[doc. web n. 9676172]

Injunction order against Azienda Usl di Bologna - April 29, 2021

Record of measures

n. 175 of 29 April 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 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 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;

HAVING REGARD to 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, prof. Pasquale Stanzione;

WHEREAS

1. The violation of personal data.

The Local Health Authority of Bologna (hereinafter the Company) has notified the Guarantor of a violation of personal data

pursuant to art. 33 of the Regulation in relation to the presence in the Electronic Health Record (FSE) of a patient under the age of a report with reference to which the interested party had exercised the right of blackout (notification dated 9.8.2019, prot. No. 92638).

In particular, in the aforementioned communication, the Company represented that the aforementioned report refers to a service provided by a consultation center for adolescents, which they can access independently, on the subject of contraception and responsible procreation. The reported circumstance made it possible for the holders of parental authority to access the aforementioned report.

2. The preliminary activity.

In relation to what was communicated by the Company, the Office, with deed no. 136366 of 9/12/2019, 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 Article 58, paragraph 2, of the Regulations, inviting the aforementioned holder 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 the law n. 689 of 24/11/1981).

In particular, the Office, in the aforementioned deed, represented that, on the basis of the elements acquired and the facts that emerged as a result of the investigation, the Company carried out, by inserting a report in the FSE of the interested party, a communication of data relating to health to those exercising the parental authority of the minor without any legal basis and in contrast with an explicit request for obscuration made by the patient, explicitly protected by the sector regulations (articles 5, 7 and 8 of Prime Minister's Decree No. 178 / 2015) and, therefore, in violation of art. 75 of the Code, of art. 9 of the Regulation and of the principle of lawfulness of processing (Article 5, paragraph 1, letter a) of the Regulation).

With a note dated 8 January 2020 (prot. No. 1842), the Company sent its defense briefs, in which additional elements were represented and in particular that:

- "before the reported episode, the reports relating to the accesses of minors to the Family Counseling Centers (...) were sent in obscured mode to the FSE in such a way that these reports remained available in the file itself to the Data Subject only, inhibiting the consultation by default by professionals and healthcare professionals. It should be noted that the mother of the minor, in the exercise of her parental responsibility, received the notification relating to the presence of an advisory report in the FSE of the minor. In the present case, the report concerned an "Individual interview" service provided at the Youth Space -

Family Counseling Center of the XX, the XX. This method allowed only the legal representative of the minor, entitled to express consent pursuant to art. 7 of DPCM n. 178 of 29 September 2015, to potentially access these types of health documents ";

- an “immediate interview was carried out with the mother, who was given information relating to the aforementioned legislation, which allows minors to contact the Health Authorities and Consultants without their parents being informed and issuing any consent. This is consistent with the objective of the rule which is to guarantee the anonymity of minors who do not want or cannot inform their parents, and to protect the right of the minor to responsible procreation. At the end of the interview, the lady thanked the Service declaring that she did not want to continue with further actions ";

- the “cancellation of the report in the FSE of the minor on receipt of the report from the mother, to protect the minor's confidentiality”;

- "After obtaining the opinion of the DPO and in agreement with the corporate privacy contact person and the IT and Communication Technology Unit Director, the rules governing the feeding of these types of documents within the ESF have been changed. To date, these types of reports no longer feed the minor's ESF (not even in obscured mode), as a default blocking rule has been adopted ";

- "The Company, as soon as it became aware of the incident, took steps to understand the causes of the reported case and promptly remedy it".

In relation to the Company's request, on 9 November 2020, at the Office of the Guarantor, pursuant to Articles 166, paragraphs 6 and 7, of the Code 18, paragraph 1, by law no. 689 of 11/24/1981 the hearing was held, during which the Company reiterated what has already been represented, specifying in particular that:

- "the mother of the person concerned expressed her thanks for the ways in which the health personnel handled the affair, which represented an opportunity for dialogue with her daughter";

- "the incident constituted an opportunity to improve the setting of the data and document feeding system in the ESF, eliminating the functionality of automatic conferment to the File of documents relating to services provided by the" Spazio Giovani ", articulations of the counseling centers of the Company. The documentation relating to the services provided to minors by these structures continues to be managed by the company information systems, without however feeding directly the electronic health records of the same. Currently, the documents relating to the services provided by the "Youth Space" are

delivered to the interested party in paper form. The aforementioned amendment concerns the documents produced by the articulation called "Youth Space" of the Company's district consultants regardless of whether the minor is accompanied by the parent or not ";

- “before the aforementioned modification, the aforementioned data fed the Dossier in an obscured mode and therefore were only visible to the interested party. This solution presented problems with reference to the ESF of minors, as being the same accessible by the parents, the latter could become aware of these types of documents. In this regard, it should be noted that the previous approach presented this criticality only with reference to the ESF of minors over sixteen with reference to the social and health services that could be provided to them even in the absence of the parent's consent;

- "It does not appear that there have been complaints in the past similar to that which is the subject of the proceeding and that, following this modification, no other episodes such as the one notified to the Guarantor have occurred".

3. Outcome of the preliminary investigation.

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

1. in the health field - information on the state of health can only be communicated to the interested party and can be communicated to third parties only on the basis of a suitable legal basis or on the indication of the interested party himself after the latter's written delegation (art. 9 Regulation and art.83 of the Code in conjunction with art.22, paragraph 11, legislative decree 10 August 2018, n.101);

2. the Code provides that "the processing of personal data carried out for the purpose of protecting the health and physical safety of the data subject (...) must be carried out (...) in compliance with the specific sector provisions" (Article 75-Specific conditions in health area of the Code). With specific reference to the case in question, reference is made to the provisions of art. 12 of the d.l. n. 179/2012 which provided for the establishment of the electronic health record, the implementation of which is currently regulated by Prime Ministerial Decree no. 178/2015 (Regulation on electronic health records - ESF), on which the Authority expressed its opinion (Opinion of 22/5/2014, web doc. No. 3230826). The aforementioned implementing regulation defined "Data subject to greater protection of anonymity" the information and health and social and health documents governed by the regulatory provisions also protecting women who undergo voluntary termination of pregnancy (Article 5). These types of data can be made visible through the ESF "only with the explicit consent of the client". The aforementioned

regulation provides that it is "the responsibility of the professionals or health workers who provide the service to acquire the explicit consent of the client" (art. 5, paragraph 2). The aforementioned regulation also established that "the assisted person has the right to request the obscuring of health and socio-health data and documents both before feeding the ESF and subsequently, ensuring that they can only be consulted by the assisted person and holders who generated them "(art. 8);

3. with reference to the case in point, the specific sector provisions that allow the minor to access certain treatments, even in the absence of the parent's consent, must be kept in mind. In particular, reference is made to the provisions of the legislation on the social protection of maternity and on the voluntary interruption of pregnancy (art. 2, last paragraph, l. 22 May 1978, n. 194), according to which "the administration on medical prescription, in health facilities and counseling centers, of the means necessary to achieve the freely chosen purposes in relation to responsible procreation is also allowed to minors "(see, in this regard, also Provision of 17.11.2010, web doc. no. 1769451);

4. the inclusion in the FSE of the interested party, of the documents relating to the service provided by the aforementioned consultation center for adolescents, in contrast to an explicit request for blackout made by the interested party, led to a communication of data relating to the health of the interested in the parents of the same without a suitable legal basis.

4. Conclusions.

In light of the aforementioned assessments, taking into account the statements made by the data controller and data processors during the investigation and considering that, unless the fact constitutes a more serious crime, anyone, in a proceeding before the Guarantor, declares or falsely 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 execution of the tasks or exercise of the powers of the Guarantor" the elements provided by the data controller in the defense briefs do not allow to overcome the findings notified by the Office with initiation of the procedure, however, as none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

For these reasons, the unlawfulness of the processing of personal data carried out by the Local Health Authority of Bologna under the terms set out in the motivation, for violation of Articles 5, par. 2, lett. a), and 9 of the Regulations, as well as art. 75 of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the Company has declared that the procedure for resolving the problem that generated the aforementioned event has been completed in such a way as to

exclude the replicability of the the conditions for the adoption of the corrective measures pursuant to 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, par. 2, lett. I and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The violation of articles 5, par. 2, lett. f), and 9 of the Regulations and 75 of the Code, caused by the conduct put in place by the Local Health Authority of Bologna, is subject to the application of a pecuniary administrative sanction pursuant to art. 83, paragraph 5, of the Regulation also pursuant to art. 166, paragraph 2 of the Code (see letter a) with reference to the violation of articles 5 and 9 of the Regulation).

In the present case - also considering the reference contained in art. 166, paragraph 2, of the Code - 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, which therefore applies to the present case.

It should be considered 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. 85, par. 2, of the Regulation in relation to which it is noted that:

- the Authority became aware of the event following the notification of personal data breach made by the same owner and no complaints or reports were received to the Guarantor on the incident (Article 83, paragraph 2, letter h) of the Regulation);
- the processing of data carried out by the Company concerns data suitable for detecting information on the health of a person concerned, under age, concerning information relating to the subject of contraception and responsible procreation (Article 83, paragraph 2, letter a) and g) of the Regulations);
- the absence of voluntary elements on the part of the Company in the causation of the event (Article 83, paragraph 2, letter b)

of the Regulations);

- the event occurred in the period of first application of the Regulation and was immediately taken over by both the Company and the person responsible for its treatment, followed by the identification of corrective and resolutive solutions (art.83 , paragraph 2, letters c) and d) of the Regulation);

- the Company immediately demonstrated a high degree of cooperation (Article 83, paragraph 2, letter f) of the Regulation);

- the Company has already been the recipient of a sanctioning procedure relating to the processing of personal data carried out through the electronic health record (provision of January 14, 2021) (Article 83, paragraph 2, letter i) of the Regulation);

Due to the aforementioned elements, assessed as a whole, also taking into account the phase of first application of the sanctioning provisions pursuant to art. 22, paragraph 13, of the d. lgs. 10/08/2018, n. 101, 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 (thirty thousand) for the violation of Articles 5, par. 1, lett. f) and 9 of the Regulations and Article 75 of the Code 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 the Local Health Authority of Bologna, for the violation of art. 5, par. 1, lett. f) and 9 of the Regulations and art. 75 of the Code in the terms set out in the motivation.

ORDER

pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations, as well as art. 166 of the Code, to the Local Health Authority of Bologna with registered office in Bologna, via Castiglione, 29 - C.F./P.IVA 02406911202, in the person of the pro-tempore legal representative, to pay the sum of 30,000 (thirty thousand) euros by way of pecuniary administrative sanction for the violations indicated in this provision, according to the methods indicated in the annex, within 30 days from the notification of 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 Company, 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 (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, April 29, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei