[doc. web no. 9039247]

Injunction against Autotrasporti Viviani s.r.l. - June 28, 2018

Register of measures

no. 400 of 28 June 2018

dated 7 November 2017;

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 Privacy Unit of the Guardia di Finanza, in execution of the request for information no. 31540/114083 of 3

October 2017, formulated pursuant to art. 157 of Legislative Decree June 30, 2003 n. 196, bearing the Code regarding the protection of personal data (hereinafter the "Code"), carried out the checks at Autotrasporti Viviani s.r.l. (hereinafter "the company"), carrying out the food trucking business on behalf of third parties, with headquarters in Bianzone (SO), via Gatta n. 11, P.I. 00920050143, formalized in the report of operations carried out on 26 October 2017, aimed at verifying the lawfulness of the processing of personal data carried out by the company and aimed at detecting the geographical position of people or objects through an electronic communication network, with particular reference to the methods with which the obligation of notification pursuant to articles has been fulfilled 37 and 38 of the Code;

resolving the reservations formulated during the inspections, it emerged that the company, since April 2014, has installed on its means of transport a geolocation system, by means of which it is possible "to know in real time the location of the vehicle and, therefore, of the driver on board; this is because the system detects the data of the tachograph card on a daily basis, assigned, respectively and unequivocally, to each driver when it is inserted into the device on board the vehicle and, therefore, when the transport journey is started (...)". With respect to the processing of personal data carried out using the aforementioned geolocation system, the company communicated that it had notified the Guarantor, pursuant to articles 37 and 38 of the Code,

CONSIDERING that, on the basis of the statements made during the inspections and the note sent on 10 November 2017,

CONSIDERING the report n. 101 of 19 December 2017 (which is referred to in its entirety here) with which the company, in the

person of its pro-tempore legal representative, was charged with the administrative violation envisaged by art. 163 of the Code, for having carried out the processing of personal data pursuant to art. 37, paragraph 1, lett. a), (processing of data that indicate the geographical position of persons or objects via an electronic communication network), by failing to submit the notification to the Guarantor before the start of the processing, as required by art. 38 of the Code;

NOTING that from the report prepared by the aforementioned Unit pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment does not appear to have been made;

CONSIDERING the written defense dated 7 February 2018, sent pursuant to art. 18 of the law n. 689/1981, with which the party has preliminarily described the main characteristics of the geolocation system installed on their vehicles, specifying that "the data collected by the program is used to plan trips through the analysis of driving times and the best routes, in order to optimize the yield of the transport. (...). The information collected by the gps system, therefore, is essential both for the estimation of the transport cost for the drafting of the contracts, and for avoiding that unforeseen times or accidental situations or too long waiting times can heavily affect the profitability of the activity (...)". In view of the installation of the aforementioned system (which "allows the employer to monitor work performance"), the party observed that it had taken steps to carry out all the fulfilments in labor matters, obtaining the authorization of the territorial inspectorate of the work, while as regards the obligations regarding privacy, it proceeded to draw up the programmatic document on security, to appoint the person in charge and those in charge of processing, to provide written information to its employees and, lastly, to carry out the notification to the Guarantor albeit belatedly. With respect to this latter requirement, the non-timely fulfillment of which resulted in the violation of art. 37 of the Code, the party declared that he had acted in perfect good faith, "ignoring the aforementioned obligation as, among other things, not mentioned among the provisions of the Labor Inspectorate, not found on the website of the National Labor Inspectorate and, among others, in the related circular no. 2 of 07/11/2016, containing operational indications on the use of GPS systems". In any case, the party observed that, once the notification pursuant to art, 38 of the Code, all the requirements requested by the Guarantor have been complied with, as provided for in provision no. 370 of 4 October 2011, containing "Vehicle tracking systems in the context of the employment relationship" (in www.garanteprivacy.it, web doc. n. 1850581). For the above, considering the criteria referred to in art. 11 of the law n. 689/1981, the party requested the application of the mitigating factor pursuant to art. 164-bis, paragraph 1, of the Code, as well as the installment of the payment of the administrative fine imposed;

READ the minutes of the hearing of 4 May 2018, held pursuant to art. 18 of the law n. 689/1981, with which the party reaffirmed what had already been declared in the defense briefs, requesting the annulment of the dispute or, alternatively, the application of the statutory minimum with the application of the decreasing pursuant to art. 164-bis, paragraph 1, in consideration of the fact that there are no previous sanctioning proceedings against him and the meager economic conditions of the company;

CONSIDERING that the arguments put forward are not suitable for determining the closure of the sanctioning procedure initiated with the above dispute. There is no doubt that, by means of the geolocation system installed on its vehicles, the company has processed data relating to the location of the vehicles and, indirectly, to that of the workers, with respect to which, therefore, it should have promptly notify the Guarantor on the basis of the combined provisions of articles 37 and 38 of the Code. This fulfillment is also required in the case in which the localization system is used essentially to satisfy organizational and production needs or for safety in the workplace, as in the present case, on the basis of the provisions of the Guarantor in the aforementioned provision of 4 October 2011, to the extent that data relating to the location of vehicles is associated (directly or indirectly) with that of workers. In the case in question, during the inspection the party found that, by means of the geolocation system, it is actually possible to trace the identity of the drivers on board the cars and that, aware of the delicacy of the problem (relating to the control of workers), had taken steps to implement the fulfilments pursuant to law no. 300/1970. However, the measures adopted are not relevant in terms of personal data protection, since the notification pursuant to articles 37 and 38 of the Code is a different fulfillment from those of a labor nature, which is why the party could not have received information on the matter from the Labor Inspectorate. The notification is, rather, a fulfillment that requires the data controller to communicate to the Guarantor a series of information relating to the type of treatment to be started and to the data controller himself, in order to provide the interested parties with every guarantee and protection referred to the treatment of own personal data. Finally, the fact that the party proceeded to notify the Guarantor as soon as he realized the error he made must be positively evaluated;

NOTING, therefore, that Autotrasporti Viviani s.r.l., as data controller, pursuant to articles 4 and 28 of the Code, has failed to notify the Guarantor, pursuant to articles 37 paragraph 1, lett. a), and 38 of the Code, before the start of the treatment; CONSIDERING the art. 163 of the Code which punishes the violation of the provisions of articles 37 and 38, with the administrative sanction of the payment of a sum from twenty thousand euros to one hundred and twenty thousand euros;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code according to which "if any of the violations pursuant to art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied to an extent equal to two fifths";

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law 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; CONSIDERED, therefore, of having to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements evaluated as a whole, in the amount of 8,000.00 (eight thousand) euros for the violation pursuant to art. 163, divided into 10 monthly installments of 800.00 (eight hundred) euros each, in acceptance of the request for payment in installments advanced in the written defence;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, and subsequent modifications and additions;

GIVEN 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 Autotrasporti Viviani s.r.l., with headquarters in Bianzone (SO), via Gatta n. 11, P.I. 00920050143, to pay the sum of 8,000.00 (eight thousand) euros as a pecuniary administrative sanction for the violation indicated in the justification, dividing it, in acceptance of the installment request, into 10 monthly installments of the amount of 800.00 (eight hundred) euros ) each;

## **ENJOYS**

to the same company to pay the sum of 8,000.00 (eight thousand) euros, according to the methods indicated in the attachment, the fractional payments of which will be made by the last day of the month following the one in which the notification of this order will take place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689.

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, 28 June 2018
PRESIDENT
Soro
THE SPEAKER
Cleric Whites
THE SECRETARY GENERAL
Busia