

Injunction against Borgo Fonte Scura s.r.l. - October 29, 2020

Register of measures

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## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components, and dr. Claudio Filippi, deputy secretary general;

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

HAVING REGARD TO the Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 (legislative decree 30 June 2003, n. 196, as amended by legislative decree 10 August 2018, n. 101, hereinafter "Code");

CONSIDERING the complaints presented to the Guarantor pursuant to article 77 of the Regulation by XX, XX and XX.

concerning the processing of personal data carried out through a video surveillance system installed at the registered office of the company Borgo Fonte Scura s.r.l.;

HAVING EXAMINED the documentation in the deeds;

GIVEN the observations made by the deputy secretary general pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Dr. Agostino Ghiglia;

WHEREAS

1. The complaint against the company and the preliminary investigation.

1.1. Messrs XX, XX and XX presented three complaints, respectively on 21 May 2019 and 22 May 2019, complaining about alleged violations of the Regulation by Borgo Fonte Scura s.r.l. (hereinafter, the company), with reference to the data processing carried out through the video surveillance system installed at the registered office of the same, considering that the complainants have carried out work activities at the company on the basis of a catering and banqueting contract. In particular, complaints were made about the lack of information relating to the aforesaid video surveillance system, the control carried out through the video surveillance system on work activity, the possibility of viewing recorded images even remotely, the high

number of subjects with the possibility of accessing to recorded images.

Given the nature of the alleged violations as well as the number of potential interested parties involved, the Office delegated the performance of the inspection which took place on 15 and 16 October 2019 at the company's registered office to the Special Unit for the Protection of Privacy and Technological Frauds .

1.2. During the inspection, the company, through its legal representative, declared (see report of operations carried out on 15 and 16 October 2019) that:

- "the company, which, to date, employs one person, while another ceased his seasonal job on 30 September 2019, carries out its economic activity [...] by entrusting it to external economic subjects with procurement contracts that are drawn up from time to time";
- "the video surveillance system [...] is for the exclusive use of the company which is the data controller";
- the video surveillance system installed at the company's registered office is "consisting of 11 cameras", the "installation [is] dated 26 April 2016" and "is currently functional and was installed in 2016, with prior authorization from Management Territorial employment of Teramo, with provv. no. 52/16 of 27 May 2016";
- "the only person authorized to access the images, in his capacity and with administrator credentials, [is the legal representative], using a personal password, while until the end of 2016, the employee could also access them [...] with his own credentials , specifically instructed and trained, orally by the [legal representative]";
- "the processing of data, through the video surveillance system, began in June 2016, after receiving the authorization from the DTL of Teramo [...]";
- "the system initially consisted of 9 cameras [...] of which 2 located inside the structure [...], 7 located outside [and by] a monitor";
- "the 7 external cameras [...] have been positioned to monitor the internal parking areas and the access roads to them, the main and secondary entrances, the entrance area to the kitchen and the entrance area to the warehouse. The 2 internal cameras [...] are instead positioned in the kitchen area and one in the reception area. [...] In February 2017, 2 additional cameras were installed inside the structure [...] one in the room adjacent to the toilets and one in the room adjacent to the external terrace [...] for this modification to the system [it must be ascertained if an integration has been made to the Territorial Labor Directorate];

- "the entire video surveillance system is active 24 hours a day, without interruptions, and records the last 96 hours, with automatic overwriting of the recordings";
- "the only one who can access the system to date, both from the personal computer, present at the reception of the structure, and remotely with a PC via an IP address, and with a smartphone [he is the legal representative]";
- the video surveillance system "does not have the possibility of acquiring audio recordings";
- "the video surveillance system in question was installed for purposes of security and protection of company assets and was consequently authorized by the DTL for the purpose of protecting company assets";
- "due to mere forgetfulness [were] not affixed [the] required information signs relating to the presence of a video surveillance system on the property [...] the employee employed at the facility [was] provided [and] verbally with the required information to regard";
- "to meet the security levels required by the regulations, [it was] limited to a single user account [...] access to the video surveillance system, its management and display, which [the legal representative] uses [for] today with dedicated credentials"
- "as soon as possible [we will] arrange to display the information at the Borgo Fonte Scura s.r.l. accommodation facility".

The members of the Special Unit for the Protection of Privacy and Technological Frauds who took the minutes also ascertained in the aforesaid report that "inside and outside the structure there is no information on the processing of data carried out by means of the video surveillance system"; with reference to the internal cameras, the one positioned in the room adjacent to the toilets and the one positioned in the room adjacent to the external terrace "are not [they are] present in the plan attached to the authorization application therefore [were not] authorized by the Territorial Labor Directorate of Teramo"; "remote access [...] can be performed by entering credentials consisting of a user ID and password".

On 25 October 2019, the company, in resolving the reservations formulated during the inspection, provided: some "photos of the successful affixing of information on data processing through the video surveillance system at the entrances to the external areas at the gates at the entrance and at the entrances to the building", a copy of the "integration application presented to the Labor Inspectorate for the successful installation of the two cameras in the room" as well as a copy of the "Register of treatments". The company itself, in the same office, also specified that "the video surveillance system is active 24 hours a day, without interruptions, and records the last 96 hours only when the structure is closed, with automatic overwriting of the records as it was programmed at the time of the inspection. During the opening period, however, the registration period is equal to 24

hours with automatic overwriting of the registrations”.

1.3. On 9 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 articles 5, par. 1, lit. a) and 13 of the Regulation, art. 114 of the Code and art. 88 of the Regulation. On 21 January 2020, the company sent the request for a hearing which was held on 21 February 2020 at the headquarters of the Authority; on the occasion, the legal representative stated that:

the company "immediately took action to comply with the regulations relating to the processing of personal data, with reference to the findings of illegality highlighted by the Privacy Unit at the time of the inspection as well as in the act of initiating the sanctioning procedure";

the authorization of the Labor Inspectorate was "obtained regarding the integration of the installation of two further cameras and [reserves] the right to present the relative documentation within a short time";

"the company is small [and is] family-run".

On that occasion, the company filed a supplementary brief in which, with reference to art. 83, par. 2, of the Regulation, declared that:

mr. Costantini used the structure "as a country house, with a restaurant and 7 rooms, managed directly [by himself], sole shareholder and director of the company";

"an examination of the financial statements [...] clearly shows the small and family size of the company, as well as the modest volume of its business";

in determining the fine, account must be taken of "the slight entity of the infringements detected, the timely elimination of the critical issues that emerged, as well as the [...] reasons that had led the innocent director and sole shareholder of Borgo Fonte Scura to make certain choices ( including, for example, the duration of video recording during periods when the facility is closed), [of] the personal and family dimensions of the company".

On 25 February 2020, the company, in resolving the reservations formulated during the hearing, provided a copy of the authorization issued by the Territorial Labor Inspectorate on 5 November 2019 in relation to the supplementary application relating to the video surveillance system.

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

After examining the statements made to the Authority during the proceedings as well as the documentation acquired, provided

that, unless the fact constitutes a more serious offence, whoever, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents and is liable pursuant to art. 168 of the Code ("False statements to the Guarantor and interruption of the performance of duties or the exercise of powers of the Guarantor"), it emerges that the company had installed and used a video surveillance system with specific characteristics that did not comply with the provisions in the authorization issued by the Territorial Directorate of Labor of Teramo on 27 May 2016 nor, more generally, to the regulations on the protection of personal data. In particular, it emerged that in February 2017 the company installed two more cameras than those for which the aforesaid authorization had been issued; the obligation to provide information to the interested parties (including workers) has not been fulfilled considering that no information signs have been affixed in this regard "due to mere oversight" and that "the employee employed at the video-monitored facility [the information is been provided] verbally"; remote access to the images by the data controller is envisaged (as declared by the same during the inspection) despite the fact that the technical report submitted to obtain the authorization dated 05.27.2016 specified in this regard that "no internet and/or direct connection with the police and therefore it will not be possible to view images from a remote location in real time".

This is in contrast with the provisions of art. 114 of the Code (which recalls art. 4 of Law 20.5.1970, n. 300 which governs the so-called remote controls), considering that, in the case of installation of a video surveillance system from which also derives the possibility of distance from the workers' activities, it is necessary to respect the specific procedure described by law aimed at obtaining, in the absence of company union representatives, the issue of a specific authorization by the Labor Inspectorate. This labor discipline constitutes one of the provisions of national law "more specific to ensure the protection of rights and freedoms with regard to the processing of personal data of employees in the context of employment relationships" identified by art. 88 of the Regulation.

The conduct held therefore constitutes a violation of the principle of lawfulness of the processing (art. 5, paragraph 1, letter a) of the Regulation in relation to art. 114 of the Code) and art. 88 of the Regulation as regards the applicable discipline on the matter.

Furthermore, failure to comply with the obligation to provide adequate information to data subjects regarding the processing carried out through the video surveillance system constitutes a violation of the provisions of art. 13 of the Regulation: on the basis of this provision, the owner is required to provide the interested party in advance with all the information relating to the

essential characteristics of the processing. In particular, as regards the installation of a video surveillance system, the Guarantor has indicated the conditions of lawfulness of the processing of personal data carried out through video surveillance systems with the provision of a general nature of 8 April 2010 (published in the Official Gazette no. 99 of 29 April 2010, available at [www.garanteprivacy.it](http://www.garanteprivacy.it), web doc. n. 1712680).

In the context of the employment relationship, the obligation to inform the employee is also an expression of the general principle of fairness (see Article 5, paragraph 1, letter a) of the Regulation).

At the end of the inspection and of the administrative procedure, the company complied with the provisions of the personal data protection regulations.

3. Conclusions: illegality of the treatment. Sanction measure pursuant to art. 58, par. 2, Regulation.

For the aforementioned reasons, the processing of personal data carried out by the company through the video surveillance system is unlawful, in the terms set out above, in relation to articles 5, par. 1, lit. a), 13, 88 of the Regulation and 114 of the Code.

Therefore, given the corrective powers attributed by art. 58, par. 2 of the Regulation, in the light of the circumstances of the specific case:

- a pecuniary administrative sanction is ordered 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. Injunction order.

Pursuant to art. 58, par. 2, lit. i) of the Regulation and of the art. 166, paragraphs 3 and 7 of the Code, the Guarantor orders the application of the pecuniary administrative sanction provided for by art. 83, par. 5 of the Regulation, through the adoption of an injunction order (art. 18, l. 11.24.1981, n. 689), in relation to the processing of personal data carried out by the company through the aforementioned video surveillance system, in relation to the articles 5, par. 1, lit. a), 13 and 88 of the Regulation and art. 114 of the Code, following the outcome of the procedure pursuant to art. 166, paragraph 5.

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

fixed at the sum of 20 million euros or, for companies, at 4% of the annual worldwide turnover of the previous year where higher.

With reference to the elements listed by art. 83, par. 2 of the Regulation for the purposes of applying the administrative fine and the relative quantification, taking into account that the fine must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), it is represented that, in the present case, the following circumstances were considered:

- a) with reference to the intentional or negligent nature of the violation and the degree of responsibility of the owner, the negligent conduct of the company and the degree of responsibility of the same was taken into consideration which did not comply with the data protection regulations in relation to a plurality of provisions;
- b) the absence of specific precedents (relating to the same type of treatment) against the company;
- c) the company's cooperation with the Authority in order to remedy the violation and mitigate its negative effects.

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness with which the Authority must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), in firstly the economic conditions of the offender, determined with reference to the financial statements for the year 2018 with respect to which the company recorded a loss for the year.

In the light of the elements indicated above and the assessments made, it is believed, in the present case, to apply against Borgo Fonte Scura s.r.l. the administrative sanction of the payment of a sum equal to 4,000.00 (four thousand) euros.

In this context, it is also believed, in consideration of the nature and seriousness of the violations ascertained, that pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision must be published on the Guarantor's website.

It is also believed that the conditions pursuant to 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 THAT BEING CONSIDERED, THE GUARANTOR

declares pursuant to articles 57, par. 1, lit. f) and 83 of the Regulation the unlawfulness of the processing carried out in the terms referred to in the justification by Borgo Fonte Scura s.r.l., for the violation of the articles 5, par. 1, lit. a) in relation to art. 114 of the Code, 88 of the Regulation, 13 and 5, par. 1, lit. a) (principle of correctness) of the Regulation;

ORDER

pursuant to art. 58, par. 2, lit. i) of the Regulations to Borgo Fonte Scura s.r.l., in the person of its legal representative, with registered office in Silvi (TE), Contrada Vallescura, 11/C, tax code 01875510677, to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

then to the same Company to pay the aforementioned sum of 4,000.00 (four 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 deeds pursuant to art. 27 of the law no. 689/1981. It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph 8, of the Code);

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's Regulation n. 1/2019, and believes 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.

Pursuant to art. 78 of the Regulation, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to the ordinary judicial authority may be lodged against this provision, with an appeal lodged with the ordinary court of the place identified in the same art. 10, within the term of thirty days from the date of communication of the measure itself, or sixty days if the appellant resides abroad.

Rome, 29 October 2020

PRESIDENT

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THE SPEAKER

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THE DEPUTY SECRETARY GENERAL



