

[doc. web n. 9713902]

Injunction order against K-city srl - 29 September 2021

Record of measures

n. 352 of 29 September 2021

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, 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, "Code regarding the protection of personal data", as amended by Legislative Decree 10 August 2018, n. 101, containing provisions for the adaptation of national law to the Regulation (hereinafter the "Code");

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 April 2019, published in the Official Gazette n. 106 of 8 May 2019 and in [www.gdpd.it](http://www.gdpd.it), doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

GIVEN the documentation in the deeds;

HAVING REGARD to the observations of the Office made by the Secretary General pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and operation of the office of the Guarantor for the protection of personal data, in [www.gdpd.it](http://www.gdpd.it), doc. web n. 1098801;

Rapporteur Prof. Ginevra Cerrina Feroni;

### 1. Introduction

From a complaint presented to the Authority in the month of XX it emerged that, in order to subscribe to the "authorized parking" service in the territory of the Municipality of Formia (hereinafter, the Municipality), it is required to fill in some forms , containing "excess data" with respect to the stated purpose.

In response to the request for information from this Authority, with note prot. n. XX of the XX, the Municipality declared that the paid parking service in the municipal area was entrusted to the company K-city s.r.l. (hereinafter, the company).

## 2. The preliminary activity

In particular, with note prot. n. XX of the XX, the Municipality declared that "on XX the company K-city s.r.l. the parking management service was delivered for a fee by means of a delivery report of the Service subject to the law and at the same time the "External Data Processor" was appointed until the signing of the contract at which time the formal appointment of External Data Processing Manager ".

From the documents it emerged that this trade union decree appointing the company as "data processor", containing the specific instructions of the owner, was issued only on the XXth date, while the company has been managing the service in question since the XXth.

In response to a request for information from the Authority, the company, with a note of the twentieth century, specified that "it is a public service concessionaire; [...] This circumstance means that the acts of regulation of the modalities in which the same is carried out can be adopted only by the granting body and not by the concessionaire; [...] this aspect eliminates any responsibility on the part of the concessionaire, which on the other hand certainly could not refuse to carry out a public service in the absence of definition of its role as external data processor; [...] the start of the service in Formia was marked by a series of operational criticalities, which were defined from time to time by the Granting Body according to a priority scale defined by the latter; [...] for this reason only in the 20th century it was possible to adopt a trade union decree defining the role of external treatment, also due to the delays due to retirements and the consequent shortages of staff within the Municipality; [...] any refusal to execute the concession in the absence and pending definition of the role of the external treatment would have had both civil and criminal consequences to the detriment of the current representative, as well as constituting an element of concrete prejudice for citizenship and the users of Formia ".

With a note of the XX (prot. No. XX), the Office, on the basis of the elements acquired, notified the company, 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 Regulation, inviting the company to produce defensive writings or documents to the Guarantor 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 law n. 689 of 11/24/1981). With the aforementioned note, the Office found that the company carried out the processing of personal data, without its role as "data

controller" previously defined by the Municipality, data controller and, therefore, in the absence of a condition of lawfulness (articles 5 and 6 of the Regulation).

With a note of the twentieth, the company stated, among other things, that:

- "held the role of concessionaire. Therefore it was up to the municipal body alone to adopt the acts useful for the discipline of the relationship and it was not possible for the company to interrupt the service, under penalty of civil and criminal penalties against it;
- the company pointed out that the violation that could be found abstractly not only was not attributable to it, but was defined and intervened at a time when, above all, the public administrations. they had not yet metabolized the new European regulations on the treatment of personal data;
- K City - a genuinely private entity - is treated as a public reality, which the company is not [...] the circumstance of being concessionaires of a public service does not change the nature of a legal entity. The rules for private and non-public entities must be applied to K City. The misunderstanding underlying the procedure undermines its correctness at its root: only the improper approach of K City to a "public reality" makes it possible to forget that the regulation of data processing relating to a concession was not the responsibility of the concessionaire, but the grantor. It is only the latter that can only be abstractly sanctioned for any omissions or deficiencies. Obviously not the concessionaire, who limited himself to acting as the first nudus minister without having any power to regulate the methods of data processing;
- parking regulation is the responsibility of local authorities and never their dealers. It would therefore have been the responsibility of the Municipality to promptly regulate the relationship: if this is not the case, K City cannot pay the consequences;
- Even before the service began, the Municipality of Formia with joint acts had governed the management methods of the parking and - among other requirements - had also introduced the details of the documents necessary to sign the season ticket. Consequently, the data processing method had been, albeit in a nutshell, already predetermined by the granting body and K City has given it promptly; this element also eliminates any responsibility of the company. Finally, it should be noted that there was a legal act, which regulated the processing - in addition to the resolutions of the City Council, the sector regulations and the internal protocols of the company - consisting of the service delivery report;
- the acquisition and management of data relating to the subjects, who have subscribed to the subscription, consequently took

place in the presence of more than one regulatory requirement and was based on the criteria of lawfulness, proportionality and transparency. In conclusion, it should be noted that the behavior or omission of the Municipality of Formia cannot have consequences to the detriment of K City, which is completely unrelated to the causal course of the affair it deals with here ".

### 3. Outcome of the preliminary investigation

Pursuant to the legislation on the protection of personal data, the processing of personal data carried out by public entities acting as owners (such as the Municipality of Formia) is lawful only if necessary "to fulfill a legal obligation to which the data controller "or" for the execution of a task in the public interest or connected to the exercise of public authority vested in the data controller "[art. 6, par. 1, lett. c) and e)]. The regulation of stops and parking in the area is part of the institutional activities entrusted to local authorities.

Even in the presence of this assumption of lawfulness, the data controller is required to respect the principles of data protection, including those of "lawfulness, correctness and transparency", on the basis of which the data must be "processed in lawful, correct and transparent way towards the interested party ", of" minimization "of data, on the basis of which the data must be" adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed "and" limitation of conservation ", according to which the data must be" kept in a form that allows the identification of the data subjects for a period of time not exceeding the achievement of the purposes for which they are processed "(Article 5, paragraph 1, letter a ) and c) and e) of the Regulation).

#### 3.1 the treatment carried out by the company

Pursuant to art. 28 of the Regulation, the owner may also entrust processing to third parties who present adequate guarantees regarding the adoption of technical and organizational measures suitable to ensure that the processing complies with the regulations on the protection of personal data ("data processors ").

The relationship between owner and manager must be governed by a contract or other legal act, stipulated in writing which, in addition to mutually binding the two figures, allows the owner to give instructions to the manager and provides, in detail, which is the subject matter governed. , the duration, the nature and the purposes of the processing, the type of personal data and the categories of data subjects, the obligations and rights of the owner. The Data Processor is therefore entitled to process the data of the interested parties "only on the documented instruction of the owner" (Article 28, par. 1 and 3 of the Regulation).

As emerged during the investigation, the processing of the data in question, carried out by the company on behalf of the

Municipality, was initiated without the role being regulated pursuant to art. 28 of the Regulations, as the delivery report of the management of the parking service for a fee of the XXth does not meet the characteristics of the legal act aimed at regulating the relationship with the Manager, as it does not contain the elements provided for by art. 28 of the Regulation.

Not having been identified as data controller and not having been indicated by the company specific conditions that legitimized the processing of personal data, it must be concluded that the same was carried out in the absence of the conditions of lawfulness and therefore in violation of Articles 5, par. 1, lett. a) and 6 of the Regulations as previously clarified by the Guarantor with regard to similar cases (see provision no.161 of 17 September 2020, web doc. 9461321; provision no. 281 of 17 December 2020, web doc 9525315; provision no. 292 of 22 July 2021, web doc. 9698558; provision no. 293 of 22 July 2021, web doc. 9698597; Guidelines "on the concepts of data controller and data processor in the GDPR" no. 07/2020, in particular note 35).

#### 4. Conclusions

In light of the aforementioned assessments, it is noted that the statements made by the company in the defensive writings ☐ the truthfulness of which one may be called to answer pursuant to art. 168 of the Code ☐ although worthy of consideration, they do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the filing of this procedure, however, none of the cases provided for by the art. 11 of the Guarantor Regulation n. 1/2019.

From the checks carried out on the basis of the elements acquired, also through the documentation sent by the company, as well as from the subsequent evaluations, the non-compliance of the treatments carried out on behalf of the Municipality of Formia concerning the regulation of the parking service of paid vehicles was ascertained. .

The violation of personal data, object of the investigation, took place in full force of the provisions of the Regulation and the Code, as amended by Legislative Decree No. 101/2018, and therefore, in order to determine the regulatory framework applicable under the time profile (art. 1, paragraph 2, of the l. 24 November 1981, n. 689), these constitute the provisions in force at the time of the committed violation, which took place starting from the month of XX.

The preliminary assessments of the Office are therefore confirmed and the unlawfulness of the processing of personal data carried out by the company from the month of XX is noted, as it occurred in the absence of a condition of lawfulness in violation of Articles 5 and 6 of the Regulation.

The violation of the aforementioned provisions makes the administrative sanction applicable pursuant to art. 58, par. 2, lett. i),

and 83, para. 4 and 5, of the same Regulation, as also referred to by art. 166, paragraph 3, of the Code.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. l and 83 of the Regulation; art. 166, paragraph 7, of the Code).

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).

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

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

For the purposes of applying the sanction, it was considered that the processing started from the month of XX and continued until the month of XX, concerned the data of about 256 interested in the subscription service for paid parking in the territory of the Municipality of Formia, in violation of the principle of "lawfulness, correctness and transparency" pursuant to art. 5, par. 1 letter a) of the Regulations and in the absence of a condition of lawfulness in violation of art. 6 of the Regulations.

This violation was brought to the attention of the Authority through a complaint.

On the other hand, the collaboration that the company has shown was favorably considered and the non-malicious behavior of the violation as well as the absence of previous violations against the company was considered.

Due to the aforementioned elements, assessed as a whole, it is deemed necessary to determine pursuant to art. 83, par. 2 and 3, of the Regulations, the amount of the pecuniary sanction, provided for by art. 83, par. 5, lett. a) of the Regulations, to the extent of € 5,000 for the violation of Articles 5 and 6 of the Regulation as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same Regulation.

It is 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.

Finally, it is believed that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. a) and f) of the Regulations, notes the unlawfulness of the processing carried out by the company Kcity srl, for the violation of Articles 5 and 6 of the Regulations, within the terms set out in the motivation

ORDER

To the company K-city srl, in the person of the pro-tempore legal representative, with registered office in Portici (NA), via Gravina n. 16, CF 08445211215– to pay the sum of 5,000 euros as a pecuniary administrative sanction for the violations mentioned in 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 company K.city srl to pay the sum of 5,000 euros - in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, according to the methods indicated in the annex, within thirty days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the l. n. 689/1981;

HAS

the publication of this provision on the website of the Guarantor, pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019;

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation.

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, 29 September 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei