

[doc. web no. 9842370]

Injunction against Società Lombarda Sport s.r.l. - November 24, 2022

Register of measures

no. 388 of 24 November 2022

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 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 individuals 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 Legislative Decree 10 August 2018, no. 101 containing "Provisions for the adaptation of national legislation to the provisions of regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and repealing Directive 95/46/EC";

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

HAVING REGARD to the documentation in the deeds;

GIVEN the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker the lawyer Guido Scorza;

WHEREAS

1. The complaint and the preliminary investigation

With note dated XX, Ms XX filed a complaint concerning the communication, by Società Lombarda Sport s.r.l. (hereinafter the "Company"), of information on the complainant's health to the Company GClub s.r.l., with which the same complainant had registered on 5 January 2022 to practice sports. In particular, according to what has been highlighted, "the aforementioned company (..) requires, for attendance, a certificate of suitability for non-competitive sports practice issued by an authorized body. Registration provides that the cost of this certification is included in the price if carried out at the Torri Sport clinic (...). I was given one month to deliver the certification and for this period I signed a document for the release of responsibility from GClub in case of health problems following physical activity. On 19 January I went for the medical examination at Torri Sport which operates under the name Lombarda Sport. The doctor who visits me requires a specialist examination to issue the certificate. On 21 January, at my own expense, I carried out the prescribed test which gave a negative result. On 24 January, having not yet brought the result of the exam to Torri Sport, I went to the GClub for a sports practice session since I am still in the period of my direct assumption of responsibility. But I'm denied access on the basis of information sent to GClub by Torri Sport without my authorisation".

For the profiles of competence in the field of personal data protection, following the request for information from the Authority (note of the XX, prot. n. XX, retransmitted via registered mail on the XX), with which they were requested, pursuant to the 'art. 157 of the Code, certain information elements useful for the assessment of the case, the aforementioned Company provided feedback with a note of the XX, in which it was represented that:

- "Lombarda Sport S.r.l., formerly Torri Sport S.r.l., is a company that provides sports medicine outpatient services, for the issue of certificates for competitive sports, regulated by the D.M. of 18 February 1982, and for the certification for non-competitive sporting activity, as per Ministerial Decree of 24 April 2013. For the provision of these services, it avails itself of the collaboration of professional doctors regularly registered with the order, who manage the activities of anamnesis, visit and subsequent certification for each patient";
- in relation to the "structure of Lombarda sport S.r.l, although it is a company with three different offices, it is to be considered as a small reality from an organizational point of view, which is still managing, with the limited administrative staff available, the growth that has had in the last period. This point needs to be clarified because it is the basis of the assessments carried out by

the company regarding the need to designate a Personal Data Protection Officer (...); however (...), also following this request for information, and with a view to better protecting patients' personal data, the inclusion of an external professional figure is being evaluated to fill the role of DPO";

- "with reference to the complaint presented by Mrs. XX, it is confirmed that she presented herself at our facility in Vimercate for the issue of a certificate for non-competitive sports activity, as per practice, she was asked if she was registered in the gym GClub s.r.l., as members of this structure are not subject to payment for the service, and the medical history form and the relative information on the processing of personal data have been provided";

- "following the medical examination, as correctly reported by Ms XX, the Doctor requested assessment tests and suspended the issue of the certificate and communicated this suspension to the Lombarda Sport administration officer, obviously without communicating the reasons which had led to the suspension of the certification issue";

- "given the existing commercial relationship between Lombarda Sport and GClub S.r.l., in which it is envisaged that the latter bears the costs of its members who use the center's services and therefore pays the amount relating to the issue of the certificate, the administration sent notification of the suspension of the procedure for the issue of the medical certificate (...), without however communicating in any way either the patient's state of health, or the reasons that had led to the request for suspension. It should be noted that no health data was communicated or transmitted to GClub S.r.l., being the communication limited to reporting that Lombarda Sport S.r.l. had not completed the phase necessary for issuing the certificate, information necessary for the administrative management of the commercial relationship between Lombarda Sport and GClub, with the sole purpose of managing the payment and provision of services rendered by Lombarda Sport to GClub customers" ;

- "the information flow relating only to the communication of the suspension has been set up in this way precisely in order to limit the data communicated to GClub and to provide only the information indispensable for the management of the administrative relationship with it, while protecting the data users' health services, which are treated only by medical personnel, as proof of this it is highlighted that the reasons linked to the suspension are not brought to the attention of the Lombarda Sport administrative personnel responsible for this communication either. In fact, the certificate and all the information relating to the patient are communicated and delivered only to the same and none of the same is sent to the GClub S.r.l. structure".

To the aforementioned note, the Company has attached a document, prepared in 2020, containing "in compliance with the principle of accountability, the assessments carried out internally aimed at establishing whether or not the obligation to appoint

a DPO applies through an examination punctual and correct of the requirements established by the European regulation 2016/679" as well as further documentation containing "Information to the user on the processing of personal data pursuant to art. 13 of Regulation no. 2016/679" submitted and signed by Mrs. XX, in which it is declared that: "Your personal data may be communicated to the following subjects: - Doctors who perform the requested health service; - Entities that provide services for the management of the information system; - Judicial authorities, as well as all the subjects to whom the communication is mandatory by law upon their express request".

The same owner also sent a copy of the Lombarda Sport emails directed to the reception of GClub S.r.l., having as subject "gclub eligibility suspension" and "gclub suspension release", in relation to the user XX.

2. Assessments of the Department on the treatment carried out and notification of the violation pursuant to art. 166, paragraph 5 of the Code

In relation to the facts described in the complaint, the Office, with a note of the XX (prot. n. XX), notified the Company, 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, inviting you 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 the 11/24/1981). In particular, the Office, in the aforementioned deed, considered that the Company made a communication of health data in the absence of a legal prerequisite in violation of the basic principles of treatment pursuant to articles 5, letter. a) and f) and 9 of the Regulation and has not fulfilled the obligations regarding the designation of the Data Protection Officer (Article 37, paragraph 1 and 7 of the Regulation).

With a note dated XX, the Company sent its defense briefs, in which, in particular, it highlighted that:

- "the successful communication of the "suspension" of the issue of the certificate does not involve the communication of data relating to health, as defined in art. 4, par. 1, no. 15, of the European Regulation 2016/679. In fact, as required by the guidelines issued by the Ministry of Health on 08/08/2014, the certifying doctor can make use of other checks, or of advice from specialist doctors if he is in the presence of "doubtful cases". These "doubtful cases" and/or any "diagnostic suspicion" do not involve the actual presence of pathologies potentially in conflict with the issue of the certificate, but instead reflect the need for in-depth studies aimed at defining whether non-competitive sporting activity can involve risks for the individual. Such situations may arise, for example, the difficulty in having a clear response from the tests carried out, the lifestyle of the subject

or elements such as age or weight or a failure to present recent tests already performed (tests that can vary from a cardiac ultrasound request. to a simple ECG performed recently but not presented during the visit)";

- "precisely for this reason, the request for verification is preliminary to the issue or otherwise of the certificate, and only with the issue of the latter is it believed to be able to identify the presence of any data relating to the state of health; (...); although it is not believed that the communication object of this present can be configured as health data, in accordance with the principle of data minimization, Lombarda Sport S.r.l. stopped communicating the names of the suspended certificates, which communications were limited in number and the result of exceptional circumstances and not as a rule";

- in relation to the "designation of the Data Protection Manager, it should be noted that Lombarda Sport has been the subject of an expansion of the activity that began in 2020, and that the health services, in particular in the field of cardiological, orthopedic counseling - traumatological, neurological, ENT, clinical biomechanical, nutritional are offered by third-party professionals with respect to Lombarda Sport, who independently manage the services offered as independent Controllers";

- "the communications of suspension were of an occasional and sporadic nature, the Lombarda Sport Company, in addition to having interrupted this type of communication as a premise, proceeded to the complete cancellation of the e-mails within its systems";

- "in addition to having removed this operation, new letters of authorization for the processing of data have been provided to Lombarda Sport personnel relating to the management of Lombarda sport Users' data, in which in particular it is recalled that: only personnel expressly authorized with letter of assignment will be able to access user data, in particular by limiting access to data relating to the state of health";

- "new information has been prepared, in which, in addition to including the contact details of the person responsible for the protection of personal data, a granular consent collection system has been set up aimed at communicating only the outcome of the certification of suitability to the indicated third parties specifically by the interested party" and "the procedures relating to the management of Lombarda Sport users' data have been reviewed and implemented, in these procedures the methods for collecting consent from the user are recalled, the methods for storing such consent, and the storage in special locked spaces, with access limited to authorized personnel only, of the documentation relating to users. The procedures also recall the need that if documentation containing data relating to health is to be sent via telematic means of communication, the files must be subjected to encryption, and the key for opening them must be sent in different ways than the file";

- "in addition, training courses on the protection of personal data are being planned to be provided to the various figures operating within Lombarda Sport, in order to raise awareness of the protection of users' personal data, and to facilitate personnel themselves in the operations envisaged by the internal procedures and in the letters of authorization".

3. Outcome of the preliminary investigation

Having taken note of what is represented by the Company in the documentation in the deeds and in the defense briefs, it is noted that:

1. "data relating to health", included among the "particular" categories of personal information, means "personal data relating 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" (art. 4, paragraph 1, no. 1 and 15 of the Regulation; recital no. 35);
2. personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party ("lawfulness, correctness and transparency")" and "processed in such a way as to guarantee adequate security (...) including protection, by adequate technical and organizational measures, from unauthorized or unlawful processing or from accidental loss, destruction or damage («integrity and confidentiality»)" (Article 5, paragraph 1, letters a) and f) of the Regulation);
3. the regulation on the protection of personal data provides - in the health sector - that information on the state of health can be communicated to third parties on the basis of a suitable legal prerequisite or on the indication of the interested party himself, subject to written authorization by the latter last (art. 9 of the Regulation and art. 84 of the Code in conjunction with art. 22, paragraph 11, Legislative Decree 10 August 2018, n. 101);
4. the ministerial decree 24 April 2013, containing "Discipline of the certification of non-competitive and amateur sporting activities and guidelines on the equipment and use of semi-automatic defibrillators and any other life-saving devices" provides that "practitioners of non-competitive sporting activities undergo annual doctor who determines the suitability for this sport. The certification resulting from the medical check-up certifying the physical fitness to practice non-competitive sporting activity is issued by the general practitioner or pediatrician of free choice, in relation to their patients, or by the sports medicine specialist on a specific form predefined" and that "in the event of a suspected diagnosis or in the presence of chronic and overt pathologies, the certifying doctor is recommended to seek the advice of a sports medicine specialist and, according to clinical judgement, of the branch specialist" (art. 3 , paragraphs 2 and 4);
5. the decree of 8 August 2014 containing "Approval of the guidelines on medical certificates for non-competitive sporting

activity" provides that "the certifying doctor, taking into account the clinical and/or diagnostic evidence found, may also make use of a maximal stress test and other tests aimed at specific health problems. In doubtful cases, the certifying doctor makes use of the advice of the specialist in sports medicine or, according to clinical judgement, of the branch specialist. The certifying doctor keeps a copy of the reports of all the diagnostic investigations performed, as well as of the additional documentation referred to in the previous paragraphs, in compliance with the provisions in force and in any case for the validity of the certificate" (Annex no. 1, points 2 and 3) .

4. Conclusions

In the light of the assessments set out above, taking into account the statements made by the data controller during the preliminary investigation and considering that, unless the fact constitutes a more serious offence, anyone who, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents, it is liable pursuant to art. 168 of the Code ("False statements to the Guarantor and interruption of the execution of the duties or the exercise of the powers of the Guarantor"), it is noted that the elements provided by the data controller in the defense briefs referred to above are not suitable for accepting the requests filing, not allowing to fully overcome the findings notified by the Office with the aforementioned act of initiation of the procedure.

In particular, in relation to the Company's statements in support of the prospective nature of the information being disclosed as non-qualified data relating to health, it should firstly be noted that, in the light of the provisions referred to above, the news relating to the suspension of suitability for non-competitive sporting activity, since specific assessment tests have become necessary, in itself reveals information on the state of health of the subject whose assessment of suitability has been suspended (diagnostic suspicion or chronic and full-blown pathologies); therefore, the aforementioned news can be included in the category of health data, pursuant to art. 4, par. 1, no. 15 of the Regulation, although it does not contain the clinical reasons underlying this suspension. In this regard, the Recital n. 35 of the Regulation specifies that data relating to health "include information on the natural person collected during his registration in order to receive health care services"; "a specific number, symbol or element attributed to a natural person to uniquely identify him or her for health purposes".

Furthermore, in the light of what is reported in the document "Information to the user on the processing of personal data pursuant to art. 13 of Regulation no. 2016/679" signed by Mrs. XX, in which it is indicated that: "Your personal data may be communicated to the following subjects:

- Doctors who perform the requested health service;
 - Entities that provide services for the management of the information system;
 - Judicial authorities, as well as all the subjects to whom the communication is mandatory by law upon their express request "
- the complainant had not given her consent to the communication of the personal data in question.

For these reasons, the unlawfulness of the processing of personal data carried out by the Company is noted, in the terms set out in the justification, for the violation of articles 5, letter. a) and f) and 9 of the Regulation.

In relation to the designation of the Data Protection Manager, we acknowledge the statements and assessments of the Company which, also due to the expansion of its business and the changed level of risk associated with the increase in the volume and type of data, has designated a data protection officer. On this point, in fact, from a check carried out by this Office, from the "Information pursuant to art. 13 Reg. (EU) 2016/679 on the protection of personal data (GDPR)", updated on 23 June 2022 (at <https://...>) it appears that "The Data Controller has appointed a data protection officer ("Data Protection Officer" or "DPO"), as required by the GDPR, with tasks of surveillance, supervision and specialist advice in the field of privacy who can be contacted for any support at the following e-mail address: salmi@studiolegalesalmi.it" and communicated the related data contact to the Authority.

In this context, considering that the conduct has exhausted its effects and that the Company has declared that it has interrupted the same conduct that does not comply with the regulations on the protection of personal data, the conditions for adopting the corrective measures referred to in 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; art. 166, paragraph 7, of the Code).

The violation of the articles 5, letter. a) and f) and 9 of the Regulation caused by the conduct of the Company is subject to the application of the administrative fine pursuant to art. 83, par. 5, letter. a) of the Regulation.

It should be considered that 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 College [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article

166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

The aforementioned pecuniary administrative sanction imposed, depending on the circumstances of each individual case, must be determined in the amount taking into account the principles of effectiveness, proportionality and dissuasiveness, indicated in art. 83, par. 1, of the Regulation, in the light of the elements provided for in art. 83, par. 2, of the Regulation in relation to which it is observed that:

the Authority became aware of the event following a complaint by the interested party (Article 83, paragraph 2, letter h) of the Regulation);

the data processing carried out by the Company concerns data suitable for detecting information on the health of the interested party and of other users (in this regard, the Company has declared that the communication of data concerning the subjects whose medical certificate had been suspended was occasional and not systematic) (Article 83, paragraph 2, letters a) and g) of the Regulation);

in terms of the subjective element, an intentional attitude emerges on the part of the data controller; moreover, the violation made it impossible for the person concerned to access the service provided by the gym to practice sports (Article 83, paragraph 2, letters a) and b) of the Regulation);

the Company promptly took care to take charge of the problem, interrupting the communication of the names of the suspended certificates, deleting the related e-mails within its systems (Article 83, paragraph 2, letter c) of the Regulation) ;

the controller has demonstrated a good degree of cooperation with the Authority in order to remedy the violations and mitigate their possible negative effects (Article 83, paragraph 2, letter f) of the Regulation);

against the Company itself, no provision has been previously adopted for pertinent violations and this is an isolated case (Article 83, paragraph 2, letter e) of the Regulation).

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction provided for by art. 83, par. 5, letter. a) of the Regulation, to the extent of 4,000.00 (four thousand) euros for the violation of articles 5 and 9 of the Regulation, as a pecuniary administrative sanction, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

It is also believed that the ancillary sanction of publication on the Guarantor's website 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, also in

consideration of the type of personal data subject to unlawful processing.

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

declares the unlawfulness of the processing of personal data carried out by Società Lombarda Sport s.r.l. for the violation of the articles 5 and 9 of the Regulation.

ORDER

pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, to Società Lombarda Sport s.r.l., Tax Code/P.Iva 08961970962, in the person of its pro-tempore legal representative, to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated herein measure; 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 aforementioned Company, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of 4,000.00 (four 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 n. 689/1981.

HAS

pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and believes 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 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, 24 November 2022

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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