[doc. web n. 9732406]

Injunction order against "Antonio Cardarelli" National Relief Hospital - 25 November 2021

Record of measures

n. 407 of 25 November 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by 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 the "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of individuals with regard to to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46 / EC (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");

GIVEN the documentation in the deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

SPEAKER Attorney Guido Scorza;

WHEREAS

1. Introduction.

On the occasion of some checks carried out as part of a proceeding against the hospital of national importance "A. Cardarelli

"it was ascertained that in the" Transparent Administration "section of the same Company, in the" Competition notices "section, by accessing the URL http: // ..., numerous deeds and documents containing personal data (eg rankings, appeals administrative, resolutions; see service report, in documents) relating to the competition based on qualifications and exams for the coverage of XX.

As verified by the Office, these documents - which could be downloaded in "pdf" format - contained numerous personal data, also relating to particular categories and health, as well as personal contact details, tax code, participation code in the competition assigned to each candidate, telephone number, residential address, personal PEC address of the participants in the procedure (see service report of XX, cit.).

In particular, among the deeds and documents that were published, there were, for example, resolution no. XX of the XX, with which candidates who have passed the pre-selection test (Annex A) as well as participants exempt from this test are admitted to the competition pursuant to art. 20 l. n. 104/1992 (annex B); the merit ranking of the competition; the intermediate rankings relating to the different phases of the procedure, broken down by single date and time of the relative test (results of the oral tests; results of the practical test; results of the written test); the deeds and the determination of admission with reserve of some candidates to the various tests, with express indication of the relative reasons (e.g. litigation in progress) or deeds of exemption of some candidates from carrying out the tests (notice of candidates admitted subject to practical test; list candidates admitted to the revised oral exam); documents relating to the appeal proceedings of the insolvency procedure by certain candidates (eg administrative appeals; notifications for public proclamations, judgments and orders of the administrative judge in the context of the same proceedings); Resolution XX of XX, which provided for the use of the merit ranking relating to the competition for the recruitment of new staff to be employed to deal with the epidemiological emergency from Covid -19 (to which the definitive ranking was attached, also complete with the column "Annotations" in which there were indications such as, "admitted with reserve" "precedes by age" "employee reserve").

2. The preliminary activity.

With a note of the twentieth, the Office, on the basis of the elements acquired, 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 art. 58, par. 2, of the Regulation, inviting the aforementioned data controller to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of the Law No.

689 of November 24, 1981). With the aforementioned note, the Office objected to the data controller for the dissemination of personal data, in violation of the general principles of processing and in the absence of a suitable legal basis, in violation of Articles 5, par. 1, lett. a) and c), 6 and 9 of the Regulations and art. 2-ter, paragraphs 1 and 3 and 2 sexies of the Code, as well as in violation of the prohibition of disclosure of health data pursuant to art. 2-septies, paragraph 8, of the Code.

With a note dated the XXth, the Company sent its defense briefs, attaching the necessary documentation to prove the measures taken with regard to the treatments in progress against employees, and specifying, among other things, that:

- "the A.O.R.N. Cardarelli in the XX with the previous Management, announced the insolvency procedure for the coverage of XX;

- “About 14,000 candidates applied for the selection. The call for the bankruptcy procedure has attracted very high media attention, representing a great job opportunity for many young unemployed or precarious workers. Right from the start, that is, before even starting the selections, complaints were received for alleged favoritism or risks connected with the correct completion of the competition ";

- "the strategic line taken by the General Management then in office was to give ample emphasis to the need for maximum transparency of all procedural steps in order to dispel any doubts about the correctness of the insolvency transactions" also in consideration of the fact "that, pending the definition of the procedure, most of the companies of the S.S.R. approved the use of the competition ranking in agreement ";

- "the first measure that was adopted in the initial phase was, therefore, materialized with the computerization of the procedure for submitting applications, through the assignment [to an external company] of the service of" online application management and computer preselection for admission [...] following a "security incident (so-called data breach) [...] a whole series of measures were taken to ensure maximum protection of personal data [...] in particular, the Administration [...] has joined the So.Re.Sa. S.p.A. for an overall regional management of the adjustments necessary to fully comply with the regulatory requirements provided for by the Regulation [… and] has joined the CONSIP SPC Cloud - Digital Identity Services and Application Security convention ";

- the Strategic Management, which took over from the previous one, proved to be "immediately sensitive to data protection matters and, aware of its social but also strategic importance for the Company, adopted the principle of accountability and founded the implementation and maintenance plan for corporate compliance with the GDPR ";

- "[...] under the new Company Management, the dynamic process of compliance of the entire public health facility with the new legislation on the protection of personal data has been almost entirely completed";

- "following a private negotiation conducted on MEPA, has entrusted [... to another company] the service (permanent and not only dedicated to individual bankruptcy procedures assigned from time to time) of support, via an IT platform / software, to the completion of the selection procedures required by the UOC GRU ";

- "as soon as the notice of initiation of the sanctioning procedure was received, it immediately activated for the removal from the portal of all the documents relating to the insolvency procedure in question [...] in order to promptly adopt all the safety measures and improvement of the paths authorizations for the publication of documents and news on the Company portal ";

- "it was therefore ordered to" remove from the portal, section "transparent administration", competition announcements page referring to the competition [in question] all the documents present [... and carried out checks in order to ascertain the presence of] other competitions for which the provisional rankings relating to the intermediate tests have been published and with the cancellation when possible or the correction of the documents, when publication is still mandatory ";

- “the editorial committee of the portal www.ospedalecardarelli.it was also established in order to dictate the guidelines for the publication of the contents and to supervise the verification of the topics to be included in the portal. The D.P.O. moreover, it invites us to implement what has been stated in the training courses […] in order to avoid the unfortunate inconveniences, as highlighted by the GDPD ”;

- the Company "then invited the R.U.P. and the Head of Corruption and Transparency to order all the corrective measures necessary to mitigate the effects of the alleged violations contested and ordered them to prepare a document containing the guidelines to guide the work of all the offices involved in the U.O.C. Human Resources Management, to be sent in advance to the DPO to obtain the relative opinion ";

- "on day XX all the deeds and documents relating to the procedure in question containing potentially harmful data were removed from the portal";

- On XX [... the] Head of Corruption and Transparency sent the U.O.C. TOWER CRANE. the "Guidelines" containing the first operational indications "in order to allow the Human Resources Management UOC to comply with specific publication obligations deriving from the legislation on transparency".

The hearing requested by the Company was also held on the 20th, pursuant to art. 166, paragraph 6, of the Code, on the

occasion of which, in confirming what has already been declared in the defense briefs, it was represented, among other things, that:

- "the violations occurred in the largest hospital in the South, where no bankruptcy proceedings had been carried out for over ten years";
- "in the procedure, against the 20 places available, about 14,000 candidates participated, and immediately appeals and reports of possible fraud were received by the Company, even before the tests were completed. In this context, the publication of the various documents on the Company's website is the result of a choice of extreme transparency, based on assessments made by the previous strategic management, in office at the time of the procedure ";
- "after only two days from the Authority's objections, the complete removal of the documents deemed to be overabundant and / or anonymizing all the data in the documents for which the publication obligation was deemed to exist was deemed to exist";
- a company expert in organizing and carrying out insolvency procedures was entrusted in order to support the administration in its completion and a new software was purchased for the management of competition procedures; a permanent technical body has been set up to monitor the publication of the documents on the website ";
- "in the context of the same insolvency procedure, as a result of the security incident that occurred during the same, a sanction has already been imposed against the Company [...] and" taking into account that the new conduct that is the subject of the Authorities originated in the same context as this procedure, the filing of this procedure is requested ";
- "the administration intends to highlight the numerous initiatives undertaken to improve compliance with the Regulation, also implemented in the delicate emergency period in progress, asking to take into account the level of cooperation with the Authority, for the purposes of this proceeding".

3. Outcome of the preliminary investigation.

Public subjects, even when they operate in the performance of insolvency, selective or in any case evaluative procedures, preliminary to the establishment of the employment relationship, can process the personal data of the interested parties (Article 4, No. 1, of the Regulation) if the processing is necessary "to fulfill a legal obligation to which the data controller is subject" (think of specific obligations under national legislation "for recruitment purposes", art. 6, par. 1, lett. c), 9, par. 2, lett. b) and 4; 88 of the Regulation) or "for the execution of a task in the public interest or connected to the exercise of public authority vested in the data controller" (art. 6, par. 1, lett. C) and e) of Regulation and art. 2-ter of the Code in the text in force at the time in

which the facts and conduct subject to dispute refer, prior to the changes made by Legislative Decree no. 8 October 2021, n. 139).

In this regard, it should be noted that - pursuant to the regulations in force at the time of the conduct - the "dissemination" of personal data (such as online publication), by public entities requires the provision of "a law or, in cases provided for by law, regulation "(art. 2-ter, paragraphs 1-4, of the Code, then amended by the aforementioned legislative decree 8 October 2021, n. 139).

With regard to the particular categories of personal data, including those relating to health - in relation to which a general prohibition of processing is envisaged, with the exception of the cases indicated in art. 9, par. 2 of the Regulation and, in any case, a system of greater guarantee than other types of data, in particular, as a result of art. 9, par. 4, as well as art. 2-septies of the Code -, the processing is allowed to fulfill specific obligations "in the field of labor law [...] to the extent that it is authorized by law [...] in the presence of appropriate guarantees" (Article 9, par. 2 , letter b), of the Regulation) as well as where "necessary for reasons of significant public interest on the basis of Union or Member State law, which must be proportionate to the purpose 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 data subject "(Article 9, paragraph 2, letter g), of the Regulation). The national legislator has defined the public interest as "relevant" for the processing "carried out by persons carrying out tasks of public interest or related to the exercise of public authority" in the matters indicated, albeit in a non-exhaustive manner, by art. 2-sexies of the Code, establishing that the relative treatments "are allowed if they are provided for by European Union law or, in the internal system, by legal provisions or, in the cases provided for by law, by regulations specifying the types of data that can be processed, the operations that can be carried out 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, data relating to health, ie those “relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health” (art. 4, par. 1, n. 15, recital 35), due to the particular sensitivity of this category of data, "cannot be disclosed" (art. 2-septies, paragraph 8 and art. 166, paragraph 2, of the Code and art. 9 , par. 1, 2, 4, of the Regulation; see already art. 22, paragraph 8, of the previous Code).

The data controller is also required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", on the basis of which personal data must be "processed lawfully. , correct and

transparent towards the interested party "and must be" adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed "(art. 5, par. 1, lett. a) and c) of the Regulation).

4. The dissemination of personal data of the participants in the competition procedure

From the assessment made on the basis of the elements acquired, as well as from the specific declarations of the Company, the data controller, it is ascertained that the same has published, in the "Transparent Administration" section of its institutional website, deeds and documents containing personal data, including relating to particular categories and the health of candidates in a specific competition procedure.

First of all, it should be noted that, based on the provisions of the regulations on transparency, pursuant to Legislative Decree no. 33, "Without prejudice to the other legal publicity obligations, the public administrations publish the competition notices for the recruitment, for any reason, of personnel at the administration, as well as the evaluation criteria of the Commission, the traces of the tests and the rankings final, updated with the possible scrolling of the eligible non-winners. Public administrations publish and constantly update the data referred to in paragraph 1 "(Article 19, paragraphs 1 and 2).

In this context, as recently highlighted by the Guarantor (see provisions 29 April 2021, n. 170, web doc. 9681778; 25 March 2021, n. 106, web doc. 9584421 and 11 March 2021, n. 89, web doc. N. 9581028), with the exception of the "final rankings", the legislative decree 14 March 2013, n. 33 and the provisions on transparency, recalled by the Company during the investigation, cannot constitute a suitable legal basis for the online dissemination of most of the deeds and documents published by the Company (e.g. determinations that report the assessments of the examination or order the exclusion or admission with reservation of certain candidates; deeds relating to the appeal proceedings of the competition procedure by certain candidates, etc.), in relation to which, based on the current regulatory framework, it is not in fact there is no mandatory publication obligation for transparency purposes.

From a different point of view, it is also recalled that the Guarantor has clarified on several occasions that ", considering the profile of the different applicable legal regime, the provisions that regulate the disclosure obligations of the administrative action for transparency purposes [to which the regime provided for by d. lgs. n. 33/2013 (term of 5 years for maintaining the document on the web, indexing obligation, possibility of reuse, etc.)] from those regulating forms of advertising for different purposes "(see" Introduction "). In this context, “they must be considered extraneous to the object of […] legislative decree [n. 33/2013] all the publication obligations provided for by other provisions for purposes other than those of transparency, such as

the obligations of publication for the purposes of legal advertising, supplementary advertising of effectiveness, declarative advertising or news (see Guidelines cit, doc . web n. 3134436), and, among these, also the specific regulatory provisions that establish, in general, the publicity of the results of the competitive tests and of the rankings of competitions and selective procedures in the public sector (on the point Guidelines cit., spec . II, par. 3.b). These provisions (see Article 7, Presidential Decree 10 January 1957, no. 3; as well as Article 15, Presidential Decree 9 May 1994, no. 487, in particular, paragraphs 5, 6 and 6 bis and, more generally, on advertising of the procedures for the recruitment of public administration personnel, Article 35, paragraph 3, of Legislative Decree 30 March 2001, no. forms of protection of one's rights and control of the legitimacy of the administrative action but also these provide that only the final rankings of the winners of the competition are published "in the praetorian register of the relative body" and not also, in particular, the results of the tests or the personal data of non-winning, non-admitted competitors or the lists of subjects admitted with reserve (see Article 15, paragraph 6-bis, of Presidential Decree 9/5/1994, n. to lending in public administrations i and the procedures for carrying out competitions, single competitions and other forms of recruitment in public employment).

More generally, it should be noted that even the presence of a specific advertising regime cannot entail any automatism with respect to the online dissemination of personal data and information, nor an exception to the principles regarding the protection of personal data, such as - among others - that of "minimization", according to which personal data - also contained in deeds or documents whose online dissemination is provided for by a specific regulatory basis - must be not only "adequate" and "relevant", but also "limited to what is necessary with respect to the purposes for which they are processed "(Article 5, paragraph 1, letter c) of the Regulation). The data protection discipline in fact provides that the owner must put in place "adequate technical and organizational measures to ensure that, by default, only the personal data necessary for each specific purpose of the processing are processed" and must be "able to demonstrate ”that they have done so in light of the principle of accountability (articles 5, par. 2, 24 and 25, par. 2, of the Regulations).

In the specific context relating to the advertising obligations of competition rankings, in fact, the Guarantor specified that, in any case, "data concerning the contact details of the interested parties cannot be published (think of fixed or mobile telephone users, residential address or e-mail address, tax code, Isee indicator, the number of disabled children, the results of psycho-aptitude tests or educational qualifications), nor those concerning the health conditions of the interested parties including references to invalidity, disability or physical and / or mental handicap "(part II, par. 3.b Guidelines cited; see also the

Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship within the public, provision of June 14, 2007, n.161, web doc n.1417809).

In light of the foregoing considerations, it must be concluded that the publication on the institutional website, section "Transparent Administration" of the Company of all the acts described above (with the sole exception of the "final" ranking, pursuant to art. 19 d. n. of articles 5, 6, 9 of the Regulation and of articles 2-ter, 2-sexies and 2-septies, paragraph. 8 of the Code (in the text prior to the amendments made by Legislative Decree No. 139/2021).

5. Conclusions.

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 and indicative of the full cooperation of the data controller in order to mitigate the risks of the processing, compared to the situation present at the time of the investigation, they do not, however, allow to overcome the findings notified by the Office with the act of initiation of the procedure and are therefore insufficient to allow the filing of this proceeding, since none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

For the purposes of determining the applicable law, in terms of time, the principle of legality referred to in art. 1, paragraph 2, of the l. n. 689 of 11/24/1981, according to which the laws that provide for administrative sanctions are applied only in the cases and times considered in them (principle of the tempus regit actum). This determines the obligation to take into consideration the provisions in force at the time of the committed violation which, considering the permanent nature of the alleged offense, must be identified at the time of cessation of the unlawful conduct, which occurred, according to what was declared by the data controller. , on day XX.

The preliminary assessments of the Office are therefore confirmed and the unlawfulness of the processing of personal data carried out by the Company in violation of the general principles of processing as well as in violation of Articles 5, 6, 9 of the Regulation and of the articles 2-ter, 2-sexies and 2-septies, paragraph 8 of the Code (in the text prior to the changes made by Legislative Decree 139/2021).

The violation of the aforementioned provisions also makes the administrative sanction applicable pursuant to art. 58, par. 2, lett. i), and 83, para. 4 and 5, of the Regulation.

In acknowledging that the data controller has, during the investigation, taken steps to conform the treatment to the principles of

the Regulation (also adopting technical and organizational measures suitable to avoid the occurrence of similar treatments in the future) and that, therefore, the conduct has exhausted its effects, it is noted that the conditions for the adoption of corrective measures, pursuant to art. 58, par. 2, of the Regulation.

6. 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, taking into account art. 83, par. 3, of the Regulations, in this case the violation of the aforementioned provisions is subject to the application of the same administrative fine provided for by art. 83, par. 5, of the Regulation.

The aforementioned administrative fine imposed, depending on the circumstances of each individual case, must be determined in the amount taking into account the elements provided for by art. 83, par. 2, of the Regulation.

For the purposes of applying the sanction, it was considered that the processing involved the dissemination of numerous deeds and documents containing personal data, including those relating to the health of the participants in the insolvency procedure, in violation of the regulations on the protection of personal data and that the data controller has operated in the mistaken belief of being able to pursue, in this way, the aim of transparency of the administrative action, without taking into account the current regulatory framework and the indications provided over time by the Guarantor to all public entities on the matter (both with the "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purposes of advertising and transparency on the web by public entities and other obliged entities" mentioned above, and with numerous decisions on individuals cases).

On the other hand, it was considered that the data controller has in any case provided his extensive cooperation during the investigation, taking steps to remove the effects of the conduct and to initiate, in at the same time, the necessary investigations to ensure full compliance also of future treatments with the provisions on data protection, in compliance with the principle of

accountability.

For the purposes of measuring the overall sanction, it was also considered that the Authority became aware of the event during the checks carried out by the Office as part of a different procedure against the same owner, then defined with provision no. 160 of 17 September 2020 (web doc no. 9461168). In this regard, it is believed that the previous violations committed by the Company - being consequent to the failure to regulate relations with the company that had managed certain phases of the same insolvency procedure and to the subsequent security incident relating to the data contained in the participation applications -, do not specific precedents can be considered "relating to the same object" (Article 83, paragraph 2, letter i) of the Regulation) with respect to the conduct in question, which despite having been carried out in the same context, refers to treatments for heterogeneous purposes .

On the basis of the aforementioned elements, evaluated as a whole, it is considered to determine the amount of the pecuniary sanction, in the amount of € 50,000.00 (fifty thousand), for the violation of Articles 5, 6, 9 of the Regulation and of the articles 2-ter, 2-sexies and 2-septies, paragraph 8, of the Code (in the text prior to the changes made by Legislative Decree 139/2021).

Taking into account the nature of the data being disseminated online and the specific risks for the rights of the data subjects, 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 by art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is believed that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

notes the unlawfulness of the processing carried out by the Antonio Cardarelli National Relief Hospital for the violation of Articles 5, 6, 9 of the Regulation and of the articles 2-ter, 2-sexies and 2-septies, paragraph 8, of the Code (in the text prior to the changes made by Legislative Decree 139/2021).

ORDER

to the National Relief Hospital "Antonio Cardarelli", in the person of the pro-tempore legal representative, with registered office in Naples - cap 80131, Via A. Cardarelli, n. 9, Tax Code 06853240635, pursuant to articles 58, par . 2, lett.i), and 83, par. 5, of the Regulations, to pay the sum of 50,000.00 (fifty thousand) euros as a pecuniary administrative sanction for the violations indicated in the motivation; pursuant to article 166, paragraph 8, of the Code, it has the right to settle the dispute by paying, within the term of thirty days, an amount equal to half of the sanction imposed;

INJUNCES

to the "Antonio Cardarelli" National Relief Hospital, to pay the sum of € 50,000.00 (fifty thousand) in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, according to the methods indicated in attached, within thirty days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to article 27 of law no. 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 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, November 25, 2021

THE VICE-PRESIDENT

Cerrina Feroni

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei