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Order injunction against Flowbird s.r.l. - July 22, 2021

Record of measures

n. 292 of 22 July 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, Professor Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members, and the cons. Fabio Mattei, general secretary;

GIVEN the 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 which repeals Directive 95/46 / EC, "General Data Protection Regulation" (hereinafter the "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196, "Code regarding the protection of personal data", as amended by Legislative Decree 10 August 2018, n. 101, containing provisions for the adaptation of national law to the Regulation (hereinafter the "Code");

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

GIVEN the documentation in the deeds;

HAVING REGARD to the observations of the Office made by the Secretary General pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and operation of the office of the Guarantor for the protection of personal data, in www.gdpd.it, doc. web n. 1098801;

SPEAKER Attorney Guido Scorza;

1. Introduction

From an investigation initiated following a report submitted to the Authority in the month of XX, it emerged that for the issue of the badges certifying the payment of parking in the parking lots of Roma Capitale, the insertion, in the appropriate parking

meters, of the license plate is required. vehicle for which payment is made.

2. Preliminary activity

In relation to the case, an investigation was launched, during which an inspection was also carried out in collaboration with the special Privacy Unit of the Guardia di Finanza.

From the assessment it emerged that, with the resolution of the Capitoline Council no. XX del XX, Roma Capitale entrusted Atac s.p.a. services complementary to scheduled public transport, relating to the management of parking areas and parking on the street for the period XX (extended until the XX by virtue of the Deliberation of the Capitoline Assembly no. XX of the XX). On the proposal of Atac s.p.a., in the month of XX, in the territory of Roma Capitale, some "advanced" parking meters were installed, supplied by the company Flowbird Italia s.r.l. (formerly Parkeon s.r.l., hereinafter, the company), on the basis of a contract drawn up with Atac s.p.a (minutes XX and annex 10), in order to allow payment also by debit / credit cards, the personalization of payment through the " insertion of the vehicle number plate (with the consequent non-need for the user to display the payment coupon) and the possible activation of additional services on the parking meter (eg payment of sanctions / taxes, purchase / renewal of public transport tickets).

As regards the functional architecture of the system, Atac s.p.a, on behalf of Roma Capitale, the data controller, has created a centralized system that collects the information (time, date of start and end of parking, amount paid and the license plate) by the aforementioned "advanced" parking meters.

In fact, according to what the company has declared, some applications (Smartfolio and Pulsar) are accessible to its customers, including Atac s.p.a., for "the management and reporting of the service (eg access reserved for Atac s.p.a. traffic auxiliaries for the verification of payment for parking) "(XX, annex 5). In particular, the company's "Pulsar" application "keeps information relating to the vehicle license plate, the cost of parking, date and time of the start of the stop, date and time of the end of the stop, etc." (minutes XX).

During the inspection, it was also ascertained that the company participated in the treatment in question without its role as "(sub) data processor" being adequately defined before the start of the treatment, in violation of art . 28 of the Regulations, while acknowledging the company's request to "formalize this role" (minutes XX, annex 7) and the actual designation made on XX (note of XX, annex 5 and 6).

Furthermore, with reference to the obligation to draw up, before the start of the processing, a register of the processing

activities carried out both as data controller and as data processor (for the activities carried out on behalf of others data controllers), pursuant to art. 30 of the Regulations, the company declared that “it did not draw up any type of register...” (minutes XX); "With regard to the register of treatments [...] I would like to point out that [is] in the process of being drawn up" (minutes XX and annex 15).

With a note of the XX (prot. No. XX), the Office, on the basis of the elements acquired, notified the company, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulation, inviting the company to produce defensive 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 aforementioned note, the Office found that the company participated in the processing of personal data collected through the new parking meters installed on the territory, without its role having been defined and therefore in the absence of a condition of lawfulness and without having adopted the registers of the treatment, in violation of art. 5, 6 and 30 of the Regulation.

With a note of the XX, the company stated that:

"Flowbird Italia s.r.l. was obliged to provide advanced parking meters and services connected to ATAC S.p.a., a published company wholly owned by the Municipality of Rome, by virtue of the XXth contract; even in the absence of the formalization of its role, if Flowbird had refrained from carrying out the processing of user data, it could have resulted in an interruption of the local public transport service and management of the parking of the Municipality of Rome;

from this point of view, Flowbird's conduct would in any case appear to be ruled out by the fulfillment of the duties assumed towards ATAC, an entity operating a public service and holding a public function in the activity of ascertaining user violations; the above allows us to understand how the company Flowbird Italia S.r.l., now required to fulfill the service contract signed with ATAC before the entry into force of the GDPR, could not refrain, after 25 May 2018, from executing the contract from which depended on the management of over 900 parking meters (and related public services) of the Municipality of Rome; the treatment register had been prepared by the Parent Company of Flowbird Italia s.r.l., and exhibited to the soldiers of the Guardia di Finanza during the inspection of the XX;

art. 30 of the GDPR requires companies or organizations to be held, which led Flowbird Italia to consider the obligation of its parent company fulfilled, since it is the same organization;

in any case, the treatment register prepared by the Flowbird company is produced, noting how the company has profitably taken steps to mitigate the effects of the identified violation by promptly establishing its own treatment register (see register attached sub 11) ".

The hearing required pursuant to art. 166, paragraph 6, of the Code, during which the company further specified that "the non-fulfillment of the obligations contracted with Atac was subject to a penalty and for this reason it was not in a position to refuse the provision of the service before the appointment to sub responsible by Atac, taking into account the nature of a public service ".

3. Outcome of the preliminary investigation

According to the regulations on the protection of personal data, public subjects can process data only if necessary "to fulfill a legal obligation to which the data controller is subject" or "for the execution of a task of public or related interest the exercise of public authority vested in the data controller "(Article 6, paragraph 1, letter c) and e) of the Regulation). In this context, the regulation of parking and paid parking is part of the institutional activities entrusted to local authorities.

Even in the presence of a condition of lawfulness, in any case, the data controller is in any case required to respect the principles of data protection (Article 5 of the Regulation).

3.1 The treatment carried out by the company

Pursuant to art. 28 of the Regulation, the owner may also entrust processing to third parties who present sufficient guarantees on the implementation of technical and organizational measures suitable to ensure that the processing complies with the regulations on the protection of personal data ("data processors"). In this case, "the processing by a manager is governed by a contract or other legal act pursuant to the law of the Union or of the Member States, which binds the manager to the owner and which stipulates the subject matter and the duration of the processing, the nature and purpose of the processing, the type of personal data and the categories of data subjects, the obligations and rights of the owner "(Article 28, paragraphs 1 and 3, of the Regulation).

Furthermore, the data controller "does not have recourse to another controller without the prior written authorization, specific or general, of the data controller" and "when a controller uses another controller for the performance of specific processing activities on behalf of the controller, the same data protection obligations contained in the contract or in other legal act between the data controller and the data processor referred to in paragraph 3, in particular providing sufficient guarantees to implement

adequate technical and organizational measures so that the processing meets the requirements of this regulation "(art. 28 , par. 2 and 4 of the Regulation).

As emerged during the investigation, the processing of the data in question carried out by the company was initiated without the role being regulated pursuant to art. 28 of the Regulation, as the contract stipulated on the 20th with Atac s.p.a. does not meet the characteristics of the legal act aimed at regulating the relationship with the Data Processor, as it does not contain the elements required by art. 28 of the Regulation (see spec. Par. 3 and 4).

As previously clarified by the Guarantor with regard to similar cases, not having been identified as the data controller and not having been indicated by the company specific conditions that have legitimized the processing of personal data, it must be concluded that the same has been carried out in the absence of the conditions of lawfulness provided for by the Regulations and the Code (see provision no. 161 of 17 September 2020, web doc. 9461321; provision no. 281 of 17 December 2020, web doc. 9525315; Guidelines "on the concepts of owner and manager of the treatment in the GDPR "n. 07/2020, in particular note 35).

While acknowledging favorably that the company had solicited its appointment as data processor (minutes XX8, annex 7), the circumstance that the processing was provided for in the contract for the provision of a public interest transport service. Art. 6, par. 1, lett. e) of the Regulation, in fact, admits the processing if necessary "for the execution of a public interest or connected to the exercise of public authority vested in the data controller", thus legitimizing the "data controller" (Roma Capitale), invested with a task of public interest, to process the data for this purpose and not other subjects who process the data on behalf of the owner.

Therefore, in the absence of the prescribed appointment as "(sub) data processor" and since the company has not identified any other conditions that may legitimize the processing of the personal data of the users of the service in question, the processing of personal data carried out by the company from from the month of XX and up to the date of effective designation, which took place on XX (note of the XX, annexes 5 and 6), it appears to have been carried out in the absence of a suitable legal basis and therefore in violation of Articles 5, par. 1, lett. a) and 6 of the Regulations.

3.2 Records of processing activities

The Regulation provides, among the general obligations connected to the processing of personal data, the obligation, for each data controller and data processor (for the activities carried out on behalf of the data controller), to draw up the "registers of

processing activities "(Article 30 of the Regulation).

On the basis of what was declared by the company (minutes of the XXth), the failure to adopt the "treatment registers" was ascertained.

These tools, suitable for providing an updated picture of the treatments in place within your organization and / or the treatments carried out on behalf of the data controller, are essential to assess the compliance of the treatments with the regulations on the protection of personal data and therefore they are preliminary to the start of the same.

Therefore, the violation of art. 30 of the Regulation on the obligations to keep the register of all categories of activities relating to the processing carried out on behalf of a data controller, taking note of the late adoption of the aforementioned registers as declared by the company in the note of the XX

4. Conclusions

In light of the aforementioned assessments, it is noted that the statements made by the company whose truthfulness may be called to respond pursuant to art. 168 of the Code ☐ although worthy of consideration, they do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the filing of this procedure, however, none of the cases provided for by the art. 11 of the Guarantor Regulation n. 1/2019.

From the checks carried out on the basis of the elements acquired, also through the documentation sent, as well as from the subsequent evaluations, the non-conformity of the treatments carried out by the company concerning the data collected through the new parking meters provided to Atac s.p.a. was ascertained. and operational in the territory of Roma Capitale starting from the month of XX

The violation of personal data, object of the investigation, took place in full force of the provisions of the Regulation and the Code, as amended by Legislative Decree No. 101/2018, and therefore, in order to determine the regulatory framework applicable under the time profile (art. 1, paragraph 2, of the l. 24 November 1981, n. 689), these constitute the provisions in force at the time of the committed violation, which took place starting from the month of XX.

The preliminary assessments of the Office are therefore confirmed and the unlawfulness of the processing of personal data carried out by the company from the month of XX is noted, as it occurred in the absence of a specific condition of lawfulness and in the absence of fulfillment of the obligation to draw up a data processing register, in violation of art. 5 par. 1 letter a), 6 and 30 of the Regulation.

The violation of the aforementioned provisions makes the administrative sanction applicable pursuant to art. 58, par. 2, lett. i), and 83, para. 4 and 5, of the same Regulation, as also referred to by art. 166, paragraph 2, of the Code.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. l and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i), and 83 of the Regulations as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary sanction pursuant to Article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, depending on the circumstances of each single case "and, in this context," the College [of the Guarantor] adopts the injunction order, with which it also disposes with regard to the application of the ancillary administrative sanction of its publication, in whole or in excerpt, on the website of the Guarantor pursuant to Article 166, paragraph 7, of the Code "(Article 16, paragraph 1, of the Guarantor Regulation no. 1/2019).

In this regard, taking into account art. 83, par. 3, of the Regulations, in this case the violation of the aforementioned provisions is subject to the application of the same administrative fine provided for by art. 83, par. 5, of the Regulation.

The aforementioned administrative fine imposed, depending on the circumstances of each individual case, must be determined in the amount, taking into account the elements provided for by art. 83, par. 2, of the Regulation.

For the purposes of applying the sanction, it was considered that the processing of personal data collected through the new operating parking meters starting from the month of XX has potentially affected all the subjects who use the paid parking service in the territory of Roma Capitale. protracted for almost a year, in the absence of a specific condition of lawfulness and in the absence of adoption of the register of processing activities.

This violation was brought to the attention of the Authority through a report.

On the other hand, it was considered that the company had requested the definition of its role as "(sub) responsible for the treatment" already in the month of XX, it proceeded to draw up the registers of the treatment activities, showing, in general, an attitude of broad collaboration, during the preliminary investigation, with the Authority. In any case, the non-malicious behavior of the violation is highlighted. Furthermore, there are no previous violations of the relevant Regulations committed by the company.

Due to the aforementioned elements, assessed as a whole, it is deemed necessary to determine pursuant to art. 83, par. 2 and 3, of the Regulations, the amount of the pecuniary sanction, provided for by art. 83, par. 5, lett. a) of the Regulations, to the

extent of € 30,000 for the violation of Articles 5, par. lett. a), 6 and 30 of the Regulation as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same Regulation.

Taking into account the number of interested parties involved in the processing in question, carried out in the absence of a condition of lawfulness, it is believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is believed that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

declares the conduct of Flowbird s.r.l. to be illegal. for the violation of articles 5, par. 1, lett. a), 6 and 30 of the Regulations, within the terms set out in the motivation,

ORDER

to Flowbird s.r.l. in the person of the pro-tempore legal representative, with registered office in Via Giuseppe Ripamonti n. 89, 20141, Milan - VAT No. 04065160964 - to pay the sum of 30,000 euros as a pecuniary administrative sanction for violations of articles 5, 6 and 30 of the Regulations; 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 sanction imposed;

INJUNCES

to Flowbird s.r.l. to pay the sum of € 30,000 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 annex, 17 within thirty days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the l. n. 689/1981:

HAS

the publication of this provision on the website of the Guarantor, pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019;

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation.

Pursuant to art. 78 of the Regulation, of art. 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, it is possible to 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 applicant resides abroad.

Rome, July 22, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei