

Injunction order against Barilla G. e R. Fratelli S.p.A. - September 16, 2021

Record of measures

n. 331 of 16 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 dr. Claudio Filippi, Deputy Secretary General;

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016 (hereinafter, the "Regulation");

GIVEN the Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 (Legislative Decree 30 June 2003, n.196, as amended by Legislative Decree 10 August 2018, no. 101, hereinafter the "Code");

GIVEN the annotation of 25 November 2019 sent to the Guarantor by the Carabinieri Command for the Protection of Labor - Carabinieri Labor Inspectorate of Ferrara, concerning the processing of personal data carried out through a video surveillance system installed at the operational headquarters of Barilla G. e R. Fratelli S.p.A .;

EXAMINED the documentation in deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the regulation of the Guarantor n. 1/2000;

Rapporteur Dr. Agostino Ghiglia;

## WHEREAS

1. Inspection access carried out by the Carabinieri Command for the Protection of Labor.

1.1. The Carabinieri Command for Labor Protection - Nucleo Carabinieri Labor Inspectorate of Ferrara sent this Authority, on 25 November 2019, the annotation relating to the inspection access carried out on 7 November 2019, at the operational headquarters of Barilla G. and R. Fratelli S.p.A. (hereinafter, the company) located in Ferrara, via Modena, n. 34 (Mulino Barilla di Ferrara), during which it was ascertained the presence of a video surveillance system, which proved to be functioning, consisting of 20 cameras positioned so as to film the "external and internal areas" of the plant and 5 monitors. At

the same time, the presence of 11 workers at the aforementioned operational headquarters was ascertained.

As for the date of activation of the aforementioned system, the verbalizers have acquired a "Declaration of compliance of the system with the rule of the art", prepared by STS Italia s.r.l. and dated 25 October 2016, relating to the "integration" of the video surveillance system, on behalf of the company. It also appears in documents that the company sent, on June 26, 2017, to the director of the establishment subject to the inspection, a communication relating to the sending of documentation concerning "the use of the installed video surveillance system".

In addition, the company, with a note dated 22 November 2019 sent to the Carabinieri Command for the Protection of Labor, declared that the aforementioned video surveillance system "was installed exclusively for security needs, defense of company assets and to ensure hygiene and wholesomeness of the product, in compliance with the principles of relevance and not excess [...]. In consideration of the aforementioned characteristics, being a preventive measure to protect the safety and corporate assets, it was considered that the plant [...] did not fall within the scope of art. 4 of the law n. 300/1970 and, for this reason, it was not the subject of an authorization request, but only of prior information to the R.S.P.P. and to the R.L.S. [...] ". In this regard, the company has attached the "minutes of the periodic consultation meeting", dated 8 February 2019, concerning, among other things, the "examination of the video surveillance project", in relation to which it should be noted that the video surveillance system "is been strengthened with the aim of improving the control of access to the mill by third parties [...] ".

1.2. On 8 January 2020, the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification to the company of the alleged violations of the Regulation found, with reference to art. 5, par. 1, lett. a) of the Regulation (principle of lawfulness of processing) and art. 114 of the Code (guarantees regarding remote control).

On 7 February 2020, the company sent its defense writings in which it stated that:

to. at the factory (mill) where the inspections were carried out "activities are carried out relating to the grinding of durum wheat to obtain semolina [...]. The factory occupies a total area of 33,900 square meters, which includes 5,400 square meters of covered premises "(see defensive briefs 7.2.2020, p. 2);

b. the video surveillance system is composed of "twenty fixed cameras, indicated by special signs, and non-pivoting [...], operating 24 hours a day, seven days a week (including holidays). Also part of the system are five monitors for viewing images in real time and two "Samsung NVR" digital video recorders (see memories quoted, p. 3);

c. the areas subject to video recording are: the external squares; pedestrian entrance gates and access / exit barriers;

courtyards and access entrances; grain unloading pit tunnel area; Enel electrical substation; parking for employees, visitors and external companies; perimeter areas (see memo cit., p. 4-5);

d. the system was installed for the following purposes: strengthening of security measures to counter terrorist threats to which the company could be subject due to the reputation of the brand in the world; protection of people and company assets against possible aggression, theft, robbery, damage or acts of vandalism; consumer protection - and therefore the reputation and corporate assets - by strengthening the protection measures provided for by international food safety standards; effective exercise of the right of defense in court in the event of unlawful facts (see memorandum cit., p. 4);

And. with reference to the discipline referred to in art. 114 of the Code, in light of the concrete characteristics of the system, "it is believed that art. 4 of the Workers' Statute cannot be applied to the present case ", considering that the system" was installed with the sole purpose of protecting the legitimate security interest of the company ", that the filming only concerns the" areas outside the offices and to the departments where the grain is milled "and the subsequent production activities, that the system" collects only the data strictly necessary for the pursuit of the aforementioned purposes " , that" the grain unloading phase is the only one, among those framed from the video surveillance system of the Mill, to take place in a covered space "; moreover, "none of the [...] cameras allows a real and effective remote control [...], as none [...] records fixed workstations of employees" and "its installation has always been known to the Company Trade Union Representatives [...] as well as the subject of information and inspection by the Workers' Safety Representative "; finally, it was reported that "no disciplinary dispute was raised on the basis of the videotaped images" (see memorandum cit., p. 8-9);

f. in any case, the company, following receipt of the notification of the alleged violations by the Authority "has deemed it appropriate to sign a trade union agreement [...] on 23.1.2020", where, in particular, it has been specified that "the installation [...] does not have the purpose of remote control of the working activity "and that the images collected" cannot be used for disciplinary purposes, except in cases [...] connected to the ascertainment of personal facts / conduct attributable to acts of a nature illicit [...] "(see cited memorandum, p. 9);

g. the company has shown that it has acted with correctness and good faith, and excludes "any will to avoid legal obligations" (see memorandum cit., p. 9);

h. finally, in the alternative, with reference to the application of a possible pecuniary sanction, the company stated that "the number of interested parties involved is minimal (the employees of Barilla nel Mulino are only eighteen), they have not suffered

any damage and the processing in question complies with the purpose limitation principle "; in this regard, moreover, the company believes that the present case can be qualified as a "minor violation" pursuant to recital no. 148 of the Regulations, given that technical, organizational and security measures have been adopted ("limitation of persons authorized to access the recorded images, the attribution of unique and nominal authentication credentials, the tracing of access to the system as well as the logical separation of network connection and communication encryption ") suitable to" exclude related potential damages for the interested parties "; the company's behavior "was not [...] characterized by willful misconduct (nor [...] by negligence)" and was characterized by the desire to cooperate with the Authority "in order to remedy the violation and mitigate its possible negative effects" (see cited memorandum, p. 10-11).

1.3. With a note dated 8 September 2020, the company sent the Authority a copy of the "Video surveillance Regulation - Technical legal regulations for configuration and use", dated 27 June 2017, containing the designation of the person in charge and persons in charge of the processing and the plans relating to the shooting area of the installed cameras.

2. The outcome of the investigation and the procedure for the adoption of corrective measures. Established violations.

Given that, unless the fact constitutes a more serious offense, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false acts or documents, is liable pursuant to art. 168 of the Code "Falsehood in declarations to the Guarantor and interruption of the execution of the tasks or the exercise of the powers of the Guarantor", on the basis of the elements acquired during the inspection access carried out by the Carabinieri Labor Inspectorate of Ferrara and the documentation subsequently sent by the company, it emerged that the company has installed, at least as of November 25, 2016, a video surveillance system inside and outside the operational headquarters of Barilla S.p.A. located in Ferrara. The video surveillance system, complete with 20 cameras, five monitors and two video recorders, is in operation twenty-four hours a day, seven days a week, therefore also during the hours in which employees work. On the basis of the declarations and documentation on file, relating to the positioning of the cameras, it appears that the area subject to video recording also includes the areas overlooking the access to the entrances and other areas reserved for the activity of workers (see defensive briefs, p. 5, "Digital network cameras" table, where it emerges that the external cameras film the "Workshop yard area" as well as the "changing room building - dining room - smoking area", as well as the "Employee parking area" and the entrances, including pedestrian entrances, to the structure).

In this regard, the Guarantor has consistently held that even the areas in which employees transit or stop - sometimes

continuously - (e.g. accesses to the structure and garages, goods loading / unloading areas, vehicle and pedestrian entrances), if subjected to video surveillance , are subject to the full application of the regulations on the protection of personal data (see, among others, provisions of 30 July 2015, no. 455, web doc. no. 4261028; 4 July 2013, no. 334, doc. web n. 2577203; 18 April 2013, n. 199 and 200, web doc. 2483269; 9 February 2012, n. 56, web doc. 188699; 17 November 2011, n. 434, web doc. . 1859558; February 26, 2009, web doc. 1601522). This is in accordance with the provisions of the jurisprudence of legitimacy (see Cass. 6 March 1986, no. 1490; see also, with reference to an instrument other than video surveillance, Cass. 13 March 2007, no. 15892).

In this case, the video recording system is positioned in such a way as to film areas where, precisely, the employees necessarily transit for the performance of the work activity (entrances, courtyards overlooking the workshop, parking lot) or even to go to the inside or in areas dedicated to them (changing rooms, refreshment area, smoking area).

The processing of personal data carried out as part of the employment relationship, if necessary for the purpose of managing the relationship itself (see Articles 6, paragraph 1, letter c); 9, par. 2, lett. b) of the Regulations), must be carried out in compliance with the general principles indicated in art. 5 of the Regulation, and in particular of the principle of lawfulness, according to which the processing is lawful if it complies with the applicable sector regulations (Article 5, paragraph 1, letter a) of the Regulation). Consistent with this approach, art. 88 of the Regulation is without prejudice to the national rules of greater protection ("more specific rules") aimed at ensuring the protection of rights and freedoms with regard to the processing of personal data of workers. The national legislator has approved, as a more specific provision, art. 114 of the Code which, among the conditions of lawfulness of the processing, established compliance with the provisions of art. 4, law 20 May 1970, n. 300. The violation of the aforementioned art. 88 of the Regulation is subject, if the requirements are met, to the application of a pecuniary administrative sanction pursuant to art. 83, par. 5, lett. d) of the Regulations.

Based on the aforementioned art. 4, l. n. 300 of 1970, if the video surveillance equipment derives from them "also the possibility of remote control" of the employee activity, "they can be used exclusively for organizational and production needs, for work safety and for the protection of company assets "And the relative installation must, in any case, be carried out after the stipulation of a collective agreement with the unitary union representation or with the company union representatives or, if it has not been possible to reach this agreement or in the absence of the representatives, only in what preceded by the release of a specific authorization by the Labor Inspectorate. The activation and conclusion of this warranty procedure is therefore an

indispensable condition for the installation of video surveillance systems. Violation of this provision is punishable by law (see Article 171 of the Code).

It is therefore ascertained that the company failed to comply with the aforementioned provision, mistakenly believing that it was not required to do so, since, since the video surveillance system installed in 2016 was preordained for the protection of safety and corporate assets, any control activity by the company, with the consequent inapplicability of the aforementioned co-determination procedure. This reconstruction cannot be accepted, given that the pursuit of one of the purposes strictly indicated by the law is one of the conditions that make the installation of the system lawful upstream, without prejudice, however, to the implementation of the specific guarantee procedures envisaged, by the aforementioned preceptive rules, if the video recording activity, being suitable for resuming the activity of employees, entails the possibility of exercising remote control over the same (see, in the same terms, lastly, Cass., section III pen., 17.12.2019, n. 50919).

Nor is the circumstance, represented by the company, that the company union representatives and the workers' safety representative had been informed of the presence of the plant and shared the need in relation to it suitable for eliminating the obligation to comply with the aforementioned discipline to the aims pursued. In fact, on this point, the jurisprudence of legitimacy has repeatedly held that art. 4, l. n. 300 of 1970 cit., "Protection of collective and super-individual interests", therefore even the consent, possibly given by individual workers to the installation of systems, is not equivalent to the necessary activation of the procedure with the employee representatives or, failing that, under the control of the public authority (see, among others, Cass., section III criminal, 8 May 2017, no. 22148 and 17.12.2019, no. 50919 cit.). In this regard, it is also noted that the Guarantor has repeatedly reiterated that in the workplace, consent does not constitute a suitable legal basis for the processing of personal data of employees (see, among others, provision 13.12.2018, no. 500, web doc. no. 9068983, point 3.1.; with specific reference to video surveillance, see provisions of 4 July 2013, no. 336, web document no. 2578071 and 18 July 2013, no. 361, web doc. no. 2605290).

The processing of personal data of employees carried out by the company through the video surveillance system is therefore illegal, within the terms indicated above, from the date of installation and activation of the system (at least starting from November 2016) until the conclusion of the agreement report on 20 January 2020.

It is recalled that pursuant to art. 2-bis of the Code "personal data processed in violation of the relevant regulations regarding the processing of personal data cannot be used".

3. Conclusions: declaration of illegality of the treatment. Corrective measures pursuant to art. 58, par. 2, Regulations.

For the aforementioned reasons, the Authority believes that the declarations, documentation and reconstructions provided by the data controller during the investigation do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and which are therefore unsuitable to allow the filing of this proceeding, since none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

The processing of personal data carried out by the company is in fact illegal, in the terms set out above, in relation to articles 5, par. 1, lett. a) (principle of lawfulness) and 88 (processing of data in the context of employment relationships) of the Regulation and art. 114 (guarantees regarding remote control) of the Code.

The violation ascertained in the terms mentioned in the motivation cannot be considered "minor", taking into account the nature, gravity and duration of the violation, the degree of responsibility and the manner in which the supervisory authority has become aware of the violation ( see cons. 148 of the Regulation).

Given the corrective powers attributed by art. 58, par. 2 of the Regulations, there is a pecuniary administrative sanction pursuant to art. 83 of the Regulation, commensurate with the circumstances of the specific case (Article 58, paragraph 2, letter i) of the Regulation).

4. 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).

At the outcome of the procedure, it appears that Barilla G. e R. Fratelli S.p.A. has violated Articles 5, par. 1, lett. a) and 88 of the Regulations and art. 114 of the Code. For the violation of the aforementioned provisions, the application of the pecuniary administrative sanction provided for by art. 83, par. 5, lett. a) of the Regulations, by adopting an injunction order (Article 18, Law 11/24/1981, n. 689).

Considering it necessary to apply paragraph 3 of art. 83 of the Regulation where it provides that "If, in relation to the same treatment or related treatments, a data controller [...] violates, with intent or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation ", the total amount of the sanction is calculated in such a way as not to exceed the legal maximum provided for by the same art. 83, par. 5.

With reference to the elements listed in art. 83, par. 2 of the Regulations for the purposes of applying the pecuniary

administrative sanction and its quantification, taking into account that the sanction must "in any case [be] effective, proportionate and dissuasive" (Article 83, par. 1 of the Regulations), it is stated that , in the present case, the following circumstances were considered:

to. in relation to the nature, gravity and duration of the violation, the nature of the violation was considered relevant, which concerned the general principles of processing, and in particular the principle of lawfulness (with reference to the specific provisions relating to processing in the context of the employment ); it was also considered that the ascertained violation began in November 2016 and ceased, only after the violation was ascertained, with the signing of the agreement report on January 20, 2020, therefore after a considerable period of time;

b. with reference to the willful or negligent nature of the violation and the degree of responsibility of the owner, the conduct of the company and the degree of responsibility of the same that has not complied with the regulations on data protection have been taken into consideration;

c. in favor of the company, the degree of cooperation with the supervisory authority was taken into account in order to remedy the violation and the absence of specific precedents (relating to the same type of treatment) charged to the company.

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness to which the Authority must comply in determining the amount of the sanction (Article 83, paragraph 1, of the Regulation), in firstly, the economic conditions of the offender, determined on the basis of the revenues achieved by the company with reference to the financial statements for the year 2020 (which recorded operating losses). Lastly, the extent of the sanctions imposed in similar cases is taken into account.

In light of the elements indicated above and the assessments made, it is considered, in the present case, to apply against Barilla G. e R. Fratelli S.p.A. the administrative sanction for the payment of a sum equal to 75,000.00 (seventy-five thousand) euro.

In this context, it is also believed, in consideration of the type of violations ascertained that concerned the general principles of processing, in particular the principle of lawfulness, that pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision should be published on the Guarantor's website.

It is also believed that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR



detects the unlawfulness of the processing carried out by Barilla G. e R. Fratelli S.p.A., in the person of the legal representative, with registered office in Via Mantova, 166, Parma (PR), Tax Code 01654010345, pursuant to art. 143 of the Code, for the violation of art. 5, par. 1, lett. a) and 88 of the Regulations and art. 114 of the Code;

#### ORDER

pursuant to art. 58, par. 2, lett. i) of the Regulations to Barilla G. e R. Fratelli S.p.A., to pay the sum of € 75,000.00 (seventy-five thousand).

as a pecuniary administrative sanction for the violations indicated in this provision;

#### INJUNCES

then to the same Company to pay the aforementioned sum of 75,000.00 (one hundred thousand) euros, 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. Please note that the offender has the right to settle the dispute by paying - again according to the methods indicated in the annex - of an amount equal to half of the sanction imposed, within the term set out in art. 10, paragraph 3, of d. lgs. n. 150 of 1.9.2011 provided for the submission of the appeal as indicated below (Article 166, paragraph 8, of the Code);

#### 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. 1/20129, and believes that the conditions set out in art. 17 of Regulation no. 1/2019.

Pursuant to art. 78 of the Regulations, as well as articles 152 of the Code and 10 of Legislative Decree n. 150/2011, an opposition to the ordinary judicial authority may be proposed against this provision, with an appeal filed with the ordinary court of the place identified in the same art. 10, within thirty days from the date of communication of the provision itself, or sixty days if the applicant resides abroad.

Rome, September 16, 2021

#### PRESIDENT

Stanzione

#### THE RAPPORTEUR

Ghiglia

THE DEPUTY SECRETARY GENERAL

Philippi