

[doc. web no. 9361186]

Injunction order against the Municipality of San Giorgio Jonico - 5 March 2020

Register of measures

no. 52 of 5 March 2020

## GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

At today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of prof.ssa Licia Califano and of dott.ssa Giovanna Bianchi Clerici, members and of dott. Giuseppe Busia, general secretary;

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

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data (hereinafter the "Code");

CONSIDERING the general provision n. 243 of 15/5/2014 containing 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», published in the Official Gazette no. 134 of 12/6/2014 and in [www.gpdp.it](http://www.gpdp.it), doc. web no. 3134436 (hereinafter "Guidelines of the Guarantor on transparency");

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 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the Secretary General 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 Dr. Augusta Iannini;

WHEREAS

1. Introduction

This Authority has received a complaint from Mr. XX regarding the illegitimate dissemination of his personal data online by the Municipality of San Giorgio Jonico.

In particular, from the preliminary verification carried out by the Office, it emerged that on the institutional website of the aforementioned Municipality, in the Historic Praetorian Register section as well as in the section called "XX", it was possible to freely view the Determination of the sector manager no. XX of the XX – concerning «XX before the Court of Taranto assignment for the defense of the Entity to the lawyer. XX - expenditure commitment" - and the related annex containing the claimant's summons before the Court of Taranto (url: <http://...>; <http://...>; <http://...> ).

The aforesaid documents (determination and relative annex containing the writ of summons) clearly reported the complainant's personal data and information in the subject and in the body of the text.

The Municipality of San Giorgio Jonico replied to the request for information from the Office and with a note dated XX confirmed the removal of the complainant's personal data from the url indicated above.

Furthermore, with a note dated XX, the Personal Data Protection Officer appointed by the Municipality also replied to the Guarantor, who however limited himself to recalling the general obligations carried out by the institution, without going into the merits of the violation of personal data complained of in the complaint .

## 2. Applicable legislation

Pursuant to the GDPR, the processing of personal data carried out by public entities (such as the Municipality) is lawful only 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).

It is also foreseen that «Member States may maintain [...] more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), by determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (art. 6, paragraph 2, GDPR), with the consequence that the provision contained in art. 19, paragraph 3, of the Code, in force at the date of the facts, which provides that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when required by law or of regulation (the new article 2-ter, paragraphs 1 and 3 of the Code also has a similar content).

Furthermore, in any case, the data controller is required to comply with 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 interested party" 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 GDPR).

### 3. Preliminary evaluations of the Office on the processing of personal data carried out

From the checks carried out on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the Municipality of San Giorgio Jonico by disseminating the data and personal information of the complainant - contained in the Determination of the sector manager n. XX of the XX, as well as in the attached writ of summons of Mr. XX before the Court of Taranto published on the praetorian register of the institutional website - carried out personal data processing that did not comply with the relevant regulations on the protection of personal data contained in the GDPR. Therefore, with the same note the violations carried out were notified to the Municipality (pursuant to article 166, paragraph 5, of the Code), communicating the initiation of the procedure for the adoption of the measures referred to in article 58, par. . 2, of the GDPR and inviting the aforementioned Municipality to send the Guarantor defense writings or documents and, possibly, to ask to be heard by this Authority, within the term of 30 days (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of Law No. 689 of 11/24/1981).

### 4. Defensive memories and hearing

With the note prot. no. XX of the XX the Municipality of San Giorgio Jonico sent its defense writings to the Guarantor in relation to the notified violations.

In this regard, it should be remembered that, unless the fact constitutes a more serious offence, anyone who, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code, entitled «False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor».

Specifically, in relation to the disputed facts, the Municipality preliminarily objected to the "nullity/inadmissibility of the dispute" received with the aforementioned note from the Office prot. no. XX of the XX due to the expiry of the ninety-day term

established by art. 14, paragraph 2, of the law no. 689/1981, as the Municipality had already been the recipient of a previous note from the Office containing the "outcome of the preliminary investigation" (prot. n. XX of XX).

On the merits, however, the institution reiterated the correctness of the processing of personal data carried out, as the regulatory prerequisite that would justify the dissemination of the data object of the complaint is to be found in art. 124 of the legislative decree lgs. no. 267/2000 which provides for the publication of the resolutions of the municipality «for fifteen consecutive days, except for specific provisions of the law»; in the articles 8 and 37 of Legislative Decree lgs. no. 33/2013, which - respectively - provide that the «data, information and documents subject to mandatory publication pursuant to current legislation are published for a period of 5 years» and that «public administrations and contracting stations publish: ) the data required by article 1, paragraph 32, of the law of 6 November 2012, n. 190; b) the deeds and information to be published pursuant to legislative decree 18 April 2016, n. 50".

In this regard, it was also specified that:

- «The municipality has conferred a legal assignment for the defense of its reasons against the claims for damages formulated with a writ of summons from Mr. XX»;
- "in terms of the legal framework of the legal aid assignment [the] code of public contracts (Legislative Decree 50/2016) [provides that] the assignment of the same, albeit in a specific regime, must take place in compliance with the general principles on public procurement. And so the national legislator, in transposing the European legislation on procurement, has expressly brought the entire legal activity under the discipline of procurement";
- «to the appointment XX n. XX the writ of summons of XX is attached [...]»;
- «The "factual story" set out in the summons attached to the decision of appointment does not contain any personal data, since it is, however, already known and public facts»;
- «In this factual and juridical context, the behavior of the Entity which - after verifying the absence of sensitive and judicial data - appears to be absolutely exempt from liability - has published in full the provision of conferral of legal appointment together with the attached writ of summons» .

With regard to the conduct held, it was asked in any case to take into consideration:

- the "regulatory, jurisprudential and interpretative stratification that have undoubtedly generated the conviction of the legitimacy and lawfulness of the conduct, causing disorientation of the operators in the process of harmonization, interpretation

and application of the legislation"; - of art. 22, paragraph 13, of Legislative Decree lgs. no. 101 of 10/08/2018 which provides that "For the first eight months from the date of entry into force of this decree, the Guarantor for the protection of personal data takes into account, for the purposes of applying administrative sanctions and within the limits in which is compatible with the provisions of Regulation (EU) 2016/679, of the phase of first application of the sanctioning provisions"»;

- «of the extreme particularity of the case in question, the absolute novelty of the question examined in relation to which there are no known jurisprudential precedents»;

- "following the request for information from the XX, this Municipality immediately and spontaneously remedied the complaints made by the complainant, so much so that the Entity was not the recipient of any injunction in this regard";

- «there was a technical and training adaptation process which the Company XX documented in its note of the XX».

On the 20th date, the hearing requested by the Municipality of San Giorgio Jonico pursuant to art. 166, paragraph 6, of the Code on the occasion of which it was represented, in addition to what has already been reported in the documentation sent, that:

- «for about 30 years the complainant has turned several times to the civil and criminal judicial authority to contest the illicit processing of personal data by the Municipality, all rejected by sentence (2009, 2011, 2014, 2019). In the present case, the Guarantor contested the processing of personal data contained in the summons published by the Municipality, in the absence of a regulatory prerequisite. Transparency in matters of litigation is essential for the Municipality. The regulatory prerequisite for the publication of the determination of conferral of the legal assignment, to which the summons is attached, is not only in the d. lgs n. 33/2013 (art. 37) but also in art. 29 of the Procurement Code (legislative decree n. 50/2016) which refers to the art. 37 of Legislative Decree lgs n. 33/2013, which provide that the deeds of award of service and supply contracts (such as that of entrusting the entity's legal aid to an external lawyer) are published on the institutional website (transparent administration) for a period of five years . This is confirmed by the jurisprudence of the Court of Auditors - Emilia Romagna (see sentence/opinion n. 144 of 2018) which provides that legal aid assignments are published, pursuant to Legislative Decree no. lgs n. 33/2013, in the transparent administration section "tenders and contracts"»;

- "the writ of summons had been considered attached to and an integral part of the resolution";

- «in relation to the publication of the summons, the personal data disclosed are only the identification data such as the name, residence and tax code of the claimant (ex XX) already made public on the website [www.comuniweb.net](http://www.comuniweb.net). All the other

information contained therein refers to excerpts from public sessions, in particular from the Town Council of the XX";

- "the complainant did not first apply to the Municipality to request the removal of the published data against which the institution would have taken immediate action, but applied directly to the Guarantor".

#### 5. Outcome of the investigation relating to the complaint presented

In the specific case submitted to the examination of the Guarantor, the subject of a complaint by the complainant is:

- the dissemination of personal data contained in the Determination of the sector manager n. XX, with which the Municipality has appointed its lawyer for the defense in court in a judicial proceeding against the claimant;
- the publication of the complete copy of the summons with which compensation for damages against the Entity was requested.

The deeds show that the data and personal information of the claimant contained in the aforementioned resolution correspond to the name and the circumstance that he sued the Municipality for compensation for damages (financial and otherwise).

The published writ of summons contains the personal data and information of the complainant such as, in addition to the name, date and place of birth, residence and tax code, a detailed reconstruction - for the purpose of initiating the case against the Municipality – of personal, professional, judicial events, as well as political-administrative activities carried out when he held the office of XX.

In relation to the contested matter, the Municipality objected - preliminarily - to the lateness of the dispute due to the expiry of the ninety-day deadline set by art. 14, paragraph 2, of the law n. 689 of 11/24/1981, as the Municipality had already been the recipient of the note containing the "outcome of the preliminary investigation" prot. no. XX of the XX (date which according to the Municipality would correspond to the «assessment»), while the contestation of the violation would have taken place with the note prot. no. XX of the XX.

In this regard, it is not possible to accept the exception presented by the Municipality regarding the expiry of the ninety-day term provided for by art. 14, paragraph 2, of the law no. 689/1981, as it is not applicable to the case in question. In fact, it must be remembered that on 19/9/2018 the new art. 166 of the Code (as amended by Legislative Decree no. 101 of 10/8/2018), which, in paragraph 7, precisely in relation to the adoption of the sanctioning measure, no longer provides for the application of art. 14 of law 689/1981 as not expressly referred to.

In the present case, relating to the violation of the provisions contained in the RGPD, the art. 166, paragraph 5, of the Code

(reformed by Legislative Decree no. 101/2018) in the light of which, with note prot. no. XX of the XX, steps were taken to ascertain the conduct held in violation of the European Regulation by notifying the offender of the violations carried out with the simultaneous initiation of the procedure for the adoption of the measures referred to in article 58, par. 2, of the GDPR; exactly, therefore, in the ways, forms and terms provided for by the provisions referred to.

On the merits, in relation to the complaints made by the Municipality regarding the conduct held, although some observations are worthy of consideration, it is not possible to completely overcome the findings notified by the Office with the deed of initiation of the procedure, as they are not sufficient to allow the filing of this proceeding, since none of the cases envisaged by art. 11 of the Regulation of the Guarantor n. 1/2019.

In this sense, in the light of resolution no. XX of the XX of the National Anti-Corruption Authority (ANAC) with which the «Guidelines n. 12. Assignment of legal services», it is believed in fact to accept the observations presented in the defensive briefs of the Municipality, on the basis of which - pursuant to the combined provisions of art. 37 of Legislative Decree lgs. no. 33/2013 and of the art. 29 of Legislative Decree lgs. 50/2016 - the resolution granting the assignment to the legal representative for the organization's defense in the cases provided for therein must be published on the institutional website. However, this does not in any way legitimize the Municipality to also publish the writ of summons, as occurred in the present case, nor to disseminate the name of the complainant (counterparty of the Municipality) reported in the published resolution, which is not necessary with respect to the purposes of the processing - i.e. the assignment of an assignment to a lawyer of the Municipality for the defense in court - in compliance with the principle of "minimization" of data (Article 5, paragraph 1, letter c, of the RGPD). With reference to the latter profile, in fact, for the purpose of entrusting the task to the lawyer it was quite possible to identify the cause by indicating only the role number, without reporting the name of the complainant or publishing the resolution by obscuring the name of the complainant or to its replacement with omitted ones.

On the other hand, the Guarantor since 2014, in the Guidelines on transparency, has highlighted that, even in the presence of an obligation to publish on the subject of transparency, the subjects called to implement it cannot in any case disseminate excess personal data or irrelevant (see part one, paragraph 2) and that in any case:

- «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 exist for the blackout of certain information";

- «Public bodies, in fact, in accordance with the principles of data protection, 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 through data anonymous or other methods that allow the data subject to be identified only in case of need [...]»;

- "Therefore, only the disclosure of personal data is permitted, the inclusion of which in deeds and documents to be published is really necessary and proportionate to the aim of transparency pursued in the concrete case (so-called "principle of pertinence and non-excess" referred to in article 11, paragraph 1, letter d, of the Code [now the "principle of minimisation" pursuant to article 5, paragraph 1, letter c), of the GDPR]). Consequently, personal data that goes beyond this purpose must not be included in the deeds and documents published online. Otherwise, it is necessary to provide, in any case, for the obscuring of the information that is found to be excessive or not pertinent".

Therefore, confirming the preliminary assessments of the Office, the illegality of the processing of personal data carried out by the Municipality of San Giorgio Jonico is noted, as:

- the disclosure of personal data contained in the summons published on the institutional website took place in the absence of a suitable regulatory prerequisite, in violation of art. 19, paragraph 3, of the Code (now reproduced in the new art. 2-ter, paragraphs 1 and 3, of the Code), in force at the time of cessation of the conduct (XX) and art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR;

- the dissemination of the name of the complainant contained in the Determination of the sector manager no. XX is not necessary with respect to the purposes of the processing - i.e. the assignment of an assignment to an external lawyer for the legal defense of the Organization - violating the principle of "minimization" of data contained in art. 5, par. 1, lit. c of the GDPR.

Considering, however, that the conduct has exhausted its effects, as the Municipality has taken steps to remove the documents containing the personal data of the complainant described above from the institutional website, without prejudice to what will be said on the application of the pecuniary administrative sanction, I do not the conditions exist for the adoption of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

6. Adoption of the injunction order for the application of the administrative fine (articles 58, paragraph 2, letter i; 83 GDPR)

The Municipality of San Giorgio Jonico appears to have violated the articles 5, par. 1, lit. c; and 6, para. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR, as well as art. 19, paragraph 3, of the Code in force at the time of the beginning of the unlawful conduct.



In this regard, the art. 83, par. 3, of the GDPR, provides that «If, in relation to the same treatment or related treatments, a data controller or a data processor violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction will not exceeds the amount specified for the most serious violation".

In this case, the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5 of the GDPR, which therefore applies to the present case.

It should also be taken into account that, although the resolution and the writ of summons which are the subject of the complaint, published online, date back to the 20th century, in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. . 1, paragraph 2, of the law no. 689/1981 which, in stating that «The laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», affirms the recurrence of the principle of *tempus regit actum*. This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - considering the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the XX in which the GDPR became applicable. In fact, the preliminary investigation documents revealed that the illicit online diffusion ceased in September 2018 (the month in which the Municipality declared that it had taken steps to remove the measures from the institutional website). The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR as well as art. 166 of the Code, has the corrective 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, depending on the circumstances of every single case". In this framework, «the Board [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).

The aforementioned pecuniary administrative sanction imposed, according to 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 GDPR.

In relation to the aforesaid elements, the detected conduct in violation of the regulations on the protection of personal data involved the dissemination of personal data and information of a single interested party, contained moreover in a summons published in full. The diffusion lasted for a period of less than a year. The Municipality of San Giorgio Jonico, which in any case is a smaller local authority, with fewer than 15,000 inhabitants, has, however, asked to take into account various extenuating

factors among which are considered relevant: the application uncertainties relating to the provisions on the publication of the deeds of assignment of legal tasks of the entity deriving from «regulatory, jurisprudential and interpretative stratification»; the circumstance that the writ of summons had been considered an attachment and an integral part of the resolution published online; the complainant contacted the Guarantor directly and did not first contact the Municipality to request the removal of the published data against which the institution would immediately take action. In addition, the administration has taken steps to remove the personal data that are the subject of the complaint and has collaborated with the Authority during the investigation of the present proceeding in order to remedy the violation - the nature of which, given what was stated by the Common, it appears to be negligent in nature – mitigating its possible negative effects. In the response to the Guarantor, various technical and organizational measures implemented pursuant to articles 25-32 of the GDPR. There are no previous relevant GDPR violations committed by the Municipality of San Giorgio Jonico.

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine pursuant to art. 83, par. 2 and 3, of the RGPD, the amount of the pecuniary sanction, provided for by art. 83, par. 5, of the RGPD, in the amount of 3,000.00 (three thousand) euros for the violation of articles 5, par. 1, lit. c; and 6, para. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the RGPD, as well as of the art. 19, paragraph 3, of the Code, as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same GDPR.

In relation to the specific circumstances of the present case - given the extremely invasive nature of the dissemination, concerning even very delicate data dating back to the complainant's time - it is also believed that the ancillary sanction of publication on the website of the Guarantor of the this provision, provided for by art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019.

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

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the processing carried out by the Municipality of San Giorgio Jonico pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR, as well as art. 166 of the Code for violation of articles 5, par. 1, lit. c; and 6, para. 1, lit. c) and e); par. 2 and par. 3, letter. b), of the RGPD, as well as of the art. 2-ter, paragraphs 1 and 3, of the Code in the terms indicated in the justification;

ORDER

to the Municipality of San Giorgio Jonico, in the person of its pro-tempore legal representative, with registered office in Via Salvo D'Acquisto - 74027 San Giorgio Ionico (TA) – Tax Code 80009010739 to pay the sum of 3,000.00 (three thousand) euros as an administrative fine for the violations referred to 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 same Municipality to pay the sum of 3,000.00 (three 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 and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019 and it is believed that the conditions referred to in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to art. 78 of the GDPR, of the articles 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, March 5th 2020

PRESIDENT

Soro

THE SPEAKER

Iannini

THE SECRETARY GENERAL

Busia