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## GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dr. Augusta Iannini, vice president, of dr. Giovanna Bianchi Clerici and of prof. Licia Califano, members, and of dr. Giuseppe Busia, 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/ EC, "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 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 and in [www.gpdp.it](http://www.gpdp.it), doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO 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. Antonello Soro;

## WHEREAS

### 1. The complaint.

With a complaint dated 12 October 2018, presented pursuant to art. 77 of the Regulation, subsequently integrated on 15 April

2019, Mr. XX, employee of the Municipality of Pettoranello di Molise and head of the municipal Technical Office, complained:

- that the aforementioned Municipality, in "violation of Article 6" of the Regulations, had sent him, on 1 August 2018, the deed of initiation of a disciplinary procedure against him and the related precautionary suspension from service ( prot. n. XX), some notes prepared in the context of the same procedure, as well as a note (prot. n. XX), concerning the reinstatement in the workplace ordered by the Court of Isernia, to the certified e-mail address (hereinafter "PEC") used by the complainant in the context of his professional activity, and that "previously there had been notifications of disciplinary measures by the Body on the PEC [of his] professional office", despite the complainant not had "never communicated to the employer the PEC address of the professional firm and [had] never authorized the latter to use this medium for communications relating to the employment relationship performed at the Co mune";
- that, despite the "repeated warnings not to use this communication method" (see note of the XX, prot. n. XX, and note of the XX, prot. n. XX, sent by the complainant to the Municipality and a copy attached to the complaint ), the Municipality "[had contravened] the indications provided" by the claimant and "still [continues] to persevere with sending certified mail";
- that a newspaper and a local television broadcaster had spread the news of the suspension from the service of the "municipal technician", deeming "a poor level of security in the treatments attributable to the data controller, evidenced by the unauthorized disclosure of documents protected by confidentiality , moreover disseminated by the press", in "violation of Article 32" of the Regulation;
- that the Municipality had not published on its institutional website the contact details of its data protection officer (hereinafter, "DPO"), in "violation of Article 37" of the Regulation.

## 2. The preliminary investigation.

With a note of the XX (prot. n. XX), the Office, having qualified the notes sent by the claimant to the Municipality (see notes of the XX, prot. n. XX and of XX, prot. n. XX), as deeds to exercise the right to object to the processing of data relating to his PEC address, invited the Municipality to comply with the request of the interested party no later than the XX, taking care to inform the latter and the Office about the decisions taken . The Office also asked the Municipality to confirm what was declared to the complainant regarding the circumstance that "no communication of the matter [...] has been forwarded to the newspapers" (see note from the Municipality of the XX), with the assumption of responsibility regarding the authenticity of the statements made, pursuant to art. 168, paragraph 1, of the Code.

With a note dated XX (prot. n. XX), the Municipality, despite having received an invitation from the Office, asked the complainant to exercise their rights, by sending an e-mail to the DPO or a PEC message to the Municipality , "with clear evidence in the object "Exercise of opposition to the use of data". Only on the XX date (prot. note n. X) did the Municipality inform the Guarantor that it had canceled "all references relating [to the complainant] to pursuant to art. 17 of the GDPR "without unjustified delay".

In the same note dated 1 April 2019, the Municipality also referred to a passage of a dismissal order, issued in June 2016 by the Judge for preliminary investigations of the Court of Isernia and relating to a criminal proceeding, initiated - according to what was declared by the Municipality - following a complaint filed by the complainant regarding facts similar to those covered by the complaint, in which it is stated that "it emerges peacefully from the documents that the communications which [the complainant] regrets are forwarded to the pec address bearing the its very generality [...] so that there is no place to hypothesize either of the two crimes to be entered given that, as regards the first [i.e. the crime referred to in Article 167 of the Code, in the text prior to the amendments made by Legislative Decree 101/2018], any authorization by the holder to read the pec box to third parties constitutes a fact which cannot lead to an accusation of violation of privacy for the senders [...]".

With reference to the fact that a newspaper and a local television broadcaster had spread the news of the suspension from the service of the "municipal technician" - the Municipality, as requested by the Office, finally confirmed that "the Municipality of Pettoranello has not never sent or disseminated data".

On the basis of the elements acquired, also through the documentation sent and the facts that emerged during the preliminary investigation, the Office notified the Municipality (note prot. n. XX of XX), in its capacity as data controller, 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 6, 12 and 37 of the Regulation, inviting the Municipality 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 the law no. 689 of 24 November 1981).

The Municipality sent its defense briefs with note dated XX (prot. n. XX), stating, in particular, that:

- the Municipality, "following the provision concerning the precautionary suspension procedure activated against the employee" "had to lawfully use the PEC address" to pursue its own "legitimate interest", recalling the provisions of art. 6, par. 1, lit. f) and from recital n. 47 of the Regulation, and specifying that, with reference to the use of the claimant's professional e-mail address

for the purpose of sending the note prot. XX, this use "was necessary for binding legitimate reasons inherent in the precautionary suspension procedure activated against the employee". Therefore, the Municipality "used the data in question because the interest: prevails over that of the interested parties (recital 69 of the GDPR [...])" and "it is legitimate";

- the provision issued "obliged the Data Controller to communicate promptly and without any unjustified delay the return of the [complainant] as an employee of the Municipality of Pettoranello";

- "sending a registered letter would have entailed not only an increase in expenditure for the public coffers but also and above all an excessive unjustified waste of time";

- "the PEC of the [complainant], for which the GIP of the Court of Isernia has not repented of a violation of privacy, can be easily downloaded" from the institutional website of the College of Surveyors and Graduated Surveyors of the Province of Isernia (<http://www.collegio-geometri-is.it/>) and "usable, in this particular case, lawfully and in a non-excessive manner";

- the Municipality "has deemed it appropriate, in order to implement the provision, to use this PEC address in a legitimate manner as the interested party appears to be contractually linked to the Municipality of Pettoranello and, therefore, can be contacted via a professional PEC";

- regarding the "non-publication on the official website of the Municipality of Pettoranello del Molise of the name and contact details of the DPO", the Municipality declared that "due to an objective structural deficiency of the Body - in particular the lack of the figure of the Municipal Secretary from more years [...] – the procedure for electronically inserting the aforementioned document was not completed but which was in any case circulated at the municipal offices with another method (posting in suitable places), but in any case subsequently inserted", specifying that "the news of the The successful appointment of the DPO (including contact details) had in any case been entered in the Entity's telematic system through the publication of the relative decree in 2018, thus also reaching the maximum diffusion, for which the omitted inclusion of the name of the DPO on the institutional website of the The body is to be considered absolutely "in good faith" for the reasons set out above".

### 3. Outcome of the preliminary investigation.

The processing of the complainant's personal data by the Municipality took place in the context of the management of the employment relationship (art. 97 of the Constitution, art. 1 of the law of 7 August 1990, n. 241, articles 1, 10 and 11 of Legislative Decree No. 165 of 30 March 2001), whose legitimacy conditions are defined by art. 6, par. 1, lit. b), c) and e) of the Regulation, since, however, lett. f) of the same article – invoked by the Municipality to justify the processing of the claimant's

professional PEC address – in relation to the processing of personal data "carried out by public authorities in the execution of their duties" (Article 6, paragraph 2, of the Regulation; see also recital no. 47 of the Regulation).

On the subject of the forms and terms of the disciplinary procedure, art. 55-bis, paragraph 5, of Legislative Decree 30 March 2001, n. 165 provides that "the communication of contestation of the charge to the employee, as part of the disciplinary procedure" must be made "by certified e-mail, in the event that the employee has a suitable mailbox, or by hand delivery. In alternative to the use of certified e-mail or hand delivery, communications are made by registered mail with return receipt". For communications following the dispute of the charge, communication between the administration and its employees is permitted, via e-mail or other IT communication tools, "or also to the fax number or other e-mail address, previously communicated by the employee or by his attorney". The regulation refers to the certified e-mail addresses and e-mail addresses made available to the worker by the employer for the purposes of work performance, it being permitted to send communications to "another e-mail address", only if the latter is been "previously communicated by the employee" to the employer (on this point, see par. 2.2 of provision no. 392 of 31 July 2014, web doc. no. 3399423 and the provisions referred to therein). In the case that is the subject of the complaint, however, it does not appear that the complainant had communicated his professional PEC address to the Municipality in order to be able to receive communications relating to the disciplinary procedure.

The circumstance that the PEC address of the complainant was published on the website of the College of Surveyors and Graduated Surveyors of the Province of Isernia does not, in any case, allow us to consider the treatment put in place by the Municipality lawful, given that the data personal data published in public registers, lists, deeds or documents that can be known by anyone can be processed with the limits and methods that the applicable sector laws establish for the knowledge and publicity of the data (cf. art. 24, paragraph 1, letter c ) of the Code, in the text prior to the amendments made by Legislative Decree 101/2018), in compliance with the principle of "purpose limitation", according to which personal data must be "collected for specific, explicit and legitimate purposes, and subsequently processed in a way that is not incompatible with these purposes" (Article 5, paragraph 1, letter b) of the Regulation). In other words, the mere fact that personal information is made publicly available online does not mean that it can be freely reused by anyone and for any purpose, having to evaluate from time to time "whether, for what purpose and according to what limits and conditions, any use further details of the personal data made public may be considered lawful in the light of the "principle of purpose" and the other principles of the European

matrix regarding the protection of personal data" (see, albeit in relation to the issue of the re-use of data published for transparency purposes 6 of 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 entities and other obliged bodies" of the Guarantor, provision no. 243 of 15 May 2014, web document n. 3134436). Therefore, the Municipality could not have, in any case, processed the data relating to the PEC address, published by the College of Surveyors and Graduated Surveyors of the Province of Isernia, to which the complainant belongs, for purposes unrelated to the professional activity of the same, or to send to that address communications relating to the employment relationship existing between the Municipality and the complainant, also taking into account the risk that third parties, such as any collaborators of the professional authorized to access the PEC address, could learn confidential information pertaining to the existing employment relationship with the interested party (see, on this point, paragraph 5.3 of the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector" of the Guarantor, of 14 June 2007, web doc. n. 1417809).

Having said that, it is noted that the Municipality has, however, acted in good faith, trusting in the circumstance that the Judge for preliminary investigations of the Court of Isernia had ordered the dismissal of the aforementioned criminal proceedings, relating to events similar to those covered by the complaint, on the assumption that the sending of communications by the Municipality to the professional PEC address of the complainant did not constitute a violation of the legislation on the protection of personal data. Without prejudice to the fact that the assessment of the unlawfulness of the processing is independent of the relevance, even from a criminal point of view, of the conduct of the owner, the good faith of the Municipality can be assessed, in this case, as a cause for the exclusion of administrative liability, since there is an element positive, extraneous to the offender (in the present case, the dismissal ordered by the Judge for preliminary investigations), suitable to generate in the perpetrator of the violation the conviction of the lawfulness of his own conduct (see, Civil Cassation, Section II Ord., 07/31/2018, no. 20219; Civil Court of Cassation, Section II, 04/06/2011, no. 7885; Civil Court of Cassation, Section I, 02/11/1999, no. 1151).

As regards, however, the failure to respond to the request to exercise the rights presented by the complainant, as well as the circumstance that, in finding - however belatedly - the invitation of the Guarantor to follow up on this request, the Municipality limited itself to asking the claiming to present a new request to exercise the rights to the DPO of the Municipality or to the

Municipality itself, it is noted that no justification has been adopted by the Municipality regarding its conduct.

Finally, in relation to the methods of publication of the contact details of the DPO, it should be noted that the obligation established by art. 37, par. 7 of the Regulation aims to "ensure that [...] data subjects (inside or outside the entity/body that owns or is responsible for the processing) [...] can contact the DPO in an easy and direct way" (Working Group Art. 29, "Guidelines on data protection officers" dated 5 April 2017, WP 243). Especially with reference to data subjects "outside the titular entity/body", the mere posting of the contact details of the DPO at the municipal offices - in relation to which, moreover, the Municipality has not provided any evidence - cannot be deemed capable of fulfilling this obligation. The Municipality, which has its own institutional website, could have easily and much more effectively published the contact details of the manager on this website (on this point, see paragraph 4 of the "Faq on the Data Protection Officer (DPO ) in the public sphere" of the Guarantor, of 15 December 2017, web doc. 7322110). As declared by the Municipality, the publication on the website was not, however, carried out for generic reasons relating to structural and organizational deficiencies of the Body, which are not appreciable from a legal point of view and are not suitable to justify the Municipality's conduct. With reference to the fact that the act of designation of the DPO had been published "in the institution's electronic system", it should be noted that - regardless of any consideration regarding the suitability of this form of publication - the Municipality has not provided elements of evidence neither regarding the publication of the deed of designation (since, moreover, it is not clear whether the reference to the "institution's electronic system" should be understood as a reference to the website of the Municipality) nor regarding the circumstance that this deed contained effectively the contact details of the DPO for data subjects.

#### 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 is believed that, with regard to the disputed violation of art. 6 of the Regulation, the filing of the administrative sanctioning procedure must be ordered, limited to this profile, taking into account, for the reasons set out above, the good faith of the Municipality as a cause for exclusion of administrative liability.

Otherwise, the elements provided by the data controller in the defense briefs in relation to the other administrative disputes, 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.

Therefore, in relation to these other violations, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Pettoranello di Molise is noted, for not having promptly responded to the request to exercise the rights of the complainant and for having published the contact details of the DPO in ways that are unsuitable for satisfying the knowledge needs underlying the related obligation, in violation, respectively, of articles 12 and 37 of the Regulation.

That said, taking into account that the data controller has declared (see note of the XX, prot. n. XX) that he has proceeded to cancel the "references relating to the [complainant]" and confirmed that he had "subsequently entered" the data contact form of the DPO on the institutional website of the Municipality (see note of the XX, prot. n. XX), the circumstances of the concrete case lead to qualifying the case as a "minor violation", pursuant to art. 83, par. 2, and of recital 148 of the Regulation.

It is therefore believed, in relation to the case in question, that it is necessary to admonish the data controller pursuant to articles 58, par. 2, lit. b), and 83, par. 2, of the Regulation, as it has violated the provisions of the Regulation governing the exercise of the rights of the interested party pursuant to articles from 15 to 22 of the Regulation, as well as the figure of the data protection officer, and that there are no conditions for the adoption of further measures by the Authority.

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

a) orders the archiving of the administrative sanctioning procedure referred to in the notification of the violation carried out pursuant to art. 166, paragraph 5, of the Code and of the art. 58, par. 1, lit. d) of the Regulation, limited to the disputed violation of art. 6 of the Regulation, for the reasons mentioned in the justification;

b) pursuant to art. 57, par. 1, lit. f), of the Regulation, declares the conduct held by the Municipality of Pettoranello di Molise to be unlawful, described in the terms referred to in the justification, consisting in the violation of articles 12 and 37 of the Regulation;

c) pursuant to art. 58, par. 2, lit. b) of the Regulation, admonishes the Municipality of Pettoranello di Molise, as owner of the treatment in question, for having violated the provisions of the Regulation governing the exercise of the rights of the interested party pursuant to articles from 15 to 22 of the Regulation, as well as the figure of the data protection officer;



d) believes 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.

Pursuant to art. 78 of the Regulation, 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, March 12, 2020

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

Busia