[doc. web no. 9565258]

Injunction order against the Municipality of Conflenti - 25 February 2021

Register of measures

no. 69 of 25 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, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and repealing Directive 95/46/ CE, “General Data Protection Regulation” (hereinafter, “Regulation”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data, as well as to the free movement of such data and which repeals Directive 95/46/EC (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.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given 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 Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Dr. Agostino Ghiglia;

WHEREAS

1. The complaint.

With complaint of the XX, presented pursuant to art. 77 of the Regulation, Ms XX, a former employee of the Municipality of Conflenti (hereinafter, the "Municipality"), complained about the publication, in the Municipal Pretorio Register, of a resolution

containing her personal data, including information regarding the of work with the municipal administration, including an extract from the letter of resignation of the XX, sent by the complainant to the Municipality and the Calabria Region.

During the investigations, it emerged that, by consulting the "search archive" section of the Municipality's online praetorian register and entering the surname and first name of the complainant, the Resolution of the Town Council of the XX (reg. no. XX) was mentioned with description “XX.” from which, after various passages, one had access to the .pdf version of the resolution of the City Council n. XX.

The circumstances mentioned above were ascertained by the Office on XX.

2. The preliminary investigation.

With a note of the XX (prot. n.XX), the Office, on the basis of the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Municipality, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lit. a) and c), 6, paragraph 1, lett. c) and e), 2 and 3, lett. b), as well as articles 2-ter, paragraphs 1 and 3 of the Code, inviting the aforesaid owner to produce defense writings or documents to the Guarantor or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, of Law No. 689 of 24 November 1981).

The Municipality sent its defense briefs with note prot. no. XX of the XX, representing that:

- “the content of the municipal resolution G. C. n. XX of the XX, in dispute with which only the name and surname of today's complainant was reported does not make the subject "identifiable" given that the same is not associated with other identifying elements such as date and place of birth, abode, residence, domicile , fiscal Code";
- "if necessary, the reference resolution does not contain sensitive data (i.e. suitable for revealing, for example, racial and ethnic origin, religious beliefs, political opinions, membership of parties or trade unions, state of health and sexual life) but only and exclusively those data indispensable for the motivation and therefore for the validity of the deed in itself necessary, also, to satisfy the purpose of transparency which could not otherwise have been achieved. It is therefore clear that the municipal administration could not have fulfilled the purpose of the deed in a different way from the one implemented";
- "we inform you that, as a precaution, the resolution of the City Council n. XX of the XX, edited by Asmenet Calabria Soc. Coop. a r.l., is no longer visible to the public on the Municipality's online praetorian register and that it is present in the internal

archives of the Institution for the uses permitted by law (Guidelines resolution of the Guarantor n. 243 of 05/15/2014) ”.

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection regulations provide that public entities, even if they operate in the performance of their duties as employers, can process the personal data (art. 4, n. 1, of the Regulation) of employees, if the treatment is necessary "to fulfill a legal obligation to which the data controller is subject" (i.e. the specific obligations or tasks established by law for the purpose of managing the employment relationship) or "for the execution of a task in the public interest or connected to the 'exercise of public powers vested in the data controller" (Article 6, paragraph 1, letters c) and e) of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of the [...] regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining with greater precision specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (Article 6, paragraph 2, of the Regulation). In this regard, it should be noted that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when provided for by a law or, in the cases provided for by law, by regulation (art. 2-ter, paragraphs 1 and 3, of the 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 "data minimization", according to which personal data must be " processed in a lawful, correct and transparent manner in relation to the data subject" 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 Regulation).

In compliance with the principle of "data minimization", even in the presence of an obligation to publish, the subjects called to implement it cannot in any case disclose excess or irrelevant personal data (see «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 entities", published in the Official Gazette No. 134 of 12/6/2014 and in www.gpdp.it, doc. web no. 3134436, part two, paragraphs 1 and 3.a.).

3.2 Disclosure of personal data

As a preliminary point, it should be noted that "personal data" means "any information relating to an identified or identifiable natural person", having to consider "identifiable the natural person who can be identified, directly or indirectly, with particular

reference to an identifier such as the name [...]" without the need for this identifying element to be associated with other additional elements (Article 4, paragraph 1, no. 1) of the Regulation) and therefore what was declared by the Municipality does not matter, with reference to the circumstance that the only the name and surname of the complainant, reported in the resolution, not associated with any other identifying element such as date, place of birth, abode, residence, domicile, tax code, does not make the subject identifiable.

Moreover, even in the presence of a law that provides for the publication of deeds and documents of the public administration (cf. art. 124 of Legislative Decree no. 267 of 18 August 2000) - which in any case must also be respected with with regard to the time frame of publication established by this - the principles of data protection must, however, be implemented, including the principle of "data minimization" (Article 5, paragraph 1, letter c), of the Regulation; see part II, par. 3(a), of the Guarantor's Guidelines mentioned above).

In the present case, the determination in question, which contained detailed information relating to events connected with the employment relationship, and with the employee's private life, was also published beyond the time period envisaged by the sector regulations (see Article 124 , Legislative Decree No. 267 of 18 August 2000 concerning the publicity of local authorities' deeds on the praetorian register, as well as Article 32, Law No. 69 of 18 June 2009), a circumstance which further connotes the dissemination of illicit personal data contained therein. (see Civil Cassation, section II, order n. 18292 of 3 September 2020)

With reference to what was claimed by the Municipality which pointed out that it was required to publish the resolution of the Municipal Council n. XX of the XX for general purposes of transparency, it should be noted that at the moment none of the provisions of Legislative Decree no. 33/2013 provides for the mandatory publication of this type of document.

Therefore, if the Municipality wanted to publish the decision, which it was not obliged to publish, pursuant to Legislative Decree no. 33/2013, should have "arranged the publication on its institutional website of data, information and documents [...] proceeding with the indication in anonymous form of any personal data present" (Article 7-bis, paragraph 3, of Legislative Decree no. 33/2013).

Therefore, the resolution to be published should not have included identification data of the interested party, such as the surname and name, or other data that could in any case have allowed identification of the same. The publication of the resolution in question, with this expedient, would not have compromised the principle of adequate motivation pursuant to art. 3

of law 241/1990, since the full version of the same would have remained, in any case, in the records of the Municipality and would have been accessible, by qualified subjects, in the ways and within the limits established by law.

4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller during the preliminary investigation the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code do not allo the findings notified by the Office to be overcome with the act of initiating the procedure and are insufficient to allow the filing of the present procedure, since none of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019.

The processing of the data of the interested party, which occurred in violation of the regulations on the processing of personal data, began with the publication of the resolution of the municipal council n. XX of the XX, in full force of the provisions of the Regulation and of the Code, which therefore constitute the provisions applicable to the case in question (art. 1, paragraph 2, of the law of 24 November 1981, n. 689).

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Conflenti is noted, for having disclosed personal data relating to the complainant, contained in the resolution of the municipal council n. XX of the XX, in the absence of suitable regulatory conditions, in violation of articles 6, par. 1, lit. c) and e), 2 and 3, lett. b) of the Regulation, and 2-ter, paragraphs 1 and 3, of the Code, as well as the basic principles of treatment contained in art. 5, par. 1, lit. a) and c) of the Regulation.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 3, of the same Regulation and art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the publication of the resolution in question on the website of the Municipality has ceased, the conditions do not exist for the adoption of further corrective measures referred to in 'art. 58, par. 2, of the Regulation.

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

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation 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).

In this regard, taking into account the art. 83, par. 3, of the Regulation, in the present case - also considering the reference contained in art. 166, paragraph 2, of the Code – the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation.

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 Regulation.

In relation to the aforementioned elements, the period of time in which the personal data was disseminated was considered; this also in the light of the indications that, since 2014, the Guarantor has provided to all public subjects in the Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public subjects and other obliged bodies, mentioned above.

On the other hand, it has been favorably noted that the Municipality has maintained a collaborative conduct with this Authority in order to remedy the violation and mitigate its possible negative effects, in particular it has promptly taken action to remove personal data from the administrative deeds subject to publication . There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction, in the amount of 2,000.00 (two thousand) euros for the violation of articles 5, par. 1, lit. a) and c), 6, par. 1, lit. c) and e), 2 and 3, lett. b), of the Regulation, as well as of the art. 2-ter, paragraphs 1 and 3 of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the time frame during which the aforementioned data were made available on the net, it is also believed that the ancillary sanction of publication on the website of the Guarantor of this provision should be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted that the conditions pursuant to 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.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f), of the Regulation, declares the conduct held by the Municipality of Conflenti to be unlawful, described in the terms referred to in the justification, consisting in the violation of articles 5, par. 1, lit. a) and c), 6, par. 1, lit. c) and e), 2 and 3, lett. b), of the Regulation, as well as of the art. 2-ter, paragraphs 1 and 3 of the Code, in the terms set out in the justification

ORDER

to the Municipality of Conflenti, in the person of its pro-tempore legal representative, with registered office in Via Marconi - 88040 Conflenti (CZ), Tax Code 00238090799, pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 2,000.00 (two thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the aforementioned Municipality to pay the sum of 2,000.00 (two 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. In this regard, it is recalled 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 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also art. 10, paragraph 3, of Legislative Decree no. 150 of 09/01/2011);

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, believing that the conditions set out in art. 17 of the Regulation of the Guarantor n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to articles 78 of the Regulation, 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, 25 February 2021

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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