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Injunction order against ASL n. 2 Savonese - 14 November 2019

Register of measures

no. 210 of 14 November 2019

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dr. Augusta Iannini, vice president, of dr. Giovanna Bianchi Clerici and of prof. Licia Califano, members, and of 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 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.gdpd.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

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 (www.gdpd.it, web doc. n. 1098801);

SPEAKER Dr. Giovanna Bianchi Clerici;

WHEREAS

1. Introduction

This Authority received a report complaining of an alleged violation of the relevant regulations on the protection of personal data, following the sending, during the months of July - September 2018, by the Local Health Authority no. 2 Savonese (hereinafter "ASL" or "Health Company") to the Company Officine Ortopediche Rizzoli S.r.l. (hereinafter "OOR Company") of n.

25 requests relating to the supply of health devices, together with the "Provision of prosthetic assistance paid for by the National Health Service" forms containing personal data relating to the health of patients, to obtain from the OOR Company the presentation of economic offers, for the supply of the aforementioned devices (see note of 27 November 2018).

With a note dated 29 January 2019 (prot. n. 9339), the ASL provided a reply to the Authority's request for information, dated 7 January 2019 (prot. n. 530), aimed at ascertaining in what capacity the same ASL had sent requests relating to the supply of health devices including the aforementioned medical prescriptions, as well as the legal conditions that would have made the aforementioned communication to the OOR Company lawful.

Specifically, the Extraordinary Commissioner and the Company Data Protection Manager, with declarations of the truthfulness of which are criminally liable pursuant to art. 168 of the Code, represented, among other things, that:

"despite the instructions given some employees of [their] offices for mere material error, attributable to lack of awareness, carelessness forwarded the communications in question without providing for the obscurity of personal data, in contrast with the ordinary practice followed by the corporate structures";

"this company has immediately taken steps to adopt (... omitted ...) precise measures identified in further written instructions aimed at obscuring, in requests for services to the third party supplier, unnecessary data or to use only the identification codes of the requested product".

2. Applicable law

The processing of personal health data is generally prohibited, pursuant to art. 9, par. 1, of the RGPD, unless one of the cases provided for by par. 2, of the same article.

In any case, the data controller is required to respect 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 GDPR).

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, also through the documentation sent by the OOR Company, and the facts that emerged following the preliminary investigation, the Office ascertained that the aforementioned communication of data on the health of no. 25 patients was carried out in the absence of the legal conditions, provided for by

art. 9 of the GDPR.

The violation of this provision is one of those for which the application of corrective measures pursuant to art. 58, par. 2 of the GDPR and the administrative sanction pursuant to art. 83, par. 5 lett. a) of the GDPR.

Therefore, in relation to the aforementioned violation, the notification provided for by art. 166, paragraph 5, of the Code, communicating the start of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the GDPR and inviting the aforementioned ASL 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 art. 18, paragraph 1, of law n. 689 of 24 November 1981).

4. Defensive memories

With a note dated March 12, 2019, the Local Health Authority sent its defense writings to the Guarantor in relation to the notified violation.

Specifically, the Extraordinary Commissioner of the Local Health Authority, after having briefly summarized the terms of the matter, represented, among other things, that:

- a) "the error concerned only the Albenga health district; contrary to what was previously stated (see note of 29 January 2019, prot. n. 9339), the sending of requests relating to the supply of medical devices together with medical prescriptions containing personal data relating to the health of patients, would comply with the standard and in any case respectful of the rights and freedoms of patients, as such information should necessarily have been sent so that the choice of the medical device could be the most appropriate and suitable for the patient";
- b) "the no. 25 patients would have been adequately informed verbally and their consent would also have been obtained";
- c) "to have adopted the regulation for the processing of sensitive and judicial data (Resolution n. 863 of 12 September 2013), which, in file n. 13 B regulates the processing of personal data in the context of "Prosthetic Assistance";
- d) "the right to lodge a complaint with the Supervisory Authority is recognized only to the interested party and that, therefore, [the same] having been proposed by the OOR Company must be archived".

With a subsequent note dated 11 April 2019, the Local Health Authority essentially reiterated its defensive arguments, underlining "the absolute good faith of the closing party who in any case had previously implemented every useful precaution aimed at guaranteeing the correct treatment of personal data".

5. Outcome of the investigation relating to the report presented

As a preliminary point, it should be noted 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 "False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor".

With reference to the present case, it should be noted that the arguments put forward by the ASL, aimed at demonstrating the groundlessness of the disputed matter, do not allow the findings notified by the Office to be overcome with the deed of initiation of the procedure and are therefore not suitable for determining the closure of the sanctioning procedure. This because:

- with reference to point a), it should be noted that the processing of personal data on health must take place in compliance with the principles established by art. 5, par. 1, lit. a) and c), according to which the data must be processed lawfully or on the basis of a suitable legitimizing prerequisite (articles 6 and 9 of the GDPR) and must be adequate, pertinent and limited to what is necessary with respect to the purposes for which are processed and must be processed, only if the purpose of the processing is not reasonably achievable by other means (principles of lawfulness, correctness, transparency and minimization; see also Cons. n. 39). In the present case, although for the supply of the aforementioned devices it was necessary to indicate specific elements relating to the pathologies of the recipients of the same, the request for estimates by the ASL should not have entailed the transmission of the forms of "Provision of prosthetic assistance of the National Health Service", containing identification data of the interested parties;
- with reference to point b), without prejudice to what was previously noted regarding the absence of the need to send lists of names, the ASL has not in any case produced any document suitable to demonstrate that it has informed the patients and that they have acquired their consent that, moreover, in the present case, it would not have constituted a valid legal prerequisite for the communication of the aforementioned data to OOR, considering the evident imbalance between the interested parties and the data controller (see cons. n. 43 of the RGPD);
- in relation to point c), it should be noted that the regulation for the processing of sensitive and judicial data adopted at the time by the ASL does not provide, in Form no. 13, dedicated to the processing of personal data in the context of prosthetic assistance, no communication of health data for the purpose of requesting estimates for the purchase of prosthetic devices;
- as regards point d), it should be noted that the Guarantor's control of the relevant regulations regarding the processing of

personal data can be initiated independently of the presentation of a complaint, on the basis of reports (art. 144 of the Code) or even of office.

For all of the above, the illegality of the processing of personal data on health carried out by the ASL is noted, for having communicated the forms of "Provision of prosthetic assistance paid by the National Health Service" containing personal data on the health of n. 25 patients to a private entity (the OOR Company), in violation of the basic principles of treatment, pursuant to art. 5 of the GDPR and in the absence of a suitable legal prerequisite, in violation of art. 9 of the GDPR.

In this context, considering that the conduct has exhausted its effects and that suitable assurances have been provided by the data controller, regarding the implementation of measures aimed at eliminating the causes that led to the violation, the conditions do not apply for the adoption of corrective measures, of a prescriptive or inhibitory type, pursuant to art. 58, par. 2 of the GDPR. However, it is believed that the extremes referred to 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.

6. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i; 83 GDPR; article 166, paragraph 7, of the Code)

The violation of the articles 5, par. 1, lit. a) and c), and 9 of the GDPR, caused by the conduct put in place by the ASL, is subject to the application of the administrative fine pursuant to art. 83, par. 5, letter. a) of the GDPR.

The Guarantor, pursuant to articles 58, par. 2, lit. the); 83 of the GDPR 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).

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 GDPR.

In relation to the aforementioned elements, the following is highlighted:

1) the ASL declared that it had "immediately put in place every useful precaution aimed at guaranteeing the correct processing of personal data and all the necessary measures aimed at the correct elimination of the causes that could have led to the

disservice itself. Moreover, a subsequent verification carried out made it possible to ascertain and confirm that it was a restricted phenomenon limited to a small district" (see defense briefs of 12 March 2019 and 11 April 2019);

2) the ASL, with a note dated 17 January 2019, which modifies that of 8 January 2019, addressed to the directors of health districts, provided specific instructions relating to communications with suppliers, in particular, providing that "the requests for estimates sent to third party suppliers they will only have to indicate the identification code of the facility and any city where to supply it (not the address of the patient, nor his personal data and even less the pathology or other health data)";

3) the conduct concerned the communication to third parties of particular categories of data (related to health) pursuant to art. 9 of the GDPR, subject to specific protection as by their nature they are particularly sensitive taking into account that the processing of such data, in certain contexts, can cause significant risks for the fundamental rights and freedoms of natural persons (Cons. n. 51) involving, however, a small number of patients (n. 25);

4) the data controller, as soon as he becomes aware of the violation in question, has:

promptly implemented corrective measures aimed at eliminating the causes that generated the disputed conduct;

collaborated with the Authority during the investigation and in this proceeding;

declared to have paid, over time, particular attention "to the current provisions on privacy, taking care to timely outline its organizational system, organizational and technical measures, and the methods and criteria for processing data in compliance with the law, also providing and training its own personnel" (see defense brief of 03/12/2019);

5) no further reports or complaints have been received with respect to the conduct involved in this proceeding; furthermore, there are no previous relevant violations committed by the data controller, nor have any provisions pursuant to art. 58 of the GDPR.

Due to the aforementioned elements, evaluated as a whole, pursuant to art. 83, par. 2 lett. a), c), d), e) f), g) and i) of the GDPR, it is therefore decided to determine the amount of the pecuniary sanction provided for by art. 83, par. 5, letter. a) of the GDPR, in the amount of 8,000 (eight thousand) euros for the violation of articles 5 and 9 of the GDPR, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the same RGPD, effective, proportionate and dissuasive.

In this context, in consideration of the extent of the processing, the number of interested parties potentially involved, the type of particular data subject to unlawful processing, it is considered, pursuant to art. 166, paragraph 7, of the Code, and of the art.

16, paragraph 1, of the Guarantor Regulation n. 1/2019, that this provision should be published on the Guarantor's website.

ALL THIS CONSIDERED

notes the illegality of the processing of personal data carried out by the ASL n. 2 Savonese in the terms referred to in the justification.

ORDER

to the ASL n. 2 Savonese, with registered office in Via Manzoni 14 – Savona, CF/P. 01062990096, in the person of the pro-tempore legal representative, to pay the sum of 8,000.00 (eight thousand) euros by way of administrative fine for the violations indicated in this paragraph;

ENJOYS

to the same ASL n. 2 Savonese to pay the sum of 8,000.00 (eight thousand) euros 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 law no. 689/1981.

Pursuant to art. 166, paragraph 8, of the Code, notifies the aforementioned ASL «Within the term referred to in article 10, paragraph 3, of legislative decree n. 150 of 2011 envisaged for the filing of the appeal, the offender and the jointly liable parties can 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, 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, November 14th 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia