

Injunction against CT BAR - 31 January 2019

Register of measures

no. 21 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 dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

CONSIDERING the Legislative Decree 196/2003 containing the "Code regarding the protection of personal data" (hereinafter "Code");

CONSIDERING the law n. 689/1981 and subsequent amendments and additions and, in particular, the art. 1, paragraph 2, 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 the 4th Section of the Administrative and Social Police Division of the Verona Police Headquarters, as part of a control service of the production activities of the Municipality of Verona, carried out an administrative inspection at the public establishment called "CT BAR", a company individual of HE Zhengfen, C.F. HEXZNG78L65Z210V (hereinafter referred to as "the company") located in Verona, via Gaspare del Carretto n.54, formalized in the report dated 10 May 2018, concerning the lawfulness of the processing of personal data carried out by the company by means of the video surveillance installed in this business;

GIVEN the documents of the inspection assessment;

CONSIDERING that on the basis of what was found by the administrative police at the company's headquarters, it was found that:

- in the company, sold in 2017 to Ms HE Zhengfen by the previous owner, there was a video surveillance system;
- four cameras were connected to this system, three inside the room and one outside it;
- the images recorded using the aforementioned system were kept for a period of 15 days;
- the company, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is the owner of the processing of personal data carried out in the performance of his work and, in particular, in relation to the activity of this video surveillance system;

CONSIDERING the report n. 35 of 27 June 2018 of the 4th Section of the Administrative and Social Police Division of the Verona Police Headquarters, with which "CT BAR", the sole proprietorship of HE Zhengfen, Tax Code HEXZNG78L65Z210V, located in Verona, via Gaspare del Carretto n.54, the administrative violation provided for by art. 162, paragraph 2-ter of the Code, for failure to comply with the provisions of the Guarantor, with reference to the Provision on video surveillance of 8 April 2010, G.U. no. 99 of 29 April 2010, doc. web no. 1712680 traceable on the website www.gdpd.it, and, in particular of point no. 3.4. referred to the times of conservation of the images;

NOTING that, for the purposes of art. 17 of the law n. 689/1981 regarding the brief definition of the sanctioning procedures in question, from the findings made by the Office through checks on the printouts provided by the Ministry of Economy and Finance relating to the payments of administrative pecuniary sanctions regarding the protection of personal data, there is no payment made by the company, so it does not appear that the party has made use of the reduced payment option pursuant to art. 16 of the law n. 689/1981;

GIVEN the defense brief of 19 July 2018, formulated pursuant to art. 18 of the law n. 689/1981, with which the company's lawyer, with reference to the dispute referred to in the aforementioned report no. 35 of 27 June 2018, requested the dismissal of the sanctioning procedure or, alternatively, the reduction of the sanction to the statutory minimum in consideration of various elements.

First of all, the unawareness of the party was highlighted with regard to the conservation times of the images in the video surveillance system both for having taken over the commercial activity only a few months ago following the sale of the company and considering that the existing systems sold, including that relating to video surveillance, were compliant. The lawyer then pointed out both the serious impact that the sanction would have, if imposed, on the economic conditions of the company - so much as to prevent the continuation of the commercial activity - and the work carried out by the party to eliminate or mitigate the consequences of the alleged violation through the intervention of a technician, immediately after the verification by the administrative police, in order to set up "(...) the video recording in compliance with the provisions of art. 154 paragraph 1 lett. c) of the Code and point 3.4 of the general provision (...) on video surveillance dated 04/08/2010";

CONSIDERING that the arguments put forward by the party's lawyer in the written defense are not suitable for determining the closure of the sanctioning procedure.

In fact, with regard to the alleged unawareness of the party regarding the duration of the conservation times of the images, it

should be noted that according to the consolidated jurisprudence of the Supreme Court, formed in relation to art. 3 of law 689/1981, the error can be considered excusable, and therefore there is good faith, when this error is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the legitimacy of his behavior, in addition on the condition that such agent has done everything possible to comply with the law so that this positive element must not be remediable by the interested party with the use of ordinary diligence. The party, covering to all intents and purposes the qualification of data controller, was diligently required to know and fulfill the obligations required by the applicable legislation in the matter in question, ascertaining what was actually the duration of the conservation of the images within of the video surveillance system present in the company premises;

NOTING, therefore, that the Company, on the basis of the considerations referred to above, appears to have committed, in its capacity as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, the administrative violation envisaged by art. 162, paragraph 2-ter of the Code, for non-compliance with the provisions of the Guarantor, with reference to the Provision on video surveillance of 8 April 2010, doc. web no. 1712680 traceable on the website www.gpdp.it, and, in particular of point no. 3.4. referred to the times of conservation of the images;

CONSIDERING the art. 162, paragraph 2-ter, of the Code which punishes non-compliance with the provisions of the Guarantor of prescription of necessary measures pursuant to art. 154, paragraph 1, lett. c) of the same Code with a fine of between thirty thousand and one hundred and eighty thousand euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that, if any of the violations referred to in articles 161, 162, 162-ter, 163 and 164, is less serious, the minimum and maximum limits are applicable in an amount equal to two fifths;

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 n. 689/1981, 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;

WHEREAS, in the present case:

a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the alleged violations are not characterized by specific elements;

b) with regard to the work performed by the agent to eliminate or mitigate the consequences of the violation, the party

immediately took steps to eliminate the consequences of the violation and restore compliance with the relevant provisions;

c) about the personality of the author of the violation, the fact that the sole proprietorship is not burdened by previous sanctioning proceedings must be considered;

d) as regards the economic conditions of the agent, it is necessary to take into account the income data of the sole proprietorship, as well as the fact that it is a business in its infancy;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 12,000.00 (twelve thousand) euros for the violation pursuant to art. 162, paragraph 2-ter, of the Code applied in conjunction with art. 164-bis, paragraph 1, of the same Code;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981 and subsequent modifications and additions;

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. Antonello Soro;

ORDER

to "CT BAR", sole proprietorship of HE Zhengfen, Tax Code HEXZNG78L65Z210V located in Verona, via Gaspare del Carretto n.54, to pay the total sum of 12,000.00 (twelve thousand) euros as a pecuniary administrative fine for the violation envisaged by art. 162, paragraph 2-ter, in conjunction with art. 164-bis, paragraph 1, of the Code as indicated in the justification;

ENJOYS

to the same sole proprietorship to pay the sum of 12,000.00 (twelve 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 of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree 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

Soro

THE SECRETARY GENERAL

Busia