[doc. web no. 9445567]

Injunction against TB s.r.l. - July 2, 2020

Register of measures

no. 124 of 2 July 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Giovanna Bianchi Clerici and Prof. Licia Califano, members, and Dr. Giuseppe Busia, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter, the "Regulation");

HAVING REGARD TO the Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to regulation (EU) 2016/679 (legislative decree 30 June 2003, n. 196, as amended by legislative decree 10 August 2018, n. 101, hereinafter "Code");

HAVING REGARD to the complaint presented to the Guarantor pursuant to article 77 of the Regulation by XX concerning the processing of personal data relating to the interested party carried out by TB s.r.l.;

HAVING EXAMINED the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Dr. Antonello Soro;

WHEREAS

1. The complaint against the company and the preliminary investigation.

1.1. With a complaint dated November 5, 2018, Ms. XX complained about alleged violations of the Regulation by TB s.r.l. (hereinafter, the company), with reference to the posting on the company bulletin board "visible to all employees and customers of the supermarket [of] the letter of [...] dismissal without just cause, with attached [...] general information [of the complainant itself]".

With a note dated 14 January 2019, the Office invited the company to provide feedback on the facts subject to the complaint. The request, in the absence of a response from the company, was renewed with a note dated June 17, 2019 pursuant to art.

157 of the Code.

1.2. Since no reply was received from the company, the Office delegated the acquisition of the requested information to the Special Unit for the Protection of Privacy and Technological Frauds of the Guardia di Finanza. However, since the registered office of the company was found to be closed, the company's lawyer, Mr. Roberto Comunian, contacted by telephone, was invited to appear on 16 October 2019 at the headquarters of the Guardia di Finanza company in Sesto San Giovanni, for the notification of documents. On the occasion, the legal representative declared (see report of operations carried out on 16.10.2019) that:

to. “starting from 4 February 2019, the supermarket managed by the company T.B. s.r.l. located in Milan in via Piero della Francesca n. 57, financial year in which the complainant worked and where the bulletin board in question was also posted, has ceased its activity";

b. "regarding the failure to reply to the request for information [...] sent to the certified e-mail tbsrl@pec.it, [...] this address is incorrect as until 9/3/2019 the company's certified e-mail was tbsrls@pec.it, therefore [he] never heard of said request. I also specify that from 9/3/2019 to today, the Pec address of the company is tbsrl@mypec.eu";

c. in relation to the merits of the complaint, considering that the complainant "maintained the role of personnel management for almost two years", the legal representative decided to post "a copy of the dismissal letter on the bulletin board reserved for communications with employees, for a few days, so that they no longer submit to any communications or directives” from the claimant;

d. the company bulletin board where the posting took place was located "within a reserved area and not publicly accessible", with the consequent possibility of viewing by employees and not by supermarket customers.

1.3. On 7 November 2019, the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification to the company of the alleged violations of the Regulation found, with reference to articles 5, par. 1, lit. a) and c) and 6 of the Regulation. No response was given by the company to the aforementioned infringement notification.

2. The outcome of the investigation and of the procedure for the adoption of corrective and sanctioning measures.

After examining the statements made to the Authority during the proceedings as well as the documentation acquired, provided that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances o produces false deeds or documents and 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 considered, as a preliminary matter, and limited to the failure to respond to the request for information formulated by the Office pursuant to of the art. 157 of the Code, to accept the reasons given by the data controller regarding the fact that the omission was due to the sending of the aforementioned request to an incorrect certified email address, which did not allow the same to become aware of the request.

From a different point of view, it emerges that the company posted the claimant's dismissal order on the company bulletin board at the point of sale of the supermarket where she worked; in this way it made the expulsion measure visible - at least - to all employees in its entirety (it was not possible, in this regard, to ascertain whether the positioning of the notice board could allow customers to see what was posted as well as to the employees). This occurred in the absence of a suitable criterion of legitimacy on the part of the employer: in fact, based on current legislation, the processing of workers' data can be carried out by the employer only if "necessary" to fulfill an obligation to law or the execution of a contract (see article 6, paragraph 1, letters b) and c) of the Regulation).

With regard to the procedure relating to the termination of the employment relationship for justified objective reasons, there is an obligation to notify the worker, not third parties. In particular, the publication of the letter of dismissal makes known to third parties the specific reasons for the withdrawal and the information contained therein which, although not included, as a rule, in the context of "particular" data, are to be considered delicate, also in reason for the economic and social consequences deriving from the withdrawal itself.

Furthermore, the employer carried out the processing in violation of the principle of proportionality: on the basis of this principle, in fact, he could have informed the employees that the complainant was no longer part of the company structure with other methods, in compliance with confidentiality and of the dignity, even professional, of the interested party (see art. 5, paragraph 1, letters a) and c) of the Regulation).

3. Conclusions: illegality of the treatment. Sanction measure pursuant to art. 58, par. 2, Regulation.

For the aforementioned reasons, the processing of personal data referring to the complainant carried out by the company through the publication of the letter of dismissal on the company bulletin board placed at the point of sale of the supermarket where the complainant provided services is unlawful, in the terms set out above, in relation to the articles . 5, par. 1, lit. a) and c) and 6 of the Regulation.

Therefore, given the corrective powers attributed by art. 58, par. 2 of the Regulation, in the light of the circumstances of the specific case:

- a pecuniary administrative sanction is ordered pursuant to art. 83 of the Regulation, commensurate with the circumstances of the specific case (Article 58, paragraph 2, letter i) of the Regulation).

4. Injunction order.

Pursuant to art. 58, par. 2, lit. i) of the Regulation and of the art. 166, paragraphs 3 and 7 of the Code, the Guarantor orders the application of the pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation, by adopting an injunction order (art. 18, l. 11.24.1981, n. 689), in relation to the processing of personal data referring to the complainant carried out by the company through the publication of the letter of dismissal on the bulletin board corporate whose illegality has been ascertained, in the terms set out above, in relation to articles 5, par. 1, lit. a) and c) and 6 of the Regulation, following the outcome of the procedure pursuant to art. 166, paragraph 5.

Considering it necessary to apply paragraph 3 of the art. 83 of the Regulation where it provides that "If, in relation to the same treatment or to connected treatments, a data controller [...] violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation", considering that the ascertained violations are both subject to the sanction provided for by art. 83, par. 5 of the Regulation, the total amount of the fine is calculated so as not to exceed the maximum prescribed by the same art. 83, par. 5, fixed at the sum of 20 million euros or, for companies, at 4% of the annual worldwide turnover of the previous year where higher.

With reference to the elements listed by art. 83, par. 2 of the Regulation for the purposes of applying the pecuniary administrative sanction and the relative quantification, taking into account that the sanction must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), it is represented that In the present case, the following circumstances were considered:

a) with reference to the intentional or negligent nature of the violation and the degree of responsibility of the owner, the negligent conduct of the company and the degree of responsibility of the same was taken into consideration which did not comply with the data protection regulations in relation to a plurality of provisions;

b) the absence of specific precedents (relating to the same type of treatment) against the company.

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness with which the Authority must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), in first of all, the economic conditions of the offender, determined on the basis of the revenues earned by the company with reference to the financial statements for micro-enterprises for the year 2017 and also taking into account that the bankruptcy procedure has been initiated against the company. Finally, account is taken of the statutory sanction established, in the previous regime, for the corresponding administrative offences.

In the light of the elements indicated above and the assessments made, it is believed, in the present case, to apply against TB s.r.l. the administrative sanction of the payment of a sum equal to 1,000.00 (one thousand) euros.

In this context, it is also believed, in consideration of the type of violation ascertained, which concerned the general principles and the conditions of lawfulness of the processing, that pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, this provision must be published on the Guarantor's website.

It is also believed 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 THAT BEING CONSIDERED, THE GUARANTOR

declares the illegality of the treatment carried out by TB s.r.l. pursuant to articles 57, par. 1, lit. f) and 83 of the Regulation, for the violation of articles 5, par. 1, lit. a) and c) and 6 of the Regulation);

ORDER

a TB s.r.l., in the person of its pro-tempore legal representative, with registered office in Via Piero della Francesca 57, 20154 Milan, P.I. 09814160967, pursuant to art. 58, par. 2, lit. i), of the Regulation, to pay the sum of 1,000.00 (one thousand) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

also to the same Company to pay the sum of 1,000.00 (one thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law no. 689/1981. It should be remembered 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 the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated

below (art. 166, paragraph 8, of the Code);

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor's Regulation n. 1/2019, 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, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to the ordinary judicial authority may be lodged against this provision, with an appeal lodged with the ordinary court of the place identified in the same art. 10, within the term of thirty days from the date of communication of the measure itself, or sixty days if the appellant resides abroad.

Rome, July 2nd 2020

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

Busia