[doc. web no. 9285411]

Injunction order against the Municipality of Urago d'Oglio - 13 February 2020

Register of measures

no. 35 of 13 February 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

At today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of prof.ssa Licia Califano and of dott.ssa Giovanna Bianchi Clerici, members and of dott. Giuseppe Busia, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE, "General Data Protection Regulation" (hereinafter "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 regarding the processing of personal data, as well as the free circulation of such data and repealing 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, 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. Giovanna Bianchi Clerici;

WHEREAS

1. The complaint.

By complaint, Ms. XX complained about the publication, on the institutional website of the Municipality of Urago d'Oglio, of document no. XX (referred to as "XX") and the complete text of sentence no. XX (RG n. XX), which contained personal data,

also relating to health.

2. The preliminary investigation.

From the preliminary verification carried out by the Office on the XX date, it emerged that on the institutional website of the Municipality of Urago D'Oglio (BS) (http://www.comune.uragodoglio.bs.it), in the "XX" section, it was a document named "XX" is available (url: http://...). The same web page also made available, and freely downloadable, the file in pdf format of the full text of sentence no. XX (RG n. XX).

In response to the specific requests of the Office (note prot. n. XX of XX), the Municipality represented (see note of XX, prot. n. XX), inter alia, that:

- together with other disputes between the complainant and the administration, "XX";
- "the news regarding this and the previous disputes have been reported on several occasions in the local weekly Chari Week" (the interested party would have given interviews on several occasions (as documented by the newspaper articles, attached to the note of the XX, cit.);
- "at the outcome of the judgement, what was pressing for the municipal administration [... was] to redeem with dignity the damage to the image and to its work heavily damaged by the information and distorted statements that were disseminated above all through the press and social media , some of which were also released by XX itself";
- "the information was therefore made public only for reasons of transparency and the duty of information regarding a known fact and a public document such as the sentence";
- the interested party could have invited "the Institution to obscure the publication of the sentence", while "the XX has never addressed the Municipality and has never formulated any request, allowing the sentence to remain published for months before presenting the exposed to the Guarantor, to complain about the violation of privacy against him".

In any case, even before providing feedback to the Office's request for elements, the Municipality declared that it had taken steps to "obscure the provision published on the website of the Municipality of Urago d'Oglio", taking steps to remove the document containing the sentence (cf. note of the XX, prot. n. XX); subsequently, the same provided proof of having effectively removed any other personal data of the data subject attributable to the alleged case (see note XX, prot. n. XX).

With a note of the XX (prot. n.XX), the Office, on the basis of the elements acquired from the checks carried out and from the documentation sent by the Municipality, and of 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 measures referred to in article 58, paragraph 2, of the Regulation, inviting the aforesaid holder 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 n. 689 of 11/24/1981).

With the note mentioned above, the Office noted that the Municipality had published on the institutional website the deeds and documents containing personal data referring to the interested party, consisting of detailed information relating to events that concerned her during the employment relationship work as well as data relating to the pathologies that have arisen, over time:

- in a manner that does not comply with the principles of "lawfulness, correctness and transparency" as well as "minimization" of the processing, in violation of art. 5, par. 1, lit. a) and c), of the Regulation;
- 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), e), para. 2 and par. 3, letter. b), of the Regulation;
- in violation of the ban on the dissemination of health data pursuant to art. 2-septies, paragraph 8, of the Code.

With a note of the XX (prot. n. XX) the Municipality sent its memorandums

defensive, representing, among other things, that:

- "the interested party has not made use of the right of [article 52 of the Code];
- "the behavior of the interested party led the entity to believe in any case the existence of the employee's implicit consent to the publication of the sentence on the municipal website";
- the entity acted in order to "provide transparent and impartial information";
- "the disputed publication is consequent to the interpretation of the current regulatory framework on legal information technology in the sense of the admissibility of the publication of the full sentence [...] the employee in fact [...] did not make use of the right pursuant to art. 52 legislative decree no. 196/2003 requesting [...] that the annotation be affixed aimed at precluding, in the event of reproduction of the sentence, for purposes of legal information in the press, electronic media, electronic communication networks, etc., the indication of general information and other significant data [...]"; “the provision in question [art. 52 of the Code] was considered a specific and special provision for legal information technology, such as to prevail over the different provision that prohibits the dissemination of personal data relating to health art. 2-septies, paragraph 8 of Legislative Decree no. 196/2003".

In the documentation sent, the Municipality reiterated that it had removed the personal data of the interested party and illustrated to the Guarantor the initiatives it intends to adopt to prevent situations similar to the case subject of the complaint from arising in the future.

The Municipality also specified that in the three-year plan for the prevention of corruption, adopted by the Municipality with Municipal Council Resolution no. 2 of 01.24.2018, "it is mandatory to publish data not required by law (art. 7 bis, co. 3, legislative decree n. 33/2013) according to the anonymization technique which, instead, for the case in point, no action was taken, drawing on the reservation for which the judicial data are released, as it was not a matter of family and/or minor relationships, as highlighted in the note of the Dpo and for all the reasons highlighted above, first of all the implied consent of the employee and good faith".

3. Outcome of the preliminary investigation.

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" (think of 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).

More specifically, public employers may process the personal data of workers, also relating to particular categories of data and relating to health, to fulfill specific obligations or tasks established by law for the purpose of managing the employment relationship (see articles 9, paragraph 2, letter b) and par. 4, and 88 of the Regulation; articles 2-sexies and 2-septies of the Code) through "authorised" and duly "instructed" personnel regarding access to data (articles 4, paragraph 10, 29 and 32, paragraph 4 of the Regulation).

More generally, European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining with greater accuracy, 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).

Furthermore, the data controller is required to respect the principles regarding data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in 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 particular, in compliance with the principle of "data minimization" (Article 5, paragraph 1, letter c), of the Regulation), even in the presence of an obligation to publish, the subjects called to implement it cannot in any case disseminate excessive or irrelevant personal data (cf., provision n. 243 of 15 May 2014, 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 subjects public and other obliged bodies, web doc. n. 3134436, second part paragraphs 1 and 3.a.).

In any case, data relating to health, i.e. those "related 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" (Article 4, par. 1, no. 15), due to the particular delicacy of this category of data, "cannot be disclosed" (Article 2-septies, paragraph 8 and Article 166, paragraph 2, of the Code).

It is also represented that, although the violation of personal data object of the investigation by this Authority began in 2017, before the date of application of the Regulation, in order to determine the applicable regulatory framework in terms of time, the principle must be recalled of legality pursuant to art. 1, paragraph 2, of the law n. 689/1981 which, in providing that «The laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», establishes the recurrence of the principle of tempus regit actum. The application of this principle therefore determines the obligation to take into consideration the provisions in force at the time of the violation committed. In the case in question, the removal from the website of the document subject to the complaint and other personal data of the interested party attributable to the alleged case took place after 25 May 2018 (see notes of the XX and XX, cited.). Therefore, considering the permanent nature of the offence, of an omissive nature, the applicable discipline must be identified with reference to that in force on the date of completion of the case, to be recognized precisely at the moment of cessation of the conduct, which occurred after the date of application both the aforementioned Regulation, as well as the internal adjustment legislation (Legislative Decree No. 101/2018).

3.1. The dissemination of personal data

In this context, it should be noted at the outset that what was declared by the Organization with reference to the implicit consent of the employee - which can be deduced from the general demeanor of the same - regarding the dissemination of personal data, also relating to health, and events is irrelevant professional and judicial, which have involved you with the municipal administration as an employer.

In fact, it is necessary to consider that consent - which by consolidated orientation at European level is to be considered a residual criterion of legitimacy of treatment with regard to treatments in the context of the employment relationship, regardless of the public or private nature of the employer (cf. Group "Article 29", Opinion 2/2017 on the processing of data in the workplace, WP 249, pages 7 and 26 and Opinion 8/2001 on the processing of personal data in the context of employment", WP 48, 13.9.2001, pages 3, 23 and 26) - cannot, as a rule, constitute a valid prerequisite for the lawfulness of the processing of personal data, as there is "a clear imbalance between the data subject and the controller" (see recital 43 of the Regulation) , especially when, as in the present case, this is a public authority in the execution of a "task of public interest or connected to the exercise of public powers" (Article 6, paragraph 1, letter e), of the Regulation; "Article 29" Group, Guidelines on c consent pursuant to EU Regulation 2016/679, WP 259, adopted on 11.28.2017 and amended on 4.10.2018).

It should also be noted that the reference made by the Entity to art. 52 of the Code is completely irrelevant as this provision governs the methods of reproduction of the sentences or provisions of the judicial authority, exclusively for the purposes of "legal IT" (title, I, chapter III of the Code), providing for certain measures to protect the dignity of the interested parties.

Therefore, contrary to what was claimed by the Municipality, the art. 52 of the Code does not apply to the present case, given that the publication of the sentence held by the Municipality as a "part" of the related judicial proceeding was not carried out for the purposes of legal IT pursuant to art. 52 of the Code, but for the purpose, as declared by the Municipality, of "redeeming [...] the damage to the image" suffered by the administration as well as for generic "transparency" purposes. In this regard, the administration's arguments regarding the purpose of providing transparent information to the community cannot be accepted, nor the need to protect one's image, which is assumed to be damaged by the demeanor and statements of the employee, given the possibility of making enforce their claims by activating the appropriate forms of protection provided for by the law, which certainly do not include the complete publication of the sentence on the Municipality's website.

For the above reasons, since the Municipality has not indicated specific provisions of law or regulation that provide for such

publication, it is believed that the dissemination on its institutional website of the personal data of the complainant, contained in the document indicated above and in the integral text of the mentioned sentence, occurred in the absence of an appropriate regulatory basis.

Furthermore, considering the presence in the text of the sentence of information attributable, not only to "states of mind", but to actual pathologies of the interested party, this dissemination also occurred in violation of art. 2-septies, paragraph 8 of the Code (art. 9, paragraph 4 of the Regulation; see, most recently, Cassation Civ., Section II, 4 April 2019, n. 9382, which confirmed a previous decision of the Guarantor concerning the online dissemination by a province of determines containing data relating to the state of health of an employee, provision 25 June 2009, web doc 1640102). In adapting the national legal system to the provisions of the Regulation, art. 2-septies of the Code (Guarantee measures for the processing of genetic, biometric and health-related data) - in addition to providing that the processing of these categories of data is lawful when one of the conditions enumerated by the Regulation in art. 9, paragraph 2 and "in compliance with the guarantee measures established by the Guarantor" - confirmed, in fact, the general prohibition on the dissemination of data relating to health (see already, art. 22, paragraph 8 of the Code, prior to the amendments of referred to in Legislative Decree No. 101/2018).

In the present case, as confirmed by the municipal administration itself, the publication should therefore have taken place in compliance with art. 7-bis, paragraph 3, legislative decree no. 33/2013 on the basis of which "Public administrations may order the publication on their institutional website of data, information and documents that they are not obliged to publish pursuant to this decree or on the basis of specific provisions of the law or regulation, in the compliance with the limits indicated in article 5-bis, proceeding with the indication in anonymous form of any personal data present".

4. Conclusions.

In the light of the assessments referred to above, taking into account 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 □ it should b noted that the elements provided by the data controller in the defense briefs, although worthy of consideration, do not allow 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 proceeding, since none of the cases envisaged by art. 11 of the Regulation of the Guarantor n. 1/2019.

This also considering that since 2014 the Authority, in the Guidelines mentioned above, has provided all public entities with specific indications on how to reconcile the transparency and publicity obligations of administrative action with the right to

protection of personal data of the interested parties .

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Urago d'Oglio is noted, for having disclosed personal data and information of the employee, contained in document n. 214 (called "XX") and in the integral text of sentence no. XX (RG n. XX), in the absence of suitable regulatory conditions, in violation of art. 2-ter, paragraphs 1 and 3 of the Code and art. 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b), of the Regulation as well as of the basic principles of the treatment contained in the articles 5, par. 1, lit. a) and c) of the Regulation; since, in the aforementioned sentence, there were also data relating to the health of the interested party, the publication also took place in violation of the prohibition of dissemination of health data pursuant to art. 2-septies, paragraph 8, of the Code.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5 of the Regulation, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the Municipality has declared that it has taken steps to remove the documents from the institutional website, the conditions do not exist for the adoption of corrective measures pursuant to to 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, letter 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 application of paragraph 3 of the art. 83 of the Regulation, according to which, if, in relation to the same treatment or related treatments, a data controller violates, with willful misconduct or negligence, various provisions of the Regulation, the total amount of the pecuniary administrative sanction does not exceed the specified amount for the most serious violation (referred to in Article 83, paragraph 5, of the Regulation), the aforementioned violations having as their object, among others, the

dissemination of health data pursuant to Article 2-septies, paragraph 8 of the Code, are to be traced back, pursuant to art. 83, par. 3 of the same Regulation and of the art. 166, paragraph 2 of the Code, in the context of the sanction envisaged for the aforementioned violation with consequent application of the sanction envisaged in 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 particular delicacy of the complainant's personal data unlawfully disclosed by the Organization was considered, including health data (articles 4, paragraph 1, no. 15 and 9, paragraph 1, of the Regulation ), also in the light of the indications that, since 2014, the Guarantor has provided to all public entities in the Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for purposes of publicity and transparency on the web by public subjects and other obliged bodies, mentioned above.

However, it is favorably noted that the Municipality of Urago d'Oglio, which is a small entity (about 3,700 inhabitants) with a limited number of employees and with scarce budgetary resources, has in any case taken action to remove the personal data contained in the published documents and collaborated with the Authority during the investigation of the present proceeding in order to remedy the violation and mitigate the possible negative effects by actively cooperating with the Authority during the investigation and of the present proceeding. 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 also taking into account the phase of first application of the sanctioning provisions pursuant to art. 22, paragraph 13, of Legislative Decree lgs. 10/08/2018, no. 101, to the extent of 4,000.00 (four thousand) euros for the violation of articles 5, par. 1, lit. a) and c) and 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b), of the Regulation, as well as of the articles 2-ter, paragraphs 1 and 3 and 2-septies, paragraph 8 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 particular delicacy of the data disseminated, as well as the extended period of time during which the aforementioned data were made available on the net, it is also believed that the accessory 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

notes the illegality of the processing carried out by the Municipality of Urago d'Oglio for violation of the articles 5, par. 1, lit. a) and c) and 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b), of the Regulation, as well as of the articles 2-ter, paragraphs 1 and 3 and 2-septies, paragraph 8 of the Code, in the terms set out in the justification

ORDER

to the Municipality of Urago d'Oglio, in the person of its pro-tempore legal representative, with registered office in Piazza Guglielmo Marconi, 26, 25030 Urago d'Oglio (BS) C.F. 00958050171 to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated in the justification; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the fine imposed;

ENJOYS

to the same Municipality to pay the sum of 4,000.00 (four thousand) euros, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, according to the methods indicated in the attachment, 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.

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pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and it is believed that the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

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, 13 February 2020

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia