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Injunction order against the Ministry of Economic Development - 11 February 2021

Register of measures

no. 54 of 11 February 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components and the cons. Fabio Mattei, 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”);

CONSIDERING the d. lgs. 30 June 2003, no. 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 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 and in www.gpdp.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, in www.gpdp.it, doc. web no. 1098801;

Speaker Prof. Pasquale Stanzione;

WHEREAS

1. Introduction

Following the publication of some press reports, this Authority opened an investigation against the Ministry of Economic Development (MISE) regarding the dissemination of personal data and information on the institutional website which occurred in a manner that did not comply with the regulations on personal data protection. On the same issue, several reports and a complaint from Mr. XX were also received in a short space of time.

Specifically, the preliminary investigation carried out by the Office revealed that at the url https://... there was a web page entitled «List of Managers» in which personal data (name, tax code, and -mail) and complete curriculum vitae (with further personal data such as, for example, mobile phone, education and training, detailed professional experiences, in some cases also a copy of the identification document and health card, etc.) referring to more than five thousand subjects concerned, included in the list of «Qualified Managers and Consulting Firms».

Furthermore, at the url https://... it was possible to download the annex to the directorial decree of the Ministry of Economic Development of the twentieth century with which the aforementioned «list of qualified managers and consultancy companies established pursuant to the decree Ministerial XX and formed on the basis of the data and information declared by the applicants", containing personal data and information of all the aforementioned subjects (including name, tax code, e-mail).

2. Reference regulatory context of the publication.

The 2019 budget law provided for specific forms of incentive through the provision of contributions for innovation consultancy ("Voucher") in favor of micro, small and medium-sized enterprises «for the purchase of consultancy services of a specialist nature aimed at supporting technological and digital transformation processes [...]» provided by consultancy companies or qualified managers, registered in a special list (hereinafter "MISE list" or "List of managers") established by specific decree of the Minister of Economic Development (art. 1, paragraphs 228 et seq., of law 12/30/2018, n. 145).

The aforementioned law provided that this decree should establish "the necessary requisites for registration in the list of consultancy companies and qualified managers, as well as the criteria, methods and formal obligations for the disbursement of contributions and for the possible reserve of a portion of the resources to be allocated primarily to micro and small businesses and business networks" (paragraph 228).

In implementation of the provisions of the aforementioned paragraph, the Ministerial Decree of 7/5/2019 (hereinafter

"Ministerial Decree") was therefore adopted which regulated the matter, dictating the provisions «application of the non-repayable grant, in the form of voucher ».

Furthermore, this Ministerial Decree, in order to detail some aspects related to the concrete disbursement of the voucher, has delegated to a further administrative act - specifically, to a "decree of the Director General for business incentives" - the detailed identification of "methods and deadlines for the presentation of applications for registration in the list of qualified managers and consultancy companies authorized to carry out managerial duties" as well as the approval of the "application form for admission to the contribution", the "deadlines for the presentation [of the itself]», of the «criteria for evaluating applications and for the priority assignment of available resources» (articles 5, paragraph 1; 6, paragraph 1).

In this regulatory framework, the Decree of the Director General for incentives for companies in the 20th century entitled «Voucher for consultancy in innovation. Procedures and deadlines for the presentation of applications for registration on the list» (hereinafter "managing decree").

In the aforementioned directorial decree, in addition to containing the provisions for the presentation of applications for registration on the list, it was envisaged that «After the deadlines for the transmission of applications for registration [...], with provision of the Director General for incentives to companies the Mise list is published, according to the scheme set out in annex n. 4, made available in the specific "Voucher for consultancy in innovation" section of the Ministry's website (www.mise.gov.it)» (art. 4, paragraph 1). Annex no. 4 cited appears to contain a table to be filled in with the following fields: surname, first name, tax code, contact e-mail (personnel or consultancy firm), cv link, consultancy firm, subject already registered in other lists of innovation managers , professional experience in carrying out managerial tasks in the areas referred to in Article 3 of the Ministerial Decree of 7 May 2019 (number of years), area of interest.

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

With the note prot. no. XX of the XX the MISE provided a response to the request for information from the Office (prot. n. XX of the XX).

With respect to what is represented, following 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 Ministry of Economic Development - by disseminating personal data online (name, tax code, e-mail) and complete curriculum vitae (with further personal data such as, for example, mobile phone, education and training,

professional experiences, etc.) referring to more than five thousand interested parties, included in the list of "qualified managers and consultancy companies" - has carried out personal data processing that does not comply with the relevant regulations on the protection of personal data contained in the RGPD.

The delay in the appointment of the Data Protection Officer (DPO) of the MISE was also ascertained, as well as in the communication to this Authority of the related contact details, both of which took place after 25/5/2018 in which the GDPR became mandatory , in violation of the art. 37, paragraphs 1 and 7, of the European Regulation.

Therefore, with the same note no. XX the aforementioned Ministry was notified of the violations carried out (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 RGPD, inviting the MISE to send the Guarantor defensive writings or documents and possibly to ask to be heard by this Authority, within 30 days (art. 166, paragraphs 6 and 7, of the Code; as well as art. 18, paragraph 1, of Law No. 689 of 11/24/1981).

4. Defensive briefs, hearing and evaluations of the Guarantor.

The Ministry of Economic Development has sent to the Guarantor - with notes prot. no. XX of the XX, prot. no. XX of XX – own written defenses in relation to the notified violations. Furthermore, on the 20th date, via remote videoconference, the hearing requested by the MISE pursuant to art. 166, paragraph 6, of the Code, during which further documentation was filed and additional clarifications were provided.

In this regard, it should be noted that, unless the fact constitutes a more serious offence, anyone who, 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».

4.a. On the legal basis of the treatment

The Office contested the MISE violation of art. 2-ter, paragraphs 1 and 3, of the Code - which provides for the possibility, for public subjects, of disclosing personal data only if this operation is provided for "by a provision of law or, in the cases provided for by law, by regulation" - as it considered that the discipline envisaged by articles 3 ff. of the 20th Directorial Decree, could not constitute a suitable regulatory prerequisite for the dissemination of personal data pursuant to the Code, taking into account that the aforementioned directorial decree does not have a regulatory nature and is not, in any case, in any way

referred to by art. . 1, paragraphs 228, 230 and 231, of the law n. 145/2018 (which provide for the establishment of the list of managers).

It was also noted that the art. 4 of the aforementioned directorial decree does not provide for the complete publication of the CVs of the managers sent, including all the personal data contained therein, but, at most, of the "MISE list", i.e. the list including the "persons authorized to carry out the tasks managerial positions subject to facilitation» (according to the definition contained in article 1, paragraph 1, letter b, of the directorial decree).

OBSERVATIONS OF THE MISE

In this regard, the MISE in the note prot. no. XX of the XX - the contents of which are also partly taken up in the "document concerning the objections raised by the Guarantor" attached to the hearing report of the XX - provided a detailed reconstruction which is essentially based on the following arguments:

- "art. 4 of the DD [i.e. the Directorial Decree] refers for the publication of the MISE List to the scheme in Annex 4, which provides, among other things, a section containing the link to the manager's CV. Therefore, the combined provisions of art. 4 and annex 4, referred to therein, allows us to peacefully believe that the DD expressly provided for the dissemination of data that have been published by the Ministry";
- "the reference to the "regulation" [contained in the Code], given the aseptic formulation, is reasonably to be understood as a generic and broad reference to provisions of a secondary nature, therefore regulatory side sensu";
- «the "regulations" can be constituted by all the secondary normative sources, and therefore with a subjective origin of the executive, which are subject to the laws. And in this context both the DM and the DD who execute it are placed";
- "art. 2-ter, paragraph 1, of the Privacy Code, in referring to the "regulation", given the absence of any normative reference to the law of 23 August 1988, n. 400, which specifically regulates the procedure for adopting traditional regulatory sources, i.e. the "regulatory container", and given the diffusion of atypical secondary sources already at the time of the issue, intends to recall - in general, and not specific terms - a regulatory act having the nature of a source subordinated to the law [...]";
- «[as regards the] interpretation of the condition to which the regulatory source must comply in order to be able to identify the legal basis for the processing of personal data ("in the cases provided for by law") [, a] literal interpretation of this sentence allows us to detect how the legislator has not in any way circumscribed even the reference to the prior identification of the processing of personal data in a provision of primary rank. [...] In other words, in order for a regulation to constitute a suitable

legal basis, it must be considered sufficient that the law identifies even only indirectly - and therefore through implementing rules which it provides for the adoption - the processing of personal data, having the primary source only the role of source of legitimation of the exercise of regulatory power by the administration».

- «On the other hand, reasoning to the contrary, it appears completely unreasonable to imagine that the law must always directly identify the legal bases for the processing of personal data, regulating the executive methods in detail, not being able to leave the identification of such cases";

- «[…] where a reading of art. 2-ter, paragraph 1, of the Privacy Code more restrictive than the one set forth, would inevitably end up conflicting with the specific provisions of the RGPD regarding the provisions that may constitute - within the legal systems of the various Member States - the "basis legal" for the processing of personal data";

- "In this regard, it must be reiterated that in the framework of the Regulation - and in particular according to what is expressly provided for in recital 41 - this legal basis can be constituted by any provision, expressly even if not of primary rank and not necessarily adopted following a procedure legislative: "where this regulation refers to a legal basis or a legislative measure, this does not necessarily require the adoption of a legislative act by a parliament"";

- «Therefore, it would be inconsistent with the clear provisions dictated by the EU legislator to adopt an interpretative approach aimed at restricting (however unjustifiably, given the observance of the principle of legal certainty, guaranteed by the publicity ensured to the sources in question) the scope of the regulatory sources which may constitute a legal basis for the processing, excluding rules which, in compliance with the aforementioned constitutional coordinates in the field of implementing rules, are clear, precise and predictable in their application, such as those dictated by the DD".

- "As provided for by art. 6, co. 3, 2nd para. of the GDPR, the rule of law or regulation which constitutes the legal basis referred to in letters c) and e) of the co. 1 of the art. 6 of the GDPR, could contain, among other things, an indication of the types of data being processed, the subjects to whom the personal data may be disclosed, the processing operations and procedures, etc. The phrase "could contain" implies and also admits the possibility that the law (in the case in question the 2019 budget law) does not specify this information, the identification of which is presumed to be left to the Data Controller. Considering the silence of the budget law on this matter, it is the owner, therefore the MiSE, which has found itself having to define the type of data processed (identification and professional), the subjects to whom the personal data can be communicated (indeterminate subjects), the processing operations (collection and dissemination)" (declaration contained in the attachment to the report of

the hearing).

ASSESSMENTS OF THE GUARANTOR

The legal reconstruction offered by the MISE, certainly useful for the purpose of assessing the conduct, does not appear suitable for overcoming the critical remarks raised and is based on an interpretation of the combined provisions of the provisions of the RGPD with those of the Code, which cannot be accepted in this site for the following reasons.

The GDPR establishes that the processing of personal data carried out by public subjects is lawful if 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). In this context, as also correctly recalled by the MISE, recital no. 41 of the RGPD indicates that where the aforementioned European regulation "refers to a legal basis or a legislative measure, this does not necessarily require the adoption of a legislative act by a parliament, without prejudice to the provisions of the constitutional order of the Member State interested. [The important thing is that] such a legal basis or legislative measure [is] clear and precise, and its application predictable, for the persons subject to it, in accordance with the case law of the Court of Justice of the European Union (the 'Court of Justice") and of the European Court of Human Rights".

Recital no. 41 should therefore not be interpreted in an isolated and decontextualized manner, as the Ministry would seem to do, but in a systematic manner and in conjunction with the other provisions in force applicable to the specific case - already referred to by the Office in the note prot. no. XX of the XX – such as art. 6, par. 2 of the GDPR and art. 2-ter, paragraphs 1 and 3, of the Code.

Indeed, the GDPR explicitly provides that «Member States may maintain […] more specific provisions to adjust the application of the rules of the [RGPD] with regard to the treatment, in accordance with paragraph 1, letters c) and e) [of the 'art. 6, par. 1], determining more precisely specific requirements for the treatment and other measures aimed at guaranteeing lawful and correct treatment […]" (Article 6, paragraph 2, of the RGPD). It is, in this context, that the Code has established specific requirements for the treatment, establishing that, in the case of dissemination of personal data (such as publication on the Internet) by public entities, this operation can only be allowed if foreseen " by a rule of law or, in the cases provided for by law, a regulation" (Article 2-ter, paragraphs 1 and 3, of the Code).

In this context, the regulatory basis invoked by the Ministry to justify the disclosure of the disputed personal data and contained in the 20th Directorial Decree does not constitute a suitable regulatory basis for the disclosure of personal data, pursuant to

art. 2-ter, paragraphs 1 and 3, of the Code.

This is because, by adopting a substantial criterion, the nature of the aforementioned directorial decree - contrary to what is claimed by the MISE - appears to be more attributable to the category of "general administrative act" (than to that of "regulation", understood as a regulatory act with content general and abstract), considering that its applicability is limited to the submission of the application for registration in the MISE list, with a deadline of 25/10/2019, and ends with the provision of the one-off voucher provided for by the 2019 budget law for "the two tax periods following the one in progress on 31 December 2018" (on this point, please refer to the reconstruction of the category of "general administrative deed" contained, ex plurimis, in Cons. St., ad.plen , n. 9 of 05/04/2012; section III, n. 6028 of 12/22/2017).

Furthermore, the use of a directorial decree to establish the management data disclosure regime was in no way foreseen by the primary-ranking rule, contained in art. 1, paragraph 228 of law no. 145/2018, which sanctioned the establishment of the list of managers by referring, for the relative discipline, to a specific Decree of the Minister of Economic Development (and not to another general administrative act such as a directorial decree).

In this sense, therefore, even if the D.M. approved (of 05/07/2019) made, in turn, a "second degree" referral to a subsequent "decree of the Director General for business incentives", it should be noted that the object of the discipline of the decree of director general for business incentives had to be limited – pursuant to art. 5, paragraph 1, of the ministerial decree - to the sole regulation of the identification of "methods and deadlines for the presentation of applications for registration in the list of qualified managers and consultancy firms authorized to carry out managerial duties", and could not extend up to the point of identifying personal data advertising schemes and online dissemination operations.

Moreover, the 20th Directorial Decree provided for the publication on the Ministry's website of the «Mise list» - which, pursuant to art. 1, paragraph 1, lett. b), of the aforementioned decree, is the list including the «subjects authorized to carry out the managerial tasks subject to the facilitation» - and not the related documents. Therefore this provision – despite the reference to the «scheme in annex n. 4" of the directorial decree contained a field dedicated to the manager's CV link (art. 4, paragraph 1) - could not be interpreted, as claimed by the MISE, in such an extensive way as to authorize the publication of thousands of curricula with all the data contained therein, but at most only the fields envisaged by the aforementioned scheme (surname, first name, tax code, contact e-mail address, consultancy company, indication of registration in other lists of innovation managers, professional experience in carrying out of managerial appointments with indication of the number of years, area of

interest).

To complicate the case in question, finally, is the circumstance, as already highlighted (cf. supra par. 2), that - despite the obvious impact on the protection of personal data - both the Decree of the Minister for Economic Development of 7/5 /2019, both the Directorial Decree of the XX (which the MISE claims to have a "regulatory" nature) were adopted without the opinion of the Guarantor, mandatorily provided for by articles 36, par. 4; 57, par. 1, lit. c); 58, par. 3, letter. b), of the GDPR (see also recital n. 96). This element also constitutes a procedural defect of the aforementioned administrative acts.

The circumstances described above, considered as a whole, therefore prevent us from believing that the aforementioned Directorial Decree of the XXth can constitute a suitable regulatory basis for disseminating the personal data contained in the MISE list and in the curricula of managers, pursuant to art. 2-ter, paragraphs 1 and 3, of the Code.

4.b. On compliance with the principle of purpose limitation and minimisation

The MISE highlighted that the purpose of publishing personal data and managers' curricula lay in the need "to allow companies potentially benefiting from the Voucher to identify, easily and in a complete way, the managers they can use to support their transformation processes technological and digital, as well as allowing the companies themselves to get in touch with these professionals" (prot. notes n. XX of XX and n. XX of XX).

The Office represented to the Ministry that, for the declared purpose, i.e. the meeting between the demand of the companies and the offer of consultancy by the managers, as required by the reference legislation, it would have been sufficient to use less invasive tools than the publication on the web of data and information concerning all managers, which represents the widest form of dissemination of personal data, with the risk of making them easily vulnerable to further forms of non-legitimate use by third parties (eg. : identity theft, illicit profiling, phishing, etc.). It could have been envisaged - for example - forms of selective access to reserved areas of the institutional website that would allow the consultation of information concerning the managers included in the MISE list only to those who intended to apply for a voucher; through the attribution to the latter of authentication credentials (e.g. username or password, or other authentication tools provided by the administration or provided for by Legislative Decree No. 82 of 03/07/2005, Digital Administration Code- CAD).

In this respect, the violation of the principles of "purpose limitation" and "data minimization" and proportionality was therefore contested, also considering that the data controller is required to implement "adequate technical and organizational measures [...] aimed at effectively implementing the principles of data protection, such as minimisation, and at integrating the necessary

guarantees in the processing in order to meet the requirements of this regulation and protect the rights of data subjects" (Article 25, paragraph 1, of the GDPR).

OBSERVATIONS OF THE MISE

In the note prot. no. XX of the XX the Ministry observed, in summary, that the personal data of the managers were collected for specific, explicit purposes (made known through specific information in which explicit reference was made to the publication of the curricula); legitimate and only for the time strictly necessary for the disbursement of the contributions, as the personal data were made available «from the XX (date of approval of the MISE List) to the XX (date on which the showcase site displaying the CVs of managers It has been closed)".

As for the possibility of alternative solutions, with respect to the online publication of all curricula, such as forms of selective access to restricted areas of the institutional website, the MISE - in the same note (the content of which is also confirmed in the «document relating to the disputes raised by the Guarantor" attached to the minutes of the hearing) - noted that this solution could not be appropriate to the case in point, among other things, because:

I) limiting access only to subjects meeting the requirements for submitting the voucher application would have resulted in:

- a "serious expenditure of time and resources for the Ministry and [...] significant problems inherent in the identification of subjects who could actually have been included among the possible beneficiaries of the Vouchers";
- "the perimeter of potentially interested subjects could not [...] be known a priori and even less could it be identified by the Ministry on the basis of any assessment, since the Voucher necessarily had to be accessible not only to already established companies, but also to all those subjects who would have decided to set up a company due to the typical incentive effect of the facilitation measures";

II) limit access to anyone who requests it, without having to carry out any type of control:

- would have «in practice [to] nullified the same measure of restricted access, given that consultation of the MiSE List should therefore have been granted to anyone»;
- "it would have represented, for the Ministry, a disproportionate and probably unmanageable burden since the implementation of a software solution and the operational processes necessary for the management of these activities would have involved" a "waste of economic resources"; «not immediate timing for the implementation of these schemes [which] would have risked compromising the timely performance of all the activities necessary for the assignment of the resources allocated for 2019 for

the Voucher - which could only be assigned by 31 December 2019 - and thus, therefore, the efficiency and efficacy of the Ministry's initiative»;

III) providing for selective access would not have been in accordance with the will of the legislator considering that:

- "the regulatory sequence envisaged by the legislator [would not have] been respected, nor the objectives of transparency connected with the provision of public incentives. In fact, only after a transparent consultation of a public list of managers could the companies actually take the decision to apply for the incentive, but not before»;

- «It is essential for companies that consult the MiSE list to acquire all the information necessary to exercise an informed choice of the most suitable manager for their corporate interests. The data indicated in the CV, provided voluntarily by the managers themselves, have been advertised according to the methods already known and accepted by the manager. The subjective identification of the consultant, as well as the professional qualification, is a discriminating and indispensable element for the finalization of the assignment. The DGIAI has offered a public service in the context of a private relationship between professionals and interested companies, so much so that the evaluation of the manager's requirements is not up to the DGIAI, which accredits the professionals on the list based on possession of the access requirements , but to the company for the selection of the manager" (declaration contained in the attachment to the report of the hearing).

IV) assigning authentication credentials, associated with the certain identity of the subject, to be used for accessing any reserved area "would certainly have created obstacles to the success of the initiative", among other things, because:

- «there are various systems that allow the use of computer credentials provided by third parties, with certainty of identification of the subject to which they are associated [including the] Public Digital Identity System ("SPID"), [the] National Service Card (" CNS") and [the] Certified Electronic Mail ("PEC") [...]» and «the same certainty of identity does not exist also with reference to the holder of an ordinary electronic mailbox»;

- considering the "fact that it would not have been possible to make the use of the aforementioned identification tools compulsory and binding for access to a public directory, since such a practical solution would have represented a "barrier" to access to subsidized contributions, it would be consequently, it was necessary to provide a form of authentication via computer credentials, such as the traditional e-mail and password, however taking care to acquire a copy of the applicant's identity document at the same time as the request for access to the MISE List (see art. 38 of the Presidential Decree 445/2000)";

- «To manage the consultation of the list of managers in the reserved area, the MISE should therefore have implemented (with

the exception of SPID, which would have required an implementation period that was too long for the new websites, as in the case of the showcase site miq.dgiai.gov.it, and therefore completely irreconcilable with the timing dictated by the applicable legislation) a system for access accreditation with verification, even at sight, of the identity document of all subjects with the only e- ordinary email but without CNS and/or PEC and should, at the same time, manage systems for issuing and managing passwords for users, with dedicated and timely assistance in the event of access and password release anomalies. These anomalies, the management of which would then have been particularly critical in the closing stages of the procedure, depending on the potential risk for a company of not being able, for example, to retrieve a manager's tax code in time due to a password forgotten and for the manager himself to lose a job opportunity».

ASSESSMENTS OF THE GUARANTOR

Also in this case, the reconstruction offered by the MISE clarifies many points of the question and is certainly useful for the purpose of assessing the conduct, but it does not appear suitable to completely overcome the critical remarks made by the Office.

In this respect, the observations of the MISE are preliminarily shared regarding the impossibility of identifying a priori the set of subjects who could actually have been included among the possible beneficiaries of the Vouchers and therefore potentially authorized to consult the list of managers including CVs (see point I above).

We also agree with what has been reported regarding the fact that consultation of the list and CVs of the managers (as complete as possible) by the companies concerned was essential in order to be able to consciously choose the person deemed most suitable to provide the specialist consultancy concerning to the technological and digital transformation processes functional to one's operational needs, which was the requirement to be able to benefit from the disbursement of the state contribution envisaged for this (so-called "voucher"). With respect to the choice of the manager-consultant, the Ministry also carried out a sort of intermediation for the establishment "of a private relationship between professionals and interested companies" with respect to which "the assessment of the manager's requirements is not up to [the Ministry]", which it had to be limited to "accrediting [the] professionals on the list based on possession of the access requirements", but exclusively "to the company for the selection of the manager".

Nonetheless, given the circumstances highlighted, it remains in any case disproportionate to make available to anyone - via online publication on the Ministry's website without any filter - data and personal information of such a large number of

interested parties for two fundamental reasons:

- the generalized knowledge of the aforesaid data did not respond to any reason of transparency, considering that the choice of managers was left to the discretion of the companies concerned, which could not be challenged by the Ministry, and, moreover, not all the managers registered in the list would have established professional relationships with the companies concerned because they rejected them;

- taking into account the state of the art and implementation costs, as well as the nature, scope, context and purposes of the processing, as well as risks of varying likelihood and severity for the rights and freedoms of natural persons , there are less invasive tools as well as more adequate technical and organizational measures, compared to those implemented by the MISE, capable of "effectively implementing the principles of data protection, such as minimisation, and of integrating the necessary guarantees in the treatment in order to meet the requirements of this regulation and protect the rights of data subjects» (Article 25 of the GDPR).

From this point of view, in fact, we cannot agree with what is represented by the MISE (see point II above) that the "regulatory sequence envisaged by the legislator" would have prevented the provision of a simple reserved access, even only to anyone who requests it, for example providing for the assignment of a username and password to them, without having to carry out any type of check (a tool capable of limiting the scope of circulation of personal data, reducing the risk of improper processing by third parties) and that this technical expedient « would have represented, for the Ministry, a disproportionate and probably unmanageable burden [...]". This is because no legislative provision prevented it and the existence of a disproportionate burden is in no way proven on the basis of the principle of accountability (articles 5, paragraph 2; 24 of the RGPD); nor can it be shared a priori, considering that the data controller is a large body such as a Ministry, used as such to process huge quantities of personal data of various kinds, even delicate and belonging to particular categories. Furthermore, from the moment of the adoption of the primary standard (December 30, 2018) up to the elaboration of the relative application provisions (Ministerial Decree 7/5/2019 and D.D. XX) and the approval of the MISE List (XX) a long period has passed certainly sufficient time to develop solutions that respect the provisions contained in the aforementioned GDPR.

From a technical point of view, there are also some inaccuracies in the reconstruction of the MISE (see point IV above), which could also have led it into error with regard to the decisions taken. In particular, it should be noted that the PEC - contrary to what is reported in the defense brief (see pages 14 and 15) - is not an instrument that presupposes «the upstream

identification of the subject to which [… is associated] by the 'institution/organisation responsible for […its] release', as PEC managers have no obligation to verify the identity of the subject requesting the activation of a certified e-mail box. Furthermore, among the instruments suitable for identifying individuals, the electronic identity card (CIE) should also be included, which, like SPID and CNS, can be used to access online services provided by public administrations (see Article 64, paragraph 2-quater, of Legislative Decree No. 82 of 7/3/2005, Digital Administration Code-CAD).

In this context, considering that the conduct has exhausted its effects, as the data controller declared that the personal data were made available «from the XX (date of approval of the MISE List) to the XX (date on which the site showcase displaying the CVs of the managers has been closed)», it is not deemed necessary to order, in the context of this proceeding and retrospectively, the adoption of specific technical and organizational measures deemed suitable for the concrete case that has already occurred.

4.c. on the appointment of the DPO

The MISE was challenged that, from the preliminary investigation and research carried out at the Protocol Office of the Guarantor, it emerged that the appointment of the Data Protection Officer (DPO) was carried out only on the XX date and that the communication to this Authority of the contact details of the DPO was carried out only on the XX date. This behavior was not compliant with the provisions of art. 37, paragraphs 1 and 7, of the RGPD, where the obligation of the aforementioned obligations is foreseen from the date of 25/5/2018 on which the European regulation became applicable.

OBSERVATIONS OF THE MISE

In this regard, in the note of the MISE prot. no. XX of the XX it was represented that:

- «in implementation of article 4-bis of the decree-law of 12 July 2018, n. 86, converted into law 9 August 2018, n. 97, in order to harmonize the organizational structure with the development of the regulatory framework on the protection of personal data, in consideration of the provisions contained in Regulation (EU) 2016/679, the Ministry has launched a complex process of reorganization of the executive offices general level and the functions entrusted to them";
- «Within the scope of the MiSE's staffing, for the DPO functions, it was intended to proceed with the identification of an ad hoc managerial position, at a general level, among those of consultancy, study and research, assignable pursuant to art. . 19 paragraphs 4 and 10 of legislative decree n. 165/2001";
- «Following numerous meetings with the General Managers and with the trade union organisations, the organizational

structure of the Ministry was modified with the Decree of the President of the Council of Ministers of 19 June 2019, n. 93, published in the Official Gazette 21 August 2019, no. 195";

- «Following publication in the Official Gazette 21 August 2019 no. 195, the aforementioned DPCM, entered into force on 5 September 2019 and regulated the organization of general management offices by amending the decree of the President of the Council of 5 December 2013, n. 158";

- «Therefore, with note no. XX of the XX, the interpellation procedure was initiated for the coverage of the managerial position in question. The aforementioned public questioning was addressed, with note no. XX (published on XX), also to the permanent managers of the Ministry and to the permanent managers of the state administrations"

- «The interpellation procedure concluded with the conferment of the assignment, for DPO activities, pursuant to article 19, paragraphs 4 and 10 of the legislative decree of 30 March 2001, n. 165, for the duration of three years";

- «The consequent decree of the President of the Council of Ministers adopted on 29 October 2019 ordered the appointment of the DPO of the Ministry and was registered by the Court of Auditors on XX, Reg. Prev. n. XX, as well as sent to the Ministry of Public Administration on XX. On the same date, the General Secretariat sent the DPCM of appointment, with attached employment contract, to the designated subject".

What is also relevant is what is reported in the "document relating to the objections raised by the Guarantor" attached to the minutes of the hearing of the XX, where, in addition to what was previously represented, it was highlighted, among other things, that the delay in the formalities envisaged " it depended on the succession of political bodies, with the establishment of a new Government on the 20th date and the start of the reorganization procedure - following the appointment of the new Minister - of the general level managerial offices, in reform of the previous structure dating back to the DPCM December 5, 2013, n.158. The reorganization culminated in the adoption of the DPCM of 06/19/2019, n. 93 subsequently amended by DPCM 12/12/2019, n. 178. With the organizational change, the intention was to strengthen the role of the data protection manager envisaged by the European regulation, creating this position from scratch, qualifying the related function post as a general management position to be assigned with an assignment pursuant to art. 19 paragraphs 4 and 10 of Legislative Decree lgs. no. 165/2001; distinguishing this figure from that of the person responsible for the prevention of corruption and transparency. The appointment of the DPO took place with DPCM 21/10/2019, registered by the Court of Auditors, on the XX date, under no. XX".

ASSESSMENTS OF THE GUARANTOR

The MISE has confirmed the delay in the fulfillments required by the GDPR relating to the appointment of the DPO, describing the circumstances.

What has been reported - even if useful for the purpose of understanding and evaluating the conduct held - does not however allow to overcome the objections raised by the Office. This above all considering that, since May XX (therefore long before the date of 25/5/2018 of application of the RGPD), this Authority has implemented a detailed information activity aimed at all public entities with regard to the obligations to be carried out, pursuant to the new GDPR (including the obligation to appoint the DPO), which envisaged the timely involvement of all Ministries, by forwarding a specific communication to the competent Ministers, which was followed by specific meetings with the contact persons designated by the Ministry, which took place at the Guarantor, on the XX date, and at the Bank of Italy headquarters on the XX date.

With reference to the specific case in question, the Chairman of the Guarantor sent the note prot. no. XX of the XX, confirmed with a note from the Chief of Cabinet of the MISE prot. no. XX of the XX.

In the attachment to the aforementioned note, the Guarantor had expressly indicated to the public administrations the priorities that they should have taken into consideration in the process of adapting to the new legal framework of the Regulation; in first place of this priority was the designation of the Data Protection Manager - DPO (articles 37-39), highlighting that "this new figure that the Regulation requires is identified on the basis of professional qualities and specialist knowledge of the legislation and data protection practice is at the heart of the process of implementing the principle of "accountability" and that "the direct involvement of the DPO in all matters concerning the protection of personal data, starting from the transitional phase, is certainly a guarantee of quality of the result of the adaptation process in progress".

5. Outcome of the investigation relating to the complex matter brought to the attention of the Guarantor

In the light of all of the above, the elements represented in the defense writings of the MISE - in any case relevant for the purpose of assessing the conduct - are not sufficient to allow the filing of the present proceeding pursuant to art. 11 of the Regulation of the Guarantor n. 1/2019.

In this context, the findings notified by the Office with the note prot. no. XX of the XX and the non-compliance of the processing of personal data object of the present proceeding with the relevant regulations on the protection of personal data is noted, as the Ministry of Economic Development:

1. by publishing personal data online (name, tax code, e-mail) and complete curriculum vitae (with additional personal data such as, for example, mobile phone, education and training, professional experience, etc.), referring to more than five thousand individuals interested parties, included in the list of «Qualified Managers and Consulting Firms», has disclosed personal data:

a) in the absence of a suitable regulatory prerequisite, in violation of art. 2-ter, paragraphs 1 and 3, of the Code and of art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR;

b) in a manner that does not comply with the principles of "lawfulness", "limitation of purpose" and "minimization of data", in violation of art. 5, par. 1, lit. a), b) and c) of the GDPR;

2. has not designated, as it was required to do so, the Data Protection Officer (DPO), nor has it communicated the relevant contact details to this Authority after appointing him, by the date of 25/5/2018 in which it became applicable the RGPD, having provided for this fulfillment only after about a year and a half and precisely on the XX date (for the appointment of the DPO) and on the XX date (for the communication of contact data), in violation of art. 37, paragraphs 1 and 7, of the GDPR.

Considering, however, that the conduct has exhausted its effects, as the data controller has taken steps to remove the personal data from the institutional website and to implement the obligations established by art. 37 of the GDPR in relation to the DPO, without prejudice to what will be said on the application of the pecuniary administrative sanction and on the adoption of the warning, 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 of the GDPR)

The Ministry of Economic Development appears to have violated articles 5, par. 1, lit. a), b) and c); 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b); 37, par. 1 and 7 of the GDPR; as well as of the art. 2-ter, paragraphs 1 and 3, of the Code.

For the violation of the aforementioned provisions - also considering the reference contained in the art. 166, paragraph 2, of the Code – the application of the administrative sanctions pursuant to art. 83, para. 4 and 5 of the GDPR.

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 the present case, therefore, the violation of the aforementioned provisions is subject to the more serious administrative

pecuniary sanction provided for by art. 83, par. 5 of the GDPR, which therefore applies to the present case.

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 this sense, the violation of the regulations on the protection of personal data concerned the dissemination of personal data; as well as the delay in appointing the DPO.

As for the first profile, the diffusion concerned personal data that do not belong to particular categories or to criminal convictions or crimes (articles 9 and 10 of the GDPR), referring to around 5,000 managers and lasted for a limited time equal to about 30 days. The conduct held, based on an incorrect assessment of the relative compliance with the legislation on the protection of personal data, is of a negligent nature. As a further mitigating element, the context in which the treatment took place and the uncertainty of the regulatory framework deriving from the coexistence of numerous sources approved over time (law, ministerial decree, directorial decree), containing reciprocal references, which, adopted in absence of the mandatory opinion of the Guarantor, could not in any case be independently disapplied by MISE operators. Furthermore, it must also be taken into account the fact that the data controller, while underestimating, in good faith, the risks of the treatment, declared that he had in any case "promptly instructed and processed all requests for cancellation from the MiSE List - 11 (eleven) - and all requests for modification of CVs and/or deletion of personal data on the showcase site - 85 (eighty-five)» (note prot. n. XX of XX, page 12).

On the other hand, as regards the delay in the appointment of the DPO, the violation of the provisions contained in art. 37, par. 1 and 7, of the RGPD, lasted for about a year and a half. On this point, while acknowledging the circumstances - described in the previous paragraph 4.c - related to the contingencies of the alternation of the new top political body and the related administrative reorganisation, it is believed that the conduct implemented, albeit of a culpable nature, does not is justifiable in

particular in the light of the communication sent by the President of the Authority to the Minister on the XX and of the information activity described above (par. 4.c)) implemented by the Guarantor also towards the MISE.

In any case, it must also be taken into account that the MISE collaborated with the Authority during the investigation of the present proceedings and there are no previous violations of the GDPR pertinent committed by the aforementioned Ministry

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 75,000.00 (seventy-five thousand) euros for the violation of articles 5, par. 1, lit. a), b) and c); 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b); 37, par. 1 and 7 of the GDPR; as well as of the 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.

It is also believed that - given the specific circumstances of the case brought to the attention of the Guarantor, relating to the publication on the Internet of the personal data contained in the managers' curricula in the absence of a suitable regulatory basis and to the appointment of the DPO - the the ancillary sanction of the publication of this provision on the Guarantor's website, provided for 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 the Regulation of the Guarantor n. 1/2019.

ALL THIS CONSIDERING THE GUARANTOR

having detected the unlawfulness of the processing carried out by the Ministry of Economic Development in the terms indicated in the justification pursuant to articles 58, par. 2, lit. i), and 83 of the GDPR

ORDER

to the Ministry of Economic Development, in the person of its pro-tempore legal representative, with registered office in Via Veneto, 33 - 00187 Rome (RM) – Tax Code 80230390587 to pay the sum of 75,000.00 (seventy-five thousand) euros as an administrative fine for the violations referred to in the justification

ENJOYS

to the same Ministry to pay the total sum of 75,000.00 (seventy-five 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;

- annotation in the Authority's internal register of the violations and measures adopted pursuant to art. 58, par. 2 of the GDPR with this provision, as required by art. 17 of the Regulation of the Guarantor n. 1/2019.

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, 11 February 2021

PRESIDENT

Station

THE SPEAKER

Station

THE SECRETARY GENERAL

Matthew