

Injunction order against the Municipality of Castel Maggiore - 7 November 2018

Register of measures

no. 480 of 7 November 2018

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 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 Office of the Guarantor, with deed no. 17786/114844 of 12 June 2018 (notified on the same date by certified e-mail), which must be understood as fully reported here, contested the Municipality of Castel Maggiore, with registered office in Castel Maggiore (BO), via Matteotti n. 10, tax code 00524081205, the violation provided for by articles 19, paragraph 3, 162, paragraph 2-bis, and 167 of the Code regarding the protection of personal data (legislative decree no. 196 of 30 June 2003, hereinafter referred to as the "Code", in the wording prior to the amendments introduced by the Legislative Decree No. 101 of 4 September 2018 in force since 19 September 2018);

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- the Guarantor has adopted a provision, no. 292 of 16 May 2018, against the Municipality of Castel Maggiore, which is understood to be referred to in full here;
- the provision states that, following a report, it was ascertained that the Municipality had published on its institutional website the Determination of the Office Sector of the General Secretary no. 1 of 18 May 2015, concerning the "obligation of abstention of the Head of the Territorial Management Sector due to partial conflict of interest";
- the Determination established, at the request of the same pro-tempore Head of the Territory Management Sector, the obligation of the same to refrain from evaluating an employee, due to a potential conflict of interest because he is his wife;
- the Determination, which clearly reported the identification data of the Sector Manager and the employee as well as information on the existence of an employment relationship with the entity and a potential conflict of interest in 2014, was

accessible both from area dedicated to the Praetorian Register, in the section called "Access to administrative documents", and from the "Transparent Administration" area, to the "Provisions" section, "Management decisions". The deed had been published for about three years and, therefore, for a period exceeding the fifteen days envisaged by sector legislation (Article 124, paragraph 1, Legislative Decree No. 267/2000);

- on the basis of what was ascertained with the aforementioned provision, the Office challenged the Municipality, as data controller, for the violation pursuant to articles 19 and 162, paragraph 2-bis, of the Code, for having disseminated personal data in the absence of a suitable regulatory prerequisite pursuant to art. 19, paragraph 3, of the Code;

NOTING that with the aforementioned deed dated June 12, 2018 the aforementioned violation was contested against the Municipality;

HAVING ACKNOWLEDGED that the Municipality has not made the reduced payment, as evidenced by the report drawn up pursuant to art. 17 of the law n. 689/1981;

READ the written defense of July 12, 2018, in which it is represented that:

- the resolution of the Municipality of Castel Maggiore of 18 May 2015 is subject to the publication obligations set forth in art. 12 of Legislative Decree lg. 33/2013, which requires the publication of any deed adopted by the public body, which has general provisions on the organization, on the procedures, including the supplementary measures to prevent corruption pursuant to art. 1, paragraph 2-bis of law 190/2012;
- the publication of documents relating to situations of conflicts of interest falls within the category of anti-corruption prevention measures and in this regard the contents of the National Anti-Corruption Plan (referred to by the aforementioned Law No. 190/2012) must be highlighted in the parts where it is established that transparency is one of the cornerstones of the anti-corruption policy and is based on publication obligations established by law but also on additional transparency measures, identified by each entity on the basis of its own functional characteristics;
- the anti-corruption plan adopted by the Anac, updated on the basis of resolution no. 12/2015, indicates that the preventive measures must have an organizational nature and allow for the adoption of interventions aimed at also affecting individual processes/proceedings aimed at reducing the operating conditions that favor corruption, measures that concern the objective and subjective impartiality of the official ;
- in this sense, it must be considered that the publication of the determined object of dispute responds to a double ratio with

reference to respect for transparency understood as total accessibility and participation in the activity of the entity, as well as the prevention of corruption phenomena in the public administration;

- publication is in any case also permitted by art. 7-bis of Legislative Decree lg. no. 33/2013, where it is envisaged that the administrations may order the publication on their institutional website, for a period of five years, of information and documents that they are not obliged to publish on the basis of the provisions of the decree or other provisions of law or regulation;
- in this respect, the territorial anti-corruption plan of the Municipality of Castel Maggiore provides for the publication on its institutional website of directives, circulars, programmes, instructions and any deed it has in general on the organization, functions, objectives and procedures and also provides that the heads of the sectors can publish further data and information they deem necessary to ensure the best substantial transparency of the administrative action;
- therefore, for the dissemination of the data of the subjects mentioned in the decision in question, the conditions required by art. 19, paragraph 3, of the Code, i.e. the existence of a law (art. 12 or art. 7-bis of Legislative Decree no. 33/2013) which allows such dissemination for a period exceeding the indicated 15 days in the art. 124 of the legislative decree lg. no. 267/2000;

CONSIDERING that the arguments put forward by the Municipality are not suitable for determining the closure of the sanctioning procedure started with the dispute of administrative violation for the following reasons:

- based on the first defensive argument, the obligation to publish the disputed determination lies in art. 12 of Legislative Decree lg. no. 33/2013, where it establishes that "every act, provided for by law or in any case adopted, which generally regulates the organization, functions, objectives, procedures or in which the interpretation of legal provisions concerning them is determined or provisions are laid down for their application, including the codes of conduct, the supplementary measures for the prevention of corruption identified pursuant to article 1, paragraph 2-bis, of law no. 190 of 2012, the strategic-management planning documents and the deeds of the independent assessment bodies";
- the art. 1, paragraph 2-bis, of law no. 190/2012 clarifies that the supplementary anti-corruption measures are identified in the national anti-corruption plan, a guideline for all public administrations, adopted every three years and updated annually, by the National Anti-Corruption Authority (ANAC);
- in the recognition carried out by the defense of the indications contained in the National Anti-Corruption Plan and in the related updates, there are no references to legal provisions that are suitable for satisfying the requirement set forth in art. 19,

paragraph 3, of the Code and which, therefore, allow, directly and specifically, the dissemination, by public entities, of personal data of employees reached by a provision which provides for their abstention from the treatment of certain proceedings;

- the consideration of the legitimacy of the aforesaid disclosure is made by the defense only through interpretative reconstructions of various provisions, not only of primary rank, on the basis of which public administrations would be allowed, due to generic needs of transparency and prevention of corruption , a wide and indiscriminate possibility of disseminating the personal data contained in the generality of the documents adopted by them;

- on the contrary, based on what is highlighted in the "Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged bodies", adopted by the Guarantor on 15 May 2014, the dissemination of personal data by public subjects is bound to stringent conditions and "is only permitted when the same is provided for by a specific law or regulation [...].

Therefore, in relation to the dissemination operation, before making information, deeds and administrative documents available on their institutional websites (in integral form or in extracts, including attachments) containing personal data, public administrations must verify that the legislation on transparency provides for this obligation [...]. Furthermore, "where the administration finds the existence of a regulatory obligation which requires the publication of the deed or document on its institutional website, it is necessary to select the personal data to be included in these deeds and documents, verifying, case by case, whether the conditions for the blacking out of certain information are met. In fact, public entities, in compliance with data protection principles, are required to minimize the use of personal data and identification data and to avoid the related processing when the purposes pursued in individual cases can be achieved using anonymous data or other methods that allow the data subject to be identified only if necessary [...]. Therefore, even in the presence of the obligations to publish deeds or documents contained in Legislative Decree lgs. no. 33/2013, the subjects called to implement it cannot in any case "make [...] intelligible personal data that is not pertinent or, if sensitive or judicial, not indispensable with respect to the specific transparency purposes of the publication" [...];

- the issue of the public employee's obligation to abstain in the event of a conflict of interest is specifically governed by art. 6-bis of the law n. 241/1990 (introduced by art. 1, paragraph 41, of law no. 190/2012) and in art. 7 of the Presidential Decree no. 62/2013 containing the "Code of conduct for civil servants", provisions that do not provide for the publication of any decisions made in this regard by the public administrations;

- these determinations, moreover, on the basis of the scheme outlined by the aforementioned regulations, would only take place following a report by the employee who is subject to the obligation to abstain, as it appears to have also occurred in the case in question, therefore, in a From the point of view of punctual and correct fulfillment of the aforesaid regulations, no supplementary measure to prevent corruption appears to be necessary;
- basically, the decision that provides for the abstention of a public employee with respect to the handling of a specific proceeding, on the basis of the report of the same employee, cannot be characterized, in itself, as an organizational measure adopted by the administration for the purpose to prevent any episodes of corruption, but as the ordinary definition and acknowledgment of a process triggered precisely on the impulse of the employee in fulfillment of specific legal obligations;
- therefore, there is no obligation to publish this deed for periods of time other than those established by art. 124 of the legislative decree lg. no. 267/2000 regarding the online praetorian register;
- as regards the second defensive profile, concerning the authority of the entity to proceed with the publication of the decision in question based on the provisions of art. 7-bis of Legislative Decree lg. no. 33/2013, it must be noted that this provision, in paragraph 3, allows entities "to publish on their institutional website data, information and documents that they are not obliged to publish pursuant to this decree or on the basis of a specific provision of law or regulation [...] proceeding with the anonymous indication of any personal data present";
- the provision does not allow margins of discretion on the part of the administration that intends to proceed with the publication, so that the defensive assumption on the basis of which, in the case of the decision published by the municipality of Castel Maggiore, "it would not have been possible to proceed with anonymizing o minimize the processing of the personal data of the two interested parties" since "the aforementioned data constitute the essence of the information itself": this consideration should be theoretically valid for any act capable of affecting the individual sphere of a data subject, distorting the obligation to anonymization contained in the standard;
- for these reasons, the responsibility of the Municipality for the disputed violation must be confirmed;

NOTING, therefore, that the Municipality of Castel Maggiore, on the basis of the deeds and considerations referred to above, appears to have committed, in its capacity as data controller, pursuant to articles 4, paragraph 1, lett. f), and 28 of the Code (in the formulation in force at the time of the events), the violation indicated in the notice of dispute no. 19270/121919 of 26 June 2018;

CONSIDERING the art. 162, paragraph 2-bis, of the Code (in the formulation in force at the material time) which punishes violations of the provisions indicated in art. 167 of the Code, which also includes art. 19, with the administrative sanction of the payment of a sum from Euro 10,000 to Euro 120,000;

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:

to. with regard to 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 violations are not characterized by profiles of gravity;

b. for the purpose of evaluating the work carried out by the agent, it must be noted that the Municipality has taken steps to remove the disputed determination;

c. regarding the personality of the perpetrator of the violation, the circumstance that the Municipality is not burdened by previous sanctioning proceedings defined briefly or following an injunction order must be considered;

CONSIDERING that, in the case in question, the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that if any of the violations referred to in 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;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, in the amount of 10,000 (ten thousand) euros for the violation pursuant to art. 162, paragraph 2-bis, of the Code and that, in the case in question, the reduction pursuant to art. 164-bis, paragraph 1, due to the minor extent of the violation, constituted by the publication of only the determined object of dispute;

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. Giovanna Bianchi Clerici;

ORDER

to the Municipality of Castel Maggiore, with registered office in Castel Maggiore (BO), via Matteotti n. 10, tax code 00524081205, in the person of the pro-tempore legal representative, to pay the sum of 4,000 (four thousand) euros as an administrative fine for the violation indicated in the justification;

ENJOYS

to the aforementioned Body to pay the sum of 4,000 (four thousand) euros, according to the methods indicated in the attachment, 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 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, 7 November 2018

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia