[doc. web no. 9549165]

Injunction order against the Municipality of Cesano Boscone - 27 January 2021

Register of measures

no. 34 of 27 January 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stazione, 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;

Supervisor Prof. Geneva Cerrina Feroni;

WHEREAS

1. The complaint.

With a complaint dated 22 April 2019, presented pursuant to art. 77 of the Regulation, as subsequently integrated, Ms XX, a former employee of the Municipality of Cesano Boscone (hereinafter, the "Municipality"), complained about the publication, in

the online praetorian register section of the institutional website of the Municipality, of certain resolutions, reporting personal data, including information relating to specific events connected to the employment relationship at the time with the municipal administration.

In particular, in the light of what was complained of in the complaint and what was ascertained by the Office, it emerged that the Municipality has published:

- the resolution of the municipal council n. 58 of 3 May 2018, with the object "appearance in court before the court of Milan - section work against the appeal brought by the employees [surname and first name of an employee of the Municipality] and [surname and first name of the complainant]. Professional assignment to the law firm [...]", containing personal data relating to the complainant and, in particular, references to a case pending before the judicial authority for the annulment of a disciplinary sanction against the same. As emerges from the documentation attached to the complaint, this resolution had already been removed from the Municipality's website before the date of proposal of the same (see note from the Municipality prot. n. 0007817/2019 of 19 April 2019, with which the Municipality also declared to have activated "the necessary procedures for the protection of the so-called "right to be forgotten"");

- determination no. 215 of 13 April 2018, with the subject "liquidation of advance notice", containing personal data relating to the complainant, identified by the serial number, and, in particular, references to the termination of the employment relationship and the liquidation of the indemnity in lieu of advance notice due to it;

- determination no. 268 of 15 May 2018 of the General Secretariat of the Municipality, concerning "expenditure commitment and payment to the lawyer [...] in the proceedings r.g. no. […] And […].". This determination contains the following text in the introduction: “that with City Council resolution no. 58 of 3 May 2018, enforceable pursuant to the law, authorized the Mayor to appear before the Court of [...] against the appeals filed by employees [surname and first name of an employee of the Municipality] and [surname and first name of the complainant] for the cancellation and/or revocation of the disciplinary sanctions of the suspension from service for days [...] inflicted by the Head of the Disciplinary Proceedings office of the Municipality agreed with provision no. [...] and prot. no. [...]". As ascertained by the Office, this determination was published on a website whose IP address is attributable to the Municipality.

During the investigations, it also emerged that, by carrying out a search on the "google.it" search engine with the surname and first name of the claimant, a link to a website was returned with the description "[Tribunale]- sez. work against. appeal filed by.

employees [surname and name of an employee of the Municipality] and [surname and name of the complainant] position", although in the file in "pdf" format, obtainable from this link, there were no references to the complainant.

The circumstances mentioned above were ascertained by the Office on 18 November 2019.

2. The preliminary investigation.

With a note dated 28 November 2019 (prot. n. 41339), 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 a note dated 23 December 2019 (prot. n. 0026272/2019), representing, among other things, that:

- “as regards resolution no. 58/2018, on 05/03/2018 [with this resolution] the Municipality assigned the lawyer [...] the task of following up the organization's defense in the case that the [claimant] in the meantime had rooted in the Court of […];
- "the published personal data of the two employees are: name and surname, associated with expressions such as "cause" and "disciplinary sanction";
- "the resolution was published on 05.03.2018 on the Municipality website in compliance with art. 124 TUEL, and also, in this case, due to an excess of zeal for the purposes of transparency, also in full on the site dedicated to transparent administration, pursuant to art. 15 d. Legislative Decree 33/2013";
- "the publication of the details of the deeds conferring managerial collaboration or consultancy assignments to external subjects for any reason for which a fee is envisaged, must be complete with an indication of the recipients, the reason for the assignment and the amount disbursed, and are conditions for the acquisition of the effectiveness of the deed and for the payment of the related fees”;
- the "assessment [of the Municipality regarding the need to publish the resolution for transparency purposes] took place in a historical period of continuous legislative changes and modifications not only on the issue of transparency, but also on privacy

[, during] [...] the transition between the Privacy Code and European Regulation 679/2016";

- "the Municipality immediately took action to protect the data of the [complainant] as communicated to the latter (following a check by the Guarantor on the site, which took place in November 2019, in fact the same did not find anything online attributable to said resolution , published on 05.03.2018 and deleted from the web on 04.19.2019)";

- "upon notification of 04.19.2019 by the [complainant] [to the] Municipality, resolution 58/2018 was immediately removed from the web by the relevant offices and prompt notice was given to the same, which - despite this - has filed the complaint";

- "all actions were also carried out by the offices in charge to be able to remove any negative effects consequential to said publication (in particular, the request for oblivion was made on the main search engines: Ask, Bing and Google)";

- "it does not appear that the [claimant] has received harm from said publication [, since] to date no claim for compensation has been made by the same against the Municipality";

- "on 04/13/2018 [the] determines no. 215, [with which] a liquidation by way of advance notice is recognized [to the complainant] [, was] published on the website of the Municipality in compliance with art. 124 TUEL";

- "the publication of that information was for the Municipality [...] the consequence of an activity connected to the exercise of institutional functions and which therefore finds its purpose in ensuring publicity and transparency to protect the public interest";

- "the reference to the complainant in the content of the resolution is by means of her serial number, known only by her and by authorized personnel";

- "the use of this data instead of the full name and surname of the employee has therefore severely limited attributability to the [complainant] to a few individuals";

- "on 04/19/2019, via PEC email, the [complainant] [...], comparing resolution 58 with resolution 215, [had considered] that the reference to the "registration number only [had] correctly" protected its "right to confidentiality", not being such it determines "contested by the [complainant] during the complaint presented to the Guarantor";

- "said deed was published on 04.18.2018" and "following communication from the Guarantor, it was removed on 11.28.2019 for the sole purpose of taking immediate action to reduce any negative effects", as in its place it was "published an informative summary with filtered and, where appropriate, anonymised data";

- "as regards decision no. 268/2018 [...], on 05/15/2018 [, with this determination,] the Municipality assumed the expense

commitment for the settlement of the lawyer's fee [...] in relation to the performance of the assignment for the defense of the Entity against the lawsuits brought by Messrs. [surname of the claimant] and [surname of an employee]";

- "the published personal data of the two employees are: name and surname, associated with the summary description of the reason for which the lawyer was appointed";

- "the determination was published on 05.03.2018 on the Municipality website in compliance with art. 124 TUEL, and also on the website dedicated to transparent administration, pursuant to art. 15 d. Legislative Decree 33/2013";

- "for all the consequential considerations on the reasons for publication, reference is made in full to what has already been written in this regard for resolution no. 58/2018";

- "decision no. 268 [...] has never been the subject of a report/complaint by the [complainant]";

- "the names and surnames of the two employees were present in the preamble of the document and therefore are not indexed, thus not visible by means of search engines but only by direct opening of the file where published";

- "said determination was published on 05.21.2018 and was immediately removed on 11.28.2019 for the exclusive protection of the complainant in order to reduce any negative effects [, as it was in its place] "published an information summary with filtered data and, where appropriate, anonymized";

- "as for the hypertext link [...] we have no other elements to be able to take a position, as to date the link has not been found [, specifying, however, that] the institutional site has undergone a thorough review in recent months and maintenance [and that the] [...] transition to a new platform with the disposal of the previous one [...] caused some confusion between the offices and some IT-technical errors, which are being corrected";

- "the willful / negligent nature of the behavior by the authorized [of] the Municipality is excluded";

- "the authorized [of the] Municipality acted in the scenario described above with the awareness, on the one hand, that "all the deeds of the municipal and provincial administration are public, with the exception of those which are considered "confidential" by express indication of law, or as a result of a declaration by the mayor or the president of the province which forbids their display since their diffusion could jeopardize the right to privacy of individuals, groups or companies" (art. 10 Legislative Decree 18 August 2000, no. 267)";

- the Municipality "has [...] proceeded to send a Data Breach Communication pursuant to art. 33 of the European Regulation to the PEC address databreach.pa@pec.gdpr.it on 04.19.2019 [, having, therefore,] alerted the Supervisory Authority about what

was reported by the [complainant] already some time before the complaint made by this 'last".

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" (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.).

In this context, it is noted, as a preliminary point, that what was declared by the Entity with reference to the fact that the complainant was identifiable only by a limited number of subjects does not matter. In fact, "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 [...] a number identification […]" (Article 4,

paragraph 1, no. 1) of the Regulation), as, in the case of determination no. 215/2018, the registration number, which is uniquely associated with the interested party. The matriculation number is, therefore, to be considered an identification number certainly suitable for allowing the identity of the interested party to be traced, not only by the authorized personnel of the Municipality, but also by any third parties, with whom the interested party has been able, over time, to share this number (think, for example, of colleagues, family members or consultants). On the other hand, even pseudonymised personal data, which can be attributed to a natural person through the use of additional information, must also be considered information on an identifiable natural person (see Recital n. 26 of the Regulation).

With reference to the circumstance that the Municipality was required, pursuant to art. 15 of Legislative Decree no. 33/2013, to the publication of resolution no. 58/2018 and of the determination n. 268/2018 for transparency purposes, it should be noted that, as clarified by the Guarantor in the aforementioned Guidelines, "where the administration finds the existence of a regulatory obligation which requires the publication of the deed or document on its institutional website it is necessary to select the personal data to be included in these deeds and documents, verifying, case by case, whether the conditions for the obscuring of certain information are met", in compliance with the principle of data minimization (Article 5, paragraph 1, letter c), of the Regulation), "when the purposes pursued in individual cases can be achieved using anonymous data or other methods that allow the data subject to be identified only if necessary". With specific reference to the publication obligations of considerations and fees, in the same Guidelines it is clarified that "for the purposes of fulfilling the publication obligations, [...] it does not appear [...] justified to reproduce on the web the full version of accounting documents [...] as well as the indication of other excess data [...]" (par. 9.c), such as, in this case, the surname and first name of the complainant and those of another employee. Furthermore, this principle was recently confirmed by the Guarantor in a decision relating to a case of unlawful online dissemination of personal data by a public entity (Provision n. 118 of 02/07/2020, web doc. n. 9440025).

Therefore, even in the presence of the publication obligations pursuant to Legislative Decree no. 33/2013, the subjects called to implement it cannot in any case "make [...] intelligible the personal data not pertinent [...] with respect to the specific purposes of transparency of the publication" (art. 7-bis, paragraph 4, of the legislative decree . no. 33/2013). The Municipality should therefore have published "the details of the deed of assignment" to the professional (Article 15, paragraph 1, letter a) of Legislative Decree no. 33/2013) without making any reference, even indirectly, to the workers concerned.

The same considerations also apply to the obligations deriving from art. 124 of Legislative Decree 267/2000, invoked by the

Municipality to justify the publication of the resolution and of the two decisions mentioned above, given that all the limits set forth above with regard to compliance with the principle also apply to publications in the online praetorian register of data minimization (see part II, paragraph 3(a) of the above-mentioned Guidelines). Therefore, the administrative deeds to be published should not have included identification data of the interested party (i.e. the surname and name) or other data that could in any case have allowed her to be identified (i.e. the registration number). The publication of the documents in question, with this expedient, would not, however, 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.

Furthermore, the fact that the administrative documents in question have been published, without prior anonymisation, in the ways and terms in which it is possible, beyond the time frame set by the sector regulations (see Article 124, Legislative Decree 18 August 2000, n. 267 concerning the publicity of the deeds of local authorities on the praetorian register, as well as art. 32, l. June 18, 2009, n. 69), further connotes the disclosure of the personal data contained therein as unlawful (cf. Civil Court of Cassation, section II, order no. 18292 of 3 September 2020).

As regards the circumstance that, in the opinion of the Municipality, the publication of these administrative documents was in any case justified pursuant to art. 10 of Legislative Decree 18 August 2000, n. 267, it should be noted that the first paragraph of this article, in providing in a general way that all the deeds of the municipal administration are public, expressly saves the cases in which "their diffusion could prejudice the right to privacy of persons".

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 □, although worthy of consideration, do not allow overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the Regulation of the Guarantor n. 1/2019.

It is also represented that for the determination of the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions

in force at the time of the committed violation, which in the case in question - given the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the 25/5/2018 in which the Regulation became applicable and the legislative decree 10 August 2018, n. 101 came into effect. In fact, the preliminary investigation documents revealed that the illicit online diffusion ceased, as declared by the Municipality, on 19 April 2019 (in the case of the resolution of the municipal council n. 58/2018) and on 28 November 2019 (in the case of determinations no. 215/2018 and 268/2018).

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Cesano Boscone is noted, for having disclosed personal data relating to the complainant and to another worker, contained in the resolution of the municipal council n. 58 of 3 May 2018, in determination no. 215 of 13 April 2018 and in determination no. 268 of 15 May 2018, also through indexing on search engines, 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 administrative documents in question on the Municipality's website has ceased, the conditions do not exist for the adoption of further 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 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 long 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 particularly 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 documents subject to publication and had proceeded to inform the Guarantor, albeit using an outdated communication method (see Provision n. 157 of 07/30/2019, web doc. n. 9126951) regarding the dissemination of data, which took place in following the publication of resolution no. 58/2018, before submitting the complaint by the interested party. 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 extended period of time 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 Cesano Boscone 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 Cesano Boscone, in the person of its pro-tempore legal representative, with registered office in Via Monsignor Pogliani n. 3 - 20090 Cesano Boscone (MI), Fiscal Code 80098810155, 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, 27 January 2021

PRESIDENT

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THE SPEAKER

Cerrina Feroni

THE SECRETARY GENERAL

Matthew