

[doc. web n. 9716887]

Injunction order - October 28, 2021

Record of measures

n. 392 of 28 October 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 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national 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 to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46 / EC (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 4/4/2019, published in the Official Gazette n. 106 of 8/5/2019 and in www.gdpd.it, doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

Having seen the documentation in the deeds;

Given the observations 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 Dr. Agostino Ghiglia;

WHEREAS

1. Reporting

With a note of the XX, the Command of the Carabinieri XX communicated to the Guarantor that it had conducted investigations on the ways in which Dr. Giglio delivered medical prescriptions to patients, reporting that they were fixed to laundry tongs attached to an axis of wood leaning against the windowsill of the doctor's office, located on the ground floor and facing the pavement of the public street.

2. The preliminary activity

Following a request for information, formulated by the Authority, pursuant to art. 157 of the Code (note of the XX, prot. No. XX),

Dr. Giglio provided a confirmation, with the notes of the XX, representing that:

- "the subject of the report was episodic and absolutely contingent, linked to a health emergency and in the awareness of the importance of the correct treatment of personal data, and also specifying that medical prescriptions were not left unattended, since I present when patients entered the clinic ";

- "it was considered important (...), albeit in a non-mandatory regime, precisely in order to reduce access to the clinic, to resort to the use of the dematerialized prescription, even for prescriptions not charged to the NHS and which commonly they are called "white recipes" with the relative release of non-paper reminders, thereby beginning to inform patients of the possibility reserved for them, also provided for by the Ministerial Decree. December 30, 2020 to send the reminder directly from the SAC to pharmacies by express choice ".

With reference to what emerged from the examination of the documentation examined and from the declarations made, taking into account that the described conduct did not comply with the relevant legislation on the protection of personal data, the Office, with deed of XX (prot. XX), notified Dr. Giglio, 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 Regulations, inviting her 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, l. N.689 of 24 November 1981).

In particular, the Office, in the aforementioned deed, represented that:

- the rules on the protection of personal data provide that data controllers are required to comply with the principles applicable to the processing of data, including that of "integrity and confidentiality", according to which personal data must be "treated in a way to guarantee adequate security (...), including protection, by means of adequate technical and organizational measures, from unauthorized or unlawful processing and from accidental loss, destruction or damage "(Article 5, par. 1, lett. f) of the

Regulation). The data controller is required to adopt adequate technical and organizational measures to ensure a level of security appropriate to the risk presented by the processing that derives from unauthorized disclosure or access, accidentally or illegally, to personal data transmitted, stored or however processed (Article 32 of the Regulation);

- in the health sector, the owner must adopt suitable measures to guarantee, also in the organization of services and services, respect for the rights, fundamental freedoms and dignity of the interested parties (Article 83 of the Code, considered compatible with the aforementioned Regulation (EU) n.2016 / 679; see art.22, paragraph 11, legislative decree 10 August 2018, n.101, in relation to which the Guarantor has adopted a specific general measure - see general provision of 9 November 2005, available on www.garanteprivacy.it, web doc. . no. 101/2018);

- information relating to health can be disclosed to third parties only on the basis of a suitable legal basis or on the indication of the interested party himself, subject to the written authorization of the latter (Article 9 of the Regulation and Article 84 of the Code in conjunction with the 'Article 22, paragraph 11, legislative decree 10 August 2018, n.101; see also general provision of 9 November 2005, available at www.gpdt.it, web doc. n. 1191411, deemed compatible with the the aforementioned Regulation and with the provisions of decree no.101 / 2018; see Article 22, paragraph 4, of the aforementioned Legislative Decree no. 101/2018).

Having said that, on the basis of the elements acquired, with the aforementioned deed of March 5, 2021, the Office found that Dr. Giglio has processed personal data in violation of the basic principles of processing referred to in Articles 5 and 9 of the Regulations and the obligation regarding the security of processing pursuant to art. 32 of the Regulation.

With a note dated 6 April 2021, the doctor sent her defense briefs, in which, in particular, it was represented that:

a) "firstly, it is specified that the prescriptions whose delivery methods are alleged to be the subject of the alleged violation were contained in sealed envelopes bearing only the patient's surname and name; (...) these envelopes had not been left unattended since the writer was always present in the clinic, and were placed in such a way that they can be taken by the interested party without entering the clinic as a function of a necessary limitation of access in the presence of a serious situation of expansion pandemic in the "Tortonese" area ";

b) "in a pandemic emergency situation" it is "necessary to adopt protocols, with reference to the methods of communication with patients, in part derogations from those that would be adopted in a normal situation; (...) This Authority in this recalling the civil protection ordinance of March 19, 2020 stated that in order to prevent citizens from going to primary care clinics to collect

prescriptions, it is expected that the general practitioner can transmit to the 'assisted by e-mail, SMS or telephone ";

c) "it is believed that there is no substantial difference in terms of security in the processing of data between e-mails and SMSs, accepted by this Authority and the positioning of closed envelopes contested by the writer";

d) "the display of the envelopes containing the prescriptions was made for the specific purpose of limiting access to the clinic, a limitation that was strongly encouraged by the aforementioned civil protection order to which the Guarantor explicitly refers".

On May 4, 2021, the hearing requested by the data controller was held before the Authority, during which, in relation to the notified violation, what had already been stated was reiterated and, in any case, it was specified that:

- "these were not prescriptions but warnings for patients concerning the correct procedures to be adopted to avoid the risk of contagion from Covid-19 and to access the clinic safely";
- "none of the patients complained and was harmed";
- "the email and the Whatsapp platform are not used to provide the aforementioned warnings as they are considered unsafe";
- "sometimes to help the elderly, the recipes are delivered directly to the home of the patients".

3. Outcome of the preliminary investigation

Given that, unless the fact constitutes a more serious crime, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false documents or documents, is liable pursuant to art. 168 of the Code ("False declarations to the Guarantor and interruption of the execution of the tasks or the exercise of the powers of the Guarantor"), upon the outcome of the declarations made to the Authority during the procedure as well as the examination of the documentation acquired, that Dr. Giglio has carried out a processing of personal data in violation of the basic principles of the processing referred to in Articles. 5, 9 of the Regulations and the obligation regarding the security of processing, pursuant to art. 32 of the Regulation.

4. Conclusions

The concise deductions reported by the holder in the defense briefs and in the hearing are insufficient to overcome the objections raised by the Office with the act of initiation of the procedure and, therefore, to allow the filing of the procedure, since none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

Preliminarily, it should be noted that during the emergency period certain measures have been envisaged to facilitate the use of the simplified procedures for acquiring the dematerialized reminder or the electronic prescription number provided for by the

Civil Protection Ordinance no. 651 of March 19, 2020, in order to avoid the client having to go to the doctor's office to collect the prescription; this, in order to contain the spread of the Sars Cov-2 virus (Ministerial Decree 25 March 2020 and Ministerial Decree 30 December 2020, on which the Authority has expressed its competent opinion - see provision 19 March 2020, web doc. . 9296257, of 2 April 2020, web doc. No. 9308089, provision of 12 November 2020, web doc. 9519603).

That said, it is understood that the statements made by Dr. Giglio relating to the reasons for which she intended to introduce a different method of delivery of the prescriptions, in the emergency period, compared to those indicated in the aforementioned decrees, do not allow to exceed the critical issues already manifested in the notes of 24 December 2020 and 5 March 2021. In particular, the reasons given by the doctor relating to the absence of a "substantial difference in terms of security in the processing of data between e-mails and SMS, this Authority and the positioning of closed envelopes contested to the writer "and the inadequacy of the" mail and (of) the Whatsapp platform "[the latter method, which is not contemplated by the aforementioned decrees], in terms of suitability, do not appear to be supported from technical and legal assessments.

It should also be noted that, from the photographic documentation attached to the report, it emerges that the delivery method devised by Dr. Giglio also concerned medical prescriptions, freely visible and accessible to anyone passing by the window sill of the medical office, because they are not contained in a sealed envelope.

In this regard, the Guarantor, in the press release of November 14, 2014, had already expressly pointed out that "medical prescriptions can be left at pharmacies and doctors' offices for collection by patients, as long as they are put in a sealed envelope. Leaving recipes and certificates within the reach of anyone or even unattended, in trays placed on the counters of pharmacies or on the desks of doctors' offices, violates the privacy of patients ". It was also pointed out that "the procedures, which have already been in place for some time, allow doctors to leave prescriptions and certificates to patients in the waiting rooms of their offices or pharmacies, without necessarily having to deliver them in person. To prevent the knowledge of sensitive data, such as health data, by outsiders, it is however essential that recipes and certificates are delivered in a sealed envelope. The sealed envelope is all the more necessary if it is not the patient who collects the documents, but a person specifically delegated by them "(see press release dated 14 November 2015, in web doc. No. 3533579; see also provision . of 24 February 2011, web doc. 1797075).

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by Dr. Giglio, in violation of Articles 5, 9 and 32 of the Regulations, within the terms set out in the motivation.

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 violation of articles 5, 9 and 32 of the Regulations, determined by the processing of personal data, the subject of this provision, carried out by Dr. Giglio, is subject to the application of a pecuniary administrative sanction pursuant to art. 83, par. 4 and 5 of the Regulation.

Consider that 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).

The aforementioned administrative fine 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 light of the elements provided for in art. 83, par. 2, of the Regulation in relation to which, in particular, it is noted that:

- the data processing carried out concerned information on the state of health of Dr. Giglio's patients and lasted for several months (Article 83, paragraph 2, letters a) and g) of the Regulations);
- the violation is malicious and the degree of responsibility of the owner is high, taking into account the technical and organizational measures implemented pursuant to art. 25 and 32 (Article 83, paragraph 2, letters b) and d) of the Regulations);
- some patients provided summary information regarding the conduct of the doctor at the Carabinieri Command XX (Article 83, paragraph 2, letter k) of the Regulations);
- the emergency state during which Dr. Giglio carried out the treatment in question, as well as the sufficient dissuasiveness of the administrative sanction imposed (Article 83, paragraph 2, letter k) of the Regulations.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction in the amount of € 10,000.00 (ten thousand) for the violation of Articles 5, 9 and 32 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 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, in relation to the particular category of personal data processed and the potential number of data subjects.

Finally, it is noted that the conditions set out in art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

WHEREAS, THE GUARANTOR

the violation of art. 5 of the Regulations, declares the unlawfulness of the processing of personal data carried out by Dr. Giglio under the terms set out in the motivation;

ORDER

to Dr. Giglio, born in XX on XX, C.F.XX, resident in XX, in XX, pursuant to articles 58, par. 2, lett. i) and 83 of the Regulations, as well as art. 166 of the Code, to pay the sum of € 10,000.00 (ten thousand) as a pecuniary administrative sanction for the violation referred to in this provision, according to the methods indicated in the annex, within 30 days from the notification of motivation; 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 the aforementioned Dr. Giglio, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 10,000.00 (ten thousand), 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

- the publication of this provision on the website of the Guarantor, pursuant to art. 166, paragraph 7, of the Code;
- the annotation of this provision in the internal register of the Authority - provided for by art. 57, par. 1, lett. u), of the Regulations, as well as by art. 17 of Regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor - relating to violations and measures adopted in accordance with art. 58, par. 2, of the same 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, October 28, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Ghiglia

THE SECRETARY GENERAL

Mattei