

[doc. web no. 9838010]

Injunction order against the health protection company - ATS Sardinia - 24 November 2022

Register of measures

no. 384 of 24 November 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and which repeals Directive 95/46/ CE, "General Data Protection Regulation" (hereinafter, "Regulation");

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal 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 the processing of personal data, as well as to the free movement of such data and which repeals Directive 95/46/EC (hereinafter the "Code");

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

Given the documentation in the deeds;

Given the observations made by the general secretary pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Prof. Pasquale Stanzione;

WHEREAS

1. Introduction.

With a complaint presented on the XX date pursuant to art. 77 of the Regulation, an employee of the Company for the protection of health - ATS Sardegna (hereinafter, the "Company"), in service as Medical Director, registered in the Order of

Physicians and Dentists of the Province of Cagliari, represented that, on the 20th date, the Company (South Zone Prevention Department) notified him of an act of assessment and communication of the absence of the vaccination requirement pursuant to art. 4, paragraph 6, of the legislative decree 1 April 2021, no. 44 (in the text in force at the time), bearing neither protocol number nor date.

Furthermore, he would also have been notified of the employer determination resulting from the ascertained absence of the vaccination requirement, with which suspension from service was ordered, given the communication with which the South Zone Prevention Department of the same Company had formally communicated what ascertained.

The complainant complained, in particular, that, contrary to the provisions of art. 4, paragraph 6, of the aforementioned decree, the Company would have sent to the professional order to which it belongs "a complete copy of the Deed of assessment of non-compliance with the vaccination obligation and related Determination of suspension [...], deeds from which the state vaccine of the person concerned".

## 2. The preliminary investigation.

An examination of the documentation attached by the complainant revealed that the Company, not already as an auditing body (function performed by the Department of Prevention), but expressly qualifying itself as an employer, would have sent a note from the General Management (prot. n XX of XX) both to the interested party and to the professional order to which he belongs, communicating the ascertained non-existence of the vaccination requirement, for the purposes of the consequent annotations on the professional register and also giving account of the consequent suspension from the service and from the salary, given the impossibility of assigning the interested party to other tasks.

In response to a request for information from the Authority (note prot. XX of XX), the Company, with note prot. no. XX of the XX, declared, in particular, that:

"The ATS was established, with effect from the first XX, by the Regional Law n. XX, through the incorporation into the pre-existing ASL of Sassari of the remaining seven Local Health Authorities of Sardinia. The Sardinia ATS was divided (corresponding to the eight extinct ASLs) into eight Local Social Health Areas, without legal personality but with organizational and operational autonomy, with a territorial scope coinciding with that of the pre-existing AA.SS.LL. and same headquarters";  
"[...] ATS Sardegna was commissioned, starting from the XX";

"[...] at the time of the disputed case, the interested complainant worked for [the Company] [...] therefore having [ATS

Sardegna] - coincidentally - both the legal qualification of entity required by law to proceed with the assessment of the lack of vaccination, as well as that of the employer, always against the complainant; and therefore being irrelevant - it is believed - the legal qualification assumed (investigator body/employer) assumed at the time of the contested communication";

"[...] [the] Legislative Decree no. 44/2021, art. 4, paragraph 6) founded the obligation of communication, also to the Order of belonging, as a fulfillment of a legal obligation to which the data controller was subject, and therefore constituted the legal basis of the treatment carried out, absorbing in relation to the remaining further hypotheses authorizations pursuant to art. 6 of the [Regulation] [...]".

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Company, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lit. a), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021, in force at the time of the facts being the subject of the complaint), inviting the aforementioned Company to produce written documents to the Guarantor defenses or documents 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 the law of 24 November 1981, n. 689).

Only with note prot. no. XX of the XX, the Company sent its defense brief, declaring, in particular, that:

"with the Regional Law of Sardinia n. 24/2020 established the extinction of the Sardinia ATS and the re-establishment, starting from the first XX, of the eight previously extinct Local Social-Health Companies, as well as the establishment of the ARES - Regional Health Company, with a support role, as a service agency to the aforementioned re-established Companies";

"with the Regional Law of Sardinia n. 17/2021, it was established in art. 34, paragraph 1, lett. b), that "At the same time as the establishment of ARES, in the interest of the Region and on the indication of the Regional Department responsible for health, the Regional Health Liquidation Management is established, endowed with legal personality and patrimonial and economic autonomy, competent for the liquidation of all active and passive positions and all pending lawsuits, from the date of establishment of the Health Protection Agency (ATS) and those previously headed by the suppressed local health units and the suppressed health agencies" ;

"with reference to the complaints of the complainant, it should be noted that the art. 4, paragraph 6, of the Legislative Decree

no. 44/2021 (discipline radically replaced by Legislative Decree no. 173/2021) provided that the ascertaining body - ATS Sardegna, at that time - of the unjustified non-fulfillment of the vaccination obligation by health professionals (in the case coinciding with the employee's employer), he/she, of the relative "assessment deed", "immediate written communication to the interested party, to the employer and to the Professional Order to which he belongs"":

"so it appears to have proceeded, in fulfillment of the aforementioned provisions of the law, by means of a confidential note [...] having dispositional substance, addressed exclusively to the interested party and to the professional Order to which he belongs; deed which, as mentioned above, from an Entity having both the qualifications of auditing entity and employer, also contained the determinations regarding the employee's employment relationship";

"this coincidence of roles, it is reiterated, has determined in the aforementioned "assessment deed" the due contextuality, alongside the declaration ascertaining the non-fulfillment of the vaccination obligation, also of the determinations regarding the employee's job position; with a deed, it should be noted, of a confidential nature communicated - in application of the regulatory provisions in force at the time, thus constituting the legal basis of the data processing - to another body governed by public law, appointed to protect the interests of the category represented, and as such placed under the supervision of the Ministry of Health".

### 3. Outcome of the preliminary investigation.

Public subjects may process personal data, also relating to particular categories of data (see Article 9, paragraph 1, of the Regulation), if the processing is necessary "to fulfill a legal obligation to which the data controller is subject" or "for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (Article 6, paragraph 1, letters c) and e), as well as art. 9, par. 2, lit. g), of the Regulation and 2-ter and 2-sexies of the Code). Under another profile, the employer can process the personal data of workers if the processing is necessary for the management of the employment relationship and to fulfill specific obligations or tasks established by laws, regulations and sector legislation (articles 6, paragraph 1, letter c), 9, paragraph 2, lit. b) and 4; 88 of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of the [...] regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining with greater precision specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (Article 6, paragraph 2, of the Regulation). In this regard, it should be noted that the operation of

communication of personal data to third parties, by public entities, is permitted only when provided for by a law or, in the cases provided for by law, a regulation (cf. art. 2-ter, paragraphs 1 and 3, of the Code, in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021; in the event that the data subject to communication belong to particular categories, see articles 9 of the Regulation and 2-sexies of the Code).

The data controller is, in any case, required to respect the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in a lawful, correct and transparent manner in relation to the data subject" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letters a) and c) of the Regulation).

With regard to the processing of personal data relating to the anti SARS-CoV-2 vaccination, the legislator - with art. 4 of the legislative decree 1 April 2021, no. 44, converted into law 28 May 2021, n. 76 - established that vaccination constitutes an "essential requirement for the exercise of the profession and for the performance of work" for health professions and operators of health interest expressly indicated by law (this professional requirement is no longer required for the aforementioned staff starting from 1 November 2022, as a result of Legislative Decree No. 162 of 31 October 2022).

The art. 4, paragraph 6, in the text in force at the time of the events which are the subject of the complaint, provided that "once the terms for certifying compliance with the vaccination obligation have elapsed [...], the competent local health authority ascertains non-compliance with the obligation vaccine and, after acquiring any additional information from the competent authorities, immediately notifies the interested party in writing, the employer and the relevant professional association. The adoption of the assessment deed by the local health authority determines the suspension of the right to perform services or tasks that involve interpersonal contacts or involve, in any other form, the risk of spreading the infection from SARS-CoV-2 " .

In the premise that the aforementioned regulatory framework had been subsequently reformed by the legislator (see Article 4, paragraph 4, of Legislative Decree No. 44 of 1 April 2021, as replaced by Article 1, paragraph 1, letter b) , of the d.l. 26 November 2021, no. 172, which envisaged a different procedure for verifying the vaccination requirement by the professional orders through the respective national federations), it should be noted that the various subjects involved (employers, regions, healthcare companies, professional orders), in carrying out the treatments in question (which find their legal basis in the aforementioned regulatory provision) were required to ensure compliance with the principles of data protection (Article 5 of the

Regulation) as well as, to process the data through authorized and duly trained personnel in this regard access to data (articles 5 and 4, paragraph 10, 29, 32, paragraph 4, of the Regulation), also taking into account the particular delicacy of the same (art. 9, paragraphs 2 and 4, as well as art. 4, point 15, and recital 35 of the Regulation).

In this context, the health authorities, based on the legislation in force at the time of the events subject to the complaint, could process personal data both as an entity that proceeded to ascertain the lack of vaccination (based on the criterion of territorial jurisdiction linked to residence of the interested parties, see art. 4, paragraph 5, legislative decree n. 44/2021) and as employers of the healthcare personnel concerned (see art. 4, paragraphs 6-10, legislative decree n. 44/2021).

Sometimes these roles could coincide (for example in the not infrequent hypothesis of the employee of a healthcare company which is also the territorially competent one based on the residence of the same, a circumstance which seems to apply in the present case). In such cases, in compliance with the general principles of processing (Articles 5, 24 and 25 of the Regulation), it was necessary to adopt specific technical and organizational measures aimed at ensuring that the data were processed only for the purposes for which they were collected, taking care to keep the purposes of the treatment pursued as an employer separate from those relating to the function of verifying the non-vaccination, also from an organizational point of view.

On the basis of the aforementioned sector regulations, only following precise checks - and only with respect to the interested parties with respect to whom the absence of the aforementioned professional requirement had been concretely ascertained (e.g. finding application of the hypotheses of exclusion expressly provided for by law, art. 4, paragraph 2, cit.) - "the competent local health authority ascertains non-compliance with the vaccination obligation and [...] gives immediate written notice to the person concerned, to the employer, and to the professional order to which they belong" (art. 4, paragraph 6 of Legislative Decree no. 44/2021). On the other hand, this framework did not provide that the employer had to communicate to the professional order of belonging the employer measures adopted following the deed of verification, by the local health authority, of the non-existence of the vaccination requirement. In fact, it was solely the responsibility of the local health authority, as the body ascertaining the aforesaid requirement, to notify the professional order, as well as the employer and the person concerned, of the suspension of the right to perform services or tasks which implied the risk of contagion (paragraph 7 of article 4), for the purposes of the adoption, by each one, of the provisions of competence (such as the assignment to alternative tasks, or suspension from work, by the employer; the annotations on the professional register by the Order).

In the system of the Regulations and the Code, these sector rules constitute the legal basis for the processing operations

necessary for verifying the existence (or otherwise) of the professional requirement, defining, in a uniform manner at national level, the scope of the processing permitted to each of the institutional subjects involved in the verification process (see the numerous provisions of the Guarantor in the emergency period and, in particular, the opinions given on the implementing provisions of the aforementioned framework, including, in particular, provision no. 430 of 13 December 2021 , web doc. n. 9727220). As traditionally stated by the Guarantor, in particular in an equally delicate working context such as that of passenger air transport, the treatments carried out for the purpose of ascertaining the requirements for accessing and carrying out certain professions envisaged by specific legal provisions must be carried out in strict compliance with the limits and conditions established by this reference framework (see provision no. 194 of 27 April 2016, web doc. no. 5149198).

In the present case, with note prot. no. XX of the XX, addressed to the complainant and to the Order of Surgeons and Dentists of the Province of Cagliari, the Company, having taken note of the communication with which its Prevention Department "gave formal communication [to the Extraordinary Commissioner of the Company ] in his capacity as employer, of the verification of non-compliance by the [complainant], in service with ATS Sardegna [...], of the vaccination obligations [...]", informed the aforementioned Order of circumstances relating to the employment relationship.

In particular, the aforementioned note reported:

the circumstance that "[...] it is not possible to assign [the complainant] to tasks, even inferior, other than those performed and which do not involve interpersonal contacts or do not involve, in any other form, the risk of spreading the infection from SARS-CoV -2";

the tasks performed by the complainant at the time;

the circumstance that "after the term of 5 days from receipt of this letter, [the complainant] is suspended [or] from the service, until the fulfillment of the vaccination obligation or, failing that, until the completion of the national vaccination plan and in any case no later on 31 December 2021";

the fact "that, for the entire duration of the suspension [...], the person concerned is not owed remuneration or other compensation or emolument [...]" .

On the basis of the regulatory framework referred to above, as in force at the time in which the facts object of the complaint occurred, the Company - as the body that proceeded to ascertain the non-existence of the vaccination requirement and not instead in the capacity of employer – should have communicated to the Professional Order only the outcome of the

assessment in question.

The Company, as an employer, has instead communicated to the Order of Surgeons and Dentists of the Province of Cagliari the measures adopted in the context of the employment relationship as a result of the assessment carried out by the Department of Prevention, as well as other information relating to the employment relationship (task performed by the complainant; circumstance that the same could not be employed for other tasks; possible suspension of the person concerned from the service without pay), of which the Order, by virtue of the aforementioned regulatory framework, does not was entitled to know. In fact, on the basis of the aforesaid regulatory framework, the Order could know, and therefore treat, for the purposes of the due annotations on the professional register, only the information relating to the non-existence of the vaccination requirement, with consequent suspension of the interested party pursuant to the law from the exercise of the medical profession (and not also the information relating to suspension from service, a hypothesis that is only possible due to the possibility for the professional to be used for alternative tasks, on the basis of the employer's assessments).

The communication of the personal data in question therefore took place in a manner that did not comply with the principle of "lawfulness, correctness and transparency" and in the absence of a legal basis, in violation of articles art. 5, par. 1, lit. a), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021, in force at the time of the events subject to the complaint).

Although the definition of "data relating to health" (art. 4, paragraph 1, n. 15) also includes the provision of health services, it must, in the present case, be observed that, contrary to what is claimed by the complainant, the information on the non-vaccination against Covid-19, without specific references to the reasons for exemption or deferral (connected to past or current, temporary or permanent morbidity), does not in itself constitute personal data on the health of the interested party. For these reasons, it is believed that the communication that is the subject of the complaint did not concern personal data relating to the health of the interested party.

#### 4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller during the preliminary investigation □ the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code □, although worthy of consideration, do not allow overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the



Regulation of the Guarantor n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Company is noted, for having communicated the complainant's personal data to a third party in the absence of a legal basis, in violation of articles 5, par. 1, lit. a), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021, in force at the time of the events subject to the complaint).

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 3, 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 accessory sanctions (articles 58, paragraph 2, letter i and 83 of the Regulation; article 166, paragraph 7, of the Code).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the College [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

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

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

In relation to the aforesaid elements, it was considered that the identified conduct involved the communication of personal data relating to events connected to the employment relationship, despite the numerous precedents on the subject and, more generally, the indications given by the Guarantor to all public entities with the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector" (provision no. 23 of 14 June 2007, web doc. no. 1417809).

On the other hand, the fact that the Company's conduct took place in the emergency context due to the SARS-CoV-2 pandemic was taken into consideration, in which it, like other Administrations, had to make complex decisions in rapid issues, in the face of a particularly complex and constantly evolving emergency regulatory framework (moreover, the professional requirement of vaccination is no longer required for healthcare personnel starting from 1 November 2022, as a result of Legislative Decree No. 16 of 31 October 2022 ). It was also considered that some of the personal data communicated (the circumstance that the interested party could not be used for other tasks; possible suspension from the service without remuneration) concern eventualities in any case abstractly contemplated by the regulatory framework of the sector referred to above in the event of non-existence of the vaccination requirement and, as such, at least foreseeable by anyone who was aware of the suspension of the claimant. It was then taken into account that the violation concerned only one interested party and did not concern the violation of personal data relating to particular categories. Furthermore, there are no previous relevant violations committed by the data controller, having the same nature as those ascertained in relation to the complaints, or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction in the amount of 4,000 (four thousand) euros for the violation of articles 5, par. 1, lit. a), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021), as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account that the communication in question had as its object personal data relating to the employment relationship of the interested party, it is also believed that the ancillary sanction of publication on the website of the Guarantor of this provision should be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted that the conditions pursuant to art. 17 of Regulation no. 1/2019.

ALL THIS CONSIDERING THE GUARANTOR

declares, pursuant to art. 57, par. 1, lit. f), of the Regulation, the unlawfulness of the processing carried out by the Company for violation of the articles 5, par. 1, lit. a), and 6 of the Regulation, as well as 2-ter of the Code (in the text prior to the amendments made by Legislative Decree No. 139 of 8 October 2021), in the terms referred to in the justification;

ORDER

pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, to the Regional Health Liquidation Management of the Health Protection Company - ATS Sardinia, with registered office in Via Enrico Costa n. 57 - 07100 Sassari (SS), Tax Code 92005870909, to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated in the justification. 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 fine imposed;

ENJOYS

to the aforementioned Regional Health Liquidation Management, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of 4,000.00 (four 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;

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code (see art. 16 of the Guarantor's Regulation no. 1/2019);

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lit. u), of the Regulation, of the violations and of the measures adopted in accordance with art. 58, par. 2, of the Regulation (see art. 17 of the Guarantor Regulation n. 1/2019).

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

Rome, 24 November 2022

PRESIDENT

station

THE SPEAKER

station

THE SECRETARY GENERAL

Matthew