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Injunction order - 25 November 2021

Record of measures

n. 411 of 25 November 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by 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 Legislative Decree 10 August 2018, n. 101 on "Provisions for the adaptation of national legislation to the provisions of 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 the free circulation of such data and repealing Directive 95/46 / EC ";

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.gpdp.it, doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

GIVEN 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 functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Speaker Dr. Agostino Ghiglia;

WHEREAS

1. The complaint and the preliminary investigation

With a note of the XX, Mrs. XX presented a complaint, concerning the communication, on several occasions (from XX to XX), by Dr. XX Naumann, of information relating to medical treatments, including also a hospitalization at Clinic XX, performed in favor of Ms XX, to XX, to the Human Resources Manager of the XX, as well as to XX, where the complainant had provided their professional activity; this, in order to urge the same to define the events relating to alleged non-payment of some health services provided by the same dott. XX Naumann.

As a result of the aforementioned communication, the XX, with which Ms XX had worked until the XX, sent an email to the complainant, in which, in highlighting that the "XX" is required to conduct that suits their status and their relationship with the XX, stimulated the same to find a solution, also in order to avoid the negative effects that the aforementioned private events could have had on the image of the XX and the XX. Similarly, XX sent an email to the complainant, calling her to resolve the issue relating to the alleged non-compliance.

Following the request for information from this Office (note of the XX, prot. No. XX), with which it was requested, pursuant to art. 157 of the Code, any element of information useful for the evaluation of the case, with particular reference to the legal basis that would have allowed the aforementioned communication of personal data relating to Ms XX to the aforementioned subjects, Dr. XX Naumann provided feedback with a note from the XX, in which it was represented that:

- "in the complaint Ms XX states that the undersigned would have sent on the XX, XX and XX the respective communications to the offices where the patient would have carried out her work and that, by doing so, the writer would have placed the recipients aware of the patient's health status ";
- "Well, this statement is not true, since, after having benefited from the health services, Ms XX not only did not pay the relative invoice, but was unavailable, so the undersigned had to look for it at the workplaces to try to obtain payment from you for professional services that have remained unpaid. The undersigned, by reason of the profession he exercises, is aware of the fact that it is forbidden to disseminate data on the health of their patients, but the data protection regulation, in art. 4, no. 15, clarified that data relating to health must be understood as data that reveal information regarding the state of health of the person ";
- "vice versa, the contacts of the undersigned at the offices took place through communications via e-mail, respectively on the

twentieth, twentieth and twentieth centuries, to which neither the invoice to be paid nor, much less, the health documentation concerning the medical services provided, (...), for which the writer has not disclosed suitable data to reveal the state of health of Ms XX, with the further consequence that the complaint of the complainant, with which she complains of the disclosure of sensitive data relating to one's own sphere of health, is groundless ".

2. Assessments by the Department on the treatment carried out and notification of the violation pursuant to art. 166, paragraph 5 of the Code

In relation to the facts described in the complaint, the Office, with a note dated XX (prot. No. XX), notified Dr. XX Naumann, 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 him to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of Law no. 24/11/1981).

In particular, the Office, in the aforementioned deed, recalled the notions of personal data and data relating to health (Article 4, paragraph 1, nos. 1 and 15 of the Regulation and Council n. 35), in postponing, also, in articles 10 to 12 of the Code of medical ethics relating, respectively to "professional secrecy", "confidentiality of personal data" and "processing of sensitive data", highlighted that:

- the processing of personal data is lawful only if and to the extent that one of the conditions provided for by art. 6 of the Regulations;
- in the health field, information on the state of health can be communicated to third parties 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 combined with art.22, paragraph 11, legislative decree 10th August 2018, n.101);
- the data controller is, in any case, required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency", according to which the data must be "processed lawfully, correctly and transparent towards the interested party "(art. 5, par. 1, lett. a) of the Regulations);
- in some communications to the employers, previous of Ms XX, which highlighted her alleged non-fulfillment in relation to the payment of health services carried out by Dr. XX Naumann in favor of the same, express reference was also made to a hospitalization at the clinic "XX" ("XX", "XX");

- this news (relating to the receipt of a health service), correlated moreover, to the indication of the specialization of the doctor who performed the aforementioned services (easily found, also on the Clinica XX website), reveals information on the state of health of the Mrs. XX and, therefore, can be counted in the category of data relating to health (Article 9 of the Regulation).

In the same deed, it was therefore ascertained that Dr. Naumann carried out, at different times, communications of information relating to Ms XX, to third parties, with whom she had worked and that such data concerned not only personal events of Ms XX, relating to to an alleged non-fulfillment of a health service, but also information on the health of the same. It was also ascertained that the aforementioned communications took place in the absence of a suitable legal basis, in violation of the basic principles of the processing referred to in Articles 5, 6 and 9 of the Regulation.

With a note of the twentieth, Dr. Naumann sent his defense briefs, in which, in particular, he highlighted that:

- "First of all, it should be noted that the communications sent do not contain data suitable for revealing the state of health of Ms XX, as required by art. 9 of the decr. lgs. 196 of 2003. The dispute states that the aforementioned data could be inferred from two elements: the first, consisting of the execution of a health service; the second, from the specialization possessed by Dr. Naumann. Except that in the communications of Dr. Naumann the type of health service that would have been performed to Mrs. XX is not indicated. While the specialization of Dr. Naumann this Authority derives (...), from the website of the Rome clinic, XX, that the recipients of the letters, holders of foreign offices, had no reason to know or any reason to consult, since it is a particular, that of specialization, for them absolutely devoid of interest. Therefore, by examining only the data contained in the repeated communications, no information on the state of health of Mrs. XX is identified that Dr. XX Naumann has provided to strangers, also because a generic health service does not presuppose the existence of a disease, being able to constitute a routine check of the patient's physical condition, in the context of preventive medicine ";
- "(...) in the communications of Dr. XX Naumann there is no information on the natural person collected during the registration of Ms XX in anticipation of the provision of health services; there is no indication of numbers, symbols, specific elements attributed to it that are capable of identifying in any way the physical conditions; no results of clinical or diagnostic examinations or checks are mentioned, nor are there any indications of illnesses, disability states, risks of disease, medical history data, clinical treatments and physiological or biomedical states of the patient. From this it follows that precisely in the light of the clarifications contained in the Regulations and referred to in the dispute of this Authority, the same conclusion is reached that Dr. XX Naumann did not disclose information suitable for revealing the state of health of Ms XX to strangers,

since even the generic reference to hospitalization could not constitute this type of information, as the clinical treatment to which the patient would have been specified was not specified. submitted, given that, as highlighted, it is instead required by art. 4, paragraph 1, nn. 1 and 5 of the Regulations and Cons. n. 35 of the Regulation ";

- "moreover, even the term dissemination does not correspond to the matter in its objectivity, if it is taken into account that Dr. XX Naumann did not send the disputed communications, without distinction, to Ms XX's employer, but addressed them to identified persons and offices institutionally responsible for intervening in the event of irregular behavior by their officials. The first communication, of the XXth, is in fact addressed to Mr. (…) XX of the XX while the second communication, of the XX, is addressed to the person delegated by the recipient of the previous letter; both, therefore, made use of the communications (…) within the limits of their own competences, in a confidential manner and in turn communicating the content to the only person concerned, Mrs. XX ";

- (…) there was absolutely no desire by the doctor to communicate information on the patient's state of health to third parties (…). Nor was there the intention of Dr. XX Naumann to make third parties, without distinction, aware of the assistance he provided to Ms XX, given that the communications of the professional, received only by the subjects authorized to receive them, concerned only the fact of non-payment of the fee by of the patient and that she herself had become unavailable. Conduct, this, capable of violating the deontological rules to which officials XX must comply, so much so that there was a recall of the employee "; "Dr. XX Naumann's behavior can therefore be considered to be characterized by good faith, since the doctor relied on the fact that there were offices in charge of supervising the conduct of XX employees and that it was possible to complain about their incorrect behavior, in order to feel entitled to report the incident, the non-payment of the fee, to the XX "; “The alleged violation was entirely episodic in nature, having been limited to notifications of non-payment of the fee (…);

- “there are no permanent effects deriving from the alleged violation; where there were, Dr. XX Naumann is ready to take action to eliminate them with the adoption of measures that this Authority will deem appropriate ".

3. Outcome of the preliminary investigation

Having taken note of what is represented by dr. XX Naumann in the documentation in deeds and in the defense briefs, it is noted that:

1. "personal data" means "any information concerning an identified or identifiable natural person (" data subject ")" and "data relating to health" "data concerning the state of health of the data subject that reveal information related to the of past, present

or future physical or mental health of the same. This includes information on the natural person collected during his registration in order to receive health care services or the related provision referred to in Directive 2011/24 / EU of the European Parliament and of the Council; a specific number, symbol or element attributed to a natural person to uniquely identify him for health purposes; information resulting from tests and checks carried out on a part of the body or an organic substance, including genetic data and biological samples; and any information regarding, for example, a disease, a disability, the risk of disease, medical history, clinical treatments or the physiological or biomedical status of the data subject, regardless of the source, such as, for example, a doctor or other healthcare worker, a hospital, a medical device or an in vitro diagnostic test "(art. 4, par. 1, nn. 1 and 15 of the Regulation and Cons. n. 35 of the Regulation);

2. the processing of personal data is lawful only if and to the extent that one of the conditions provided for by art. 6 of the Regulation and, in the case of health data, by art. 9 of the Regulation (see also art. 84 of the Code in conjunction with art. 22, paragraph 11, legislative decree 10 August 2018, n. 101, in relation to the communication of health data); art. 5, par. 1, lett. a) of the Regulation provides for compliance with the principle of "lawfulness, correctness and transparency", according to which the data must be "processed in a lawful, correct and transparent manner towards the interested party".

4. Conclusions

In light of the above assessments, taking into account the statements made by the data controller during the investigation and considering that, unless the fact constitutes a more serious crime, anyone, 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 ("False statements to the Guarantor and interruption of the execution of the tasks or the exercise of the powers of the Guarantor"), it is noted that the elements provided by the data controller in the aforementioned defensive briefs are not suitable for accepting the requests archiving, not allowing to overcome the findings notified by the Office with the aforementioned act of initiation of the procedure.

In particular, underlining that the Authority, in the act of notification of violation of the XX, did not contest the dissemination operation, but the communication of personal data, it should be noted that, in the light of the above definitions, the information relating to the hospitalization undergone by Ms XX at Clinic XX is attributable to the notion of health data. In fact, the information regarding the fact that Ms XX underwent hospitalization and, in any case, that she was a patient of Dr. Naumann already constitute personal data relating to health pursuant to art. 4, par. 1, no. 15, of the Regulations, although they do not

indicate the clinical reasons and / or the pathology of the complainant, which determined the need for the medical service received. In this sense, the Authority, over the years, has often intervened to clarify that the patient's state of health can also be deduced through the correlation between his identity and the indication of the structure or department (in the case of hospital structures ) where that patient went or was hospitalized (see Annual Report 2014, p. 64).

That said, at the state of the deeds and the documentation acquired, none of the conditions, among those indicated in art. 9, par. 2, of the Regulation, which could have, by overcoming the general prohibition on processing health data, indicated in art. 9, par. 1 of the Regulation, make the communication of data on Ms XX's health to third parties lawful.

It should also be noted that, without prejudice to the responsibilities of the office in charge of receiving reports (XX) regarding alleged misconduct relating to the execution of contractual obligations by staff or violations of the standards of conduct for "XX", which is not up to the Guarantor to assess here, the issue in question does not pertain to the regulations on reporting unlawful conduct in the context of an employment relationship (so-called whistleblowing) (see point l. 30 November 2017, no. . 179 and art.54-bis, legislative decree no. 165 of 30 March 2001, as amended by art.1, paragraph 2, of law no. 179/2017; see also the opinion of the Guarantor on the "Guidelines on the protection of the authors of reports of crimes or irregularities of which they have become aware due to an employment relationship, pursuant to art. 54-bis of Legislative Decree 165/2001" of ANAC, made with provision 4 December 2019, web doc. no. 9215763).

In the present case, the conduct of Dr. Naumann was aimed, as stated by the same, to try to "obtain payment from her for professional services that have remained unpaid", a purpose that the legal system allows to pursue with specific protection tools. This has determined that the treatment of the data relating to the contractual obligations and the health of Ms XX by the doctor, underlying the purpose of achieving the fulfillment of the payment of the professional service, has not been carried out in a lawful and correct manner towards of the interested party or for specific, explicit and legitimate purposes.

Moreover, the aforementioned communication made by Dr. Naumann had as recipients third parties, who no longer held the position of employers of Ms XX. In fact, the same, at the time in which she received the health services from Dr. Naumann and in the time interval in which the described communications were put in place by the same doctor, he was no longer employed by the XX.

Furthermore, in acknowledging that Dr. Naumann did not intend to specify in the light of which condition, among those indicated in art. 6 of the Regulation, the processing of data concerning the alleged breach of an obligation by the complainant

would have been lawful, it should be noted that, in relation to the good faith invoked by the doctor regarding the supposed existence of offices responsible for supervising the conduct of employees of the XX, which would have legitimized the doctor to report the incident, this motivation cannot be accepted. In fact, in the light of a consolidated jurisprudence (Cass. Civ. Section I of 21 February 1995 n. 1873; Cass. Civ. Section II of 13 March 2006, n. 5426, Cass. N. 13610/2007, Cass. N. . 16320/2010, Cass. N. 19759/2015), so that art. 3 of the law n. 689/1981, it is necessary that good faith or error, in order to be excusable, be based on a positive element, foreign to the agent and capable of determining in him the conviction of the lawfulness of his behavior. This positive element must not be obvious to the interested party with the use of ordinary diligence. Dr. Naumann, as data controller and in relation to the exercise of his profession as a doctor, was required, diligently, to know and also observe the rules applicable to the processing of personal data of his patients, as well as the relative interpretation.

From all the above, it follows that Dr. Naumann made a communication of personal data, concerning the non-payment of professional and health-related services of Ms XX, to third parties, with whom she had provided her work, despite the termination of her employment relationship. , in the absence of a suitable legal basis and in violation of the principles of lawfulness, correctness and transparency. For these reasons, the unlawfulness of the processing of personal data carried out by Dr. Naumann, in the terms set out in the motivation, for the violation of articles 5, 6 and 9 of the Regulations.

In this context, considering, in any case, that the conduct has exhausted its effects, the conditions for the adoption of the corrective measures referred to in art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (Articles 58, paragraph 2, letter i) and 83 of the Regulations; art. 166, paragraph 7, of the Code).

The violation of articles 5, 6 and 9 of the Regulations caused by the conduct put in place by Dr. Naumann is subject to the application of a pecuniary administrative sanction pursuant to art. 83, par. 5, lett. a) of the Regulations.

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 it is noted that the treatments carried out by Dr. Naumann, subject of this provision, concern data relating to the non-payment of a professional service as well as information on the health of a single person concerned, who presented the complaint (Article 83, paragraph 2, letters a), g) and h) of the Regulation) and that the violation is intentional and is likely to cause immaterial damage, being able to damage the reputation of the interested party (Article 83, paragraph 2, letter a) and b) of the Regulation).

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction provided for by art. 83, par. 5, lett. a) of the Regulations, to the extent of € 30,000.00 (thirty thousand) for the violation of Articles 5, 6 and 9 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, also in consideration of the type of personal data subject to unlawful processing.

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

declares the unlawfulness of the processing of personal data carried out by Dr. XX Naumann, for the violation of arts. 5, 6 and 9 of the Regulations.

ORDER

pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations, as well as art. 166 of the Code, to dott. XX Naumann, born in XX, XX, resident in XX, in XX, C.F. XX, to pay the sum of € 30,000.00 (thirty thousand) as a pecuniary administrative sanction for the violations indicated in this provision, according to the methods indicated in the annex, within 30 days of notification of the 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. XX Naumann, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 30,000.00 (thirty 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

pursuant to art. 166, paragraph 7, of the Code, the full publication of this provision on the website of the Guarantor and believes 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.

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, November 25, 2021

THE VICE-PRESIDENT

Cerrina Feroni

THE RAPPORTEUR

Ghiglia

THE SECRETARY GENERAL

Mattei