

Injunction against the Municipality of Bardolino - 31 January 2019

Register of measures

no. 33 of 31 January 2019

THE 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;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

NOTING that on 1 July 2016 this Authority received a report complaining of the publication on the institutional website of the Municipality of Bardolino of the lists of beneficiaries of economic contributions, contained in the resolutions for the years 2013, 2015 and 2016, with the indication of the name and tax code of the interested parties as well as the reference discipline, and of the Newsletters containing information and personal data of two municipal employees who are beneficiaries of the "Compulsory Abstention from work" and "Paid leave" permits;

CONSIDERING that the Office initiated an investigation against the Municipality of Bardolino, at the end of which it ascertained, with note no. 12867 of 3 May 2018, that on the institutional website of the Municipality itself the files containing the lists of beneficiaries of economic contributions of less than one thousand euros or who are in conditions of economic hardship were published, bearing the name and tax code of the interested parties, with the relevant reference legislation; two newsletters were also published containing data and personal information relating to two municipal employees, beneficiaries of the "Compulsory time off from work" and "Paid leave for two years in consideration of the serious disability of the cohabiting father" . The publication of the aforementioned information had caused the dissemination of personal data in the absence of suitable regulatory conditions and the dissemination of data suitable for revealing the state of health, in violation of the provisions, respectively, of articles 19, paragraph 3, and 22, paragraph 8, of the Code regarding the protection of personal data (legislative decree no. 196 of 30 June 2003, hereinafter the "Code");

CONSIDERING the report prot. no. 16898/109485 of 4 June 2018 with which the Municipality of Bardolino, with headquarters in Bardolino (VR), P.tta S. Gervaso n. 1, tax code 00345090237, in the person of the pro-tempore legal representative:

- the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code, applied in conjunction with art. 164-bis, paragraph 3, (in consideration of the high number of interested parties involved in the violation) in relation to art. 19, paragraph 3, of the same Code, for having disseminated, in the absence of a law or regulation, personal data relating to the recipients of economic contributions and personal data of the two municipal employees who are beneficiaries of the "Compulsory Abstention from work" and "Paid leave";

- the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code in relation to art. 22, paragraph 8, for having disseminated data suitable for revealing the state of health;

informing the party of the right to make the payment in a reduced amount pursuant to art. 16 of the law of 24 November 1981 n. 689;

NOTING that from the report prepared pursuant to art. 17 of the law of 24 November 1981, n. 689, the reduced payment has not been made;

HAVING REGARD TO the written defenses, dated 26 June 2018, sent pursuant to art. 18 of the law of 24 November 1981 n. 689, with which the Municipality requested that the sanctioning procedure be dismissed in consideration of various elements.

In the first place, the party noted the absolute vagueness of the quantification of the sanction due to the "vacuity, concentration and confusion in a single item of different hypotheses of violation, namely: the publication of the lists of recipients of financial contributions on the institutional website and in the at the same time the dissemination of personal data of two municipal employees who are beneficiaries of compulsory abstention from work and paid leave published in the Municipality newsletter".

In particular, the application of the aggravating circumstance pursuant to art. 164-bis, paragraph 3, of the Code should be valid, possibly, only for the case relating to the publication of the lists of beneficiaries of economic contributions and not also to the publication in the newsletter of the data of the two municipal employees who are beneficiaries of leave.

Secondly, the party objected to the late notification of the dispute (which took place on 4 June 2018) in consideration of the fact that the violation had already been ascertained with the note dated 10 February 2017, with which the Municipality replied to the request for information of the Guarantor. Subsequently, the Guarantor's Office sent a new request for information "after one year" (note no. 7249 of 2 March 2018), with which it limited itself to "requesting a supplementary investigation only and solely with reference to the another issue concerning the online dissemination of files containing the lists of beneficiaries of deeds granting economic benefits (...)" without asking for anything with respect to the issue relating to the dissemination of personal

data in newsletters, the assessment of which must, therefore, be considered concluded with the aforementioned note of February 10, 2017.

It was also noted that the aforementioned preliminary investigation supplement of the Guarantor (which took place as mentioned with the note of 2 March 2018), had as its object the publication of files no longer accessible on the website, except by those who "had a precise and exact knowledge of the location of the information in the browser cache on the server". In fact, with the note of 10 February 2017, the Municipality had provided reassurances regarding the republication of the lists in compliance with the sector regulations.

Lastly, the party observed that the note dated May 3, 2018 with which the Office concluded the investigation referred only to "newsletter no. 9 of 9 March 2016" and not also that n. 5 of 10 February 2016, which is why the dispute, which instead refers to both newsletters as a prerequisite for the provisions deemed violated, must be considered void;

CONSIDERING the minutes of the hearing of 18 September 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party reaffirmed what had already been argued in the defense briefs, requesting the dismissal of the sanctioning procedure or, alternatively, the application of the statutory minimum in consideration of the criteria pursuant to art. 11 of the law n. 689/1981;

CONSIDERING that the arguments put forward by the party must be partially accepted, with reference to the application of the aggravating circumstance pursuant to art. 164-bis, paragraph 3, of the Code, in relation to art. 19, paragraph 3. In this regard, it should be noted that in the notification of the dispute, on the basis of what was ascertained by the Office during the investigation, the violation of art. 19, paragraph 3, of the Code includes both the publication of the lists of beneficiaries of economic contributions and the publication, via newsletter, of information relating to the two municipal employees, on the assumption that the unlawful conduct is a single one and consists, in fact, in the dissemination of personal data in the absence of a law or regulation that expressly provides for it. However, the number of interested parties involved in the violation of the art. 19, paragraph 3, of the Code, (element that justifies the application of the aggravating circumstance pursuant to art. 164-bis, paragraph 3), can be found only in the case of the dissemination of the lists of beneficiaries of economic contributions. believes that, in accordance with the request of the party, the provision pursuant to art. 164-bis, paragraph 3, of the Code, in relation to art. 19, paragraph 3. In consideration of the fact that the party promptly proceeded to republish the aforementioned lists in accordance with the sector regulations and to definitively delete the files from the system cache, it is believed that the

sanction pursuant to art. 162, paragraph 2-bis, of the Code must be applied in conjunction with art. 164-bis, paragraph 1, of the Code which provides for a reduction of two fifths of the minimum and maximum limits of the sanctions when the violation is less serious, a circumstance which occurs in the case in question. Finally, it should be noted that, with reference to one of the two newsletters, the publication of the employee's initials and title, together with an indication of the severe disability status of the cohabiting father, resulted in the dissemination of data capable of revealing the status of health, expressly prohibited by the provision of art. 22, paragraph 8, of the Code.

On the other hand, as regards the argument put forward by the party regarding the lateness of the notification of the dispute, it is noted that the moment of ascertainment of the violation cannot be traced back to the acknowledgment note from the Municipality, dated 10 February 2017, but to the moment in which the Office, having acquired all the elements necessary to know and, above all, to evaluate the incident, concluded the investigation with the note dated May 3, 2018, notifying the party thereof. Therefore, from that moment the definition of the assessment takes place from which the 90 days provided for by art. 14 of the law n. 689/1981 to proceed with the notification of the dispute, which took place regularly on 4 June 2018. Among other things, it must be noted that the preliminary investigation had become necessary in consideration of the fact that the files containing the lists of beneficiaries of the granting deeds economic benefits (relating to the years 2013, 2015 and 2016) were still visible at the url addresses consulted by the Office, despite the fact that the Municipality had previously communicated that it had republished them, in accordance with the provisions in force on the matter. For the purposes of ascertaining the violation, therefore, considering the need to ask the party for further information regarding the persistence of these online documents, only following the response provided by the Municipality on 13 March 2018, was the situation corrected (by the definitive elimination of the data from the web server of the Municipality) and it was possible to conclude the investigation with the aforementioned note dated 3 May 2018, in which all the critical issues that emerged during the investigation (including those relating to the publication of the newsletters) were ascertained as a violation of the regulations on the protection of personal data. Finally, it is noted that, contrary to what was claimed by the party, the closing note of the investigation not only highlighted the unlawful dissemination of personal data through the publication of the newsletter, but also revealed the violation of art. 22, paragraph 8, of the Code, for having reported the news of a municipal employee who had been granted a period of leave "in consideration of the serious disability of his father";

NOTING, therefore, that the Municipality of Bardolino has disseminated personal data in the absence of suitable regulatory

conditions, in violation of the provisions of art. 19, paragraph 3, of the Code, and the dissemination of data suitable for revealing the state of health, in violation of the provisions of art. 22, paragraph 8, of the same Code;

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes the violation of the provisions indicated in art. 167 of the same Code, including the articles 19 and 22, paragraph 8, with the administrative sanction of payment of a sum from ten thousand euros to one hundred and twenty thousand euros, for each of the two disputed violations;

CONSIDERING that, with reference to the violation of art. 19, paragraph 3, of the Code, the prerequisites for applying the provision pursuant to art. 164-bis, paragraph 3, of the Code;

CONSIDERING, on the other hand, that the prerequisites for applying the provision pursuant to art. 164-bis, paragraph 1, of the Code;

NOTING that the violation of Article 22, paragraph 8, although relating to a data suitable for revealing the state of health, concerned only one person and with reference to a data presumably already known in a small community such as that of the Municipality of Bardolino;

CONSIDERING that the procedure described in article 18 indicated above is not applicable to disputes arising after 25 May 2018, but that the rigidity of the indication of a deadline for being admitted to the facilitated definition, taking into account that the offender has not power to affect the timeliness of the notification of the dispute, allows to evaluate the opportunity to apply the decreasing provided for by art. 164-bis, paragraph 1, of the Code to the present case;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law of 24 November 1981 n. 689, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary fine, based on the aforementioned elements assessed as a whole, to the extent of:

- 4,000.00 (four thousand) euros for the violation pursuant to art. 162, paragraph 2-bis of the Code, applied in conjunction with art. 164-bis, paragraph 1, in relation to art. 19, paragraph 3, of the Code;
- 4,000.00 (four thousand) euros for the violation pursuant to art. 162, paragraph 2-bis of the Code, applied in conjunction with art. 164-bis, paragraph 1, in relation to art. 22, paragraph 8, of the Code, for a total amount of 8,000.00 (eight thousand) euros;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations of the Office, formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Augusta Iannini;

ORDER

to the Municipality of Bardolino, with headquarters in Bardolino (VR), P.ta S. Gervaso n. 1, tax code 00345090237, in the person of the pro-tempore legal representative, to pay the sum of 8,000.00 (eight thousand) euros as a pecuniary administrative sanction for the violation envisaged by art. 162, paragraph 2-bis, of the Code, as indicated in the justification, for having disseminated personal data in the absence of suitable regulatory conditions and disseminated data suitable for revealing the state of health;

ENJOYS

to the same to pay the sum of 8,000.00 (eight thousand) euros according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree lg. no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 31 January 2019

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia