrollment) and, therefore, the holder should have already proceeded with the notification to the Guarantor, based on the provision of art. 38 of the Code. Finally, the observation according to which the request for an opinion formulated by the company on 9 March 2016 must be considered as a notification must be rejected. The latter, in fact, is a fulfillment that requires the data controller to communicate to the Guarantor a series of information relating to the type of treatment to be started as well as relating to the data controller himself. This information flows into the CD. Register of treatments which is freely accessible and consultable, in order to provide every guarantee for the protection of the interested parties;

NOTING, therefore, that Osimo Servizi S.p.a. as data controller, pursuant to articles 4 and 28 of the Code, has failed to notify the Guarantor, pursuant to articles 37 paragraph 1, lett. a), and 38 of the Code, before the start of the treatment;

CONSIDERING the art. 163 of the Code which punishes the violation of the provisions of articles 37 and 38, with the administrative sanction of the payment of a sum from twenty thousand euros to one hundred and twenty thousand euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code according to which "if any of the violations pursuant to art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied to an extent equal to two fifths";

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 8,000.00 (eight thousand) euros for the violation pursuant to art. 163;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981 n. 689, and subsequent modifications and additions;

HAVING REGARD TO the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Prof. Licia Califano;

ORDER

to Osimo Servizi s.p.a. based in Osimo (AN), Piazza del Comune n. 1, tax code 02071990424, to pay the total sum of 8,000.00 (eight thousand) euros as a pecuniary administrative sanction for the violation provided for by art. 163 of the Code as indicated in the motivation;

ENJOYS

to the same Company to pay the sum of 8,000.00 (eight 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 deeds pursuant to art. 27 of the law of 24 November 1981, n. 689, prescribing that, within 10 (ten) days from the payment, receipt of the payment must be sent to this Authority, in original or certified copy.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 14 June 2018

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia