

Injunction order - December 13, 2018

Register of measures

no. 507 of 13 December 2018

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 the Lieutenancy of the Guardia di Finanza of Osimo, in execution of a delegation of investigations from the Public Prosecutor's Office at the Court of XX and subject to authorization granted on 18 June 2018 by the aforementioned Prosecutor's Office, ascertained, on the basis of the elements acquired, that mr. XX Fiscal code: XX, born in XX, on XX, as owner of the sole proprietorship XX VAT number: XX, based in XX, via XX (hereinafter Sole Proprietorship), proceeded, within the 'money transfer activity on behalf of and as agent of Western Union Payment Services Ireland Limited, to carry out two separate fund transfer operations abroad (France) attributing them to two unaware subjects, as revealed by specific reports of other summary information pursuant to art. 351 c.p.p. drafted against the aforementioned subjects who have disavowed their signatures affixed at the bottom of the "To Send Money" receipt forms, also declaring that they have not arranged the transactions recorded with the aforementioned forms, and therefore without acquiring their consent to the processing of data pursuant to art. 23 of Legislative Decree 30 June 2003, no. 196 laying down the Personal Data Protection Code (hereinafter referred to as the Code);

HAVING REGARD to the complaint report dated 6 August 2018, which is understood to be referred to in full here, with which the Sole Proprietorship, as data controller, was challenged with two administrative violations envisaged by art. 162, paragraph 2-bis of the Code, for having carried out, for each interested party, a processing of personal data, consisting of as many money transfers in the name of the aforementioned interested parties who were unaware of the processing of their personal data, carried out, therefore, without acquiring the relative consent pursuant to art. 23 of the Code;

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 individual company XX;

HAVING REGARD TO the written defenses dated 19 June 2015, drawn up pursuant to art. 18 of the law n. 689/1981 in which the sole proprietorship, highlighting how the ascertaining body had already recognized in the context of the dispute "(...) that the violation (...) was not relevant (...). By virtue of this, in fact, they decided to apply the provision envisaged by art. 164-bis (paragraph 1) of the Code (...). By deciding to apply the minimum penalty reduced by two fifths, the subsequent increase in art. 16 of the law n. 689/1981", he deduced that "(...) the tax takers then doubled the sum (...) as they believed, erroneously, the existence of two violations (...)". Furthermore, the offender decided to point out that "(...) the tax takers did not even take into account the tenuity of the facts pursuant to art. 11 Law n. 689/81 (...)". He also highlighted how "The conduct charged (...) falls within the scope of art. 8 paragraph 2 of Law 689 of 1981 (...) which introduced legal cumulation into the administrative sanction system (...) or rather the principle of continuation". In any event, he observed that "At the present time, installments may in any case be granted in the payment of the amount due (...)";

CONSIDERING that the arguments put forward are not suitable for excluding the liability of the party in relation to the disputed matter.

Contrary to what was believed, the Guardia di Finanza duly ascertained two distinct violations. The transgressor, in fact, as ascertained pursuant to art. 13 of the law n. 689/1981, has violated the provisions of art. 23 of the Code by failing to acquire a specific consent from each of the two unaware interested parties. This evidence renders irrelevant what has been argued with reference to the interpretation provided regarding the recurrence of art. 164-bis, paragraph 1 of the Code and art. 16 of the law n. 689/1981. The tax inspectors, therefore, correctly considered applying the less serious cases referred to in the aforementioned art. 164-bis, paragraph 1 of the Code to the two disputed violations and duly calculated the amount for the short term settlement pursuant to art. 16 of the law n. 689/1981 for each of the two violations in question.

Equally irrelevant is what is deduced in relation to the "(...) tenuity of the facts pursuant to art. 11 Law n. 689/81 (...)". On this point, it should be noted that the body investigating the two disputed offenses has no discretionary power regarding the determination of the amount of the fine, being able only to indicate, as required by art. 16 of the law n. 689/1981, the amount of the sum necessary for the payment in a reduced amount useful for the eventual extinction of the administrative sanctioning

procedure. The application of the criteria established by art. 11 of the law n. 689/1981 it is up to the Guarantor who, defining the sanctioning administrative procedure, adopts the injunction order.

With regard to the aforementioned regulation provided for by art. 8 of the law n. 689/1981, it should be noted that, in the present case, this provision is not applicable, given that the findings pertain to two distinct conducts (actions) or two distinct omitted acquisitions of consent pursuant to art. 23 of the Code of two unaware interested parties. For this reason, the legal cumulation of sanctions provided for by both art. 8, paragraph 1 of the law n. 689/1981 whose prerequisite is the uniqueness of the action. The regulation provided for by art. 8 paragraph 2 of the law n. 689/1981, however, is not applicable as it can only be traced back to the sanctions envisaged in the matter of compulsory social security and assistance;

NOTING, therefore, that the sole proprietorship has carried out two treatments of personal data consisting of two separate operations of transfer of funds to France attributed to two unwitting subjects punctually identified, and therefore without acquiring their consent to the treatment of data pursuant to the art. 23 of the Code;

CONSIDERING that for both of the two data processing of the interested parties in question, an express and specific consent had to be acquired, differently from what was ascertained in the present case, pursuant to art. 23 of the Code;

CONSIDERING the art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 of the Code, including the one referred to in art. 23 of the same Code, with the administrative sanction of payment of a sum ranging from ten thousand euros to one hundred and twenty thousand euros for each of the two concerned;

CONSIDERING, in any case, that, as already noted in the dispute report in question, the prerequisites exist, for the two disputed offenses, for the application of the provision pursuant to art. 164-bis, paragraph 1 of the Code, pursuant to which if any of the violations pursuant to art. 161, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied 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 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 and that therefore the amount of the pecuniary sanction referred to in art. 162, paragraph 2-bis must be quantified in the amount of 4,000.00 (four thousand) euros, for each of the two contested sanctions for a total amount of 8,000.00 (eight thousand) euros;

CONSIDERING, also, to accept the request for payment in 8 (eight) monthly installments of the amount of Euro 1,000.00 (one thousand) each, for a total amount of Euro 8,000.00 (eight thousand);

HAVING REGARD to the documentation in the deeds;

HAVING REGARD to the law of 24 November 1981 n. 689, 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. Augusta Iannini;

ORDER

to the sole proprietorship XX VAT number: XX, with headquarters in XX, via XX, in the person of the owner, Mr. XX Fiscal Code: XX, born in XX, the XX, to pay the total sum of 8,000.00 (eight thousand) euros as an administrative fine for the two violations set out in art. 162, paragraph 2-bis, in conjunction with art. 164-bis, paragraph 1 of the Code, as indicated in the justification by dividing it, in acceptance of the request for payment in installments, into 8 (eight) monthly amounts of 1,000.00 (one thousand) euros each;

ENJOYS

the same to pay the sum of 8,000.00 (eight thousand) euros according to the methods indicated in the attachment, the fractional payments of which will be made by the last day of the month following the one in which the notification of this order will take place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689, prescribing that, within 10 (ten) days from the payment, receipt of the payment must be sent to this Authority, in original or certified copy.

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, 13 December 2018

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia