[doc. web n. 9704048]

Injunction order against the Consorzio di Bonifica dell'Oristanese - 16 September 2021

Record of measures

n. 319 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, 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 / CE, "General Data Protection Regulation" (hereinafter, "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");

Having seen the documentation in the deeds;

Given 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;

Rapporteur the lawyer Guido Scorza;

WHEREAS

1. The complaint.

With complaint of the XX, submitted pursuant to art. 77 of the Regulation, the publication, in the transparent administration section of the website of the Consorzio di Bonifica dell'Oristanese (hereinafter "Consortium"), of a disciplinary measure against

the complainant, an employee of the Consortium, also containing information relating to the his state of health. From the complaint it emerged that the resolution was also available online, by consulting the search engine "Google" (www.google.it) and that, following a request for exercise of rights by the complainant, including the request for cancellation of the data, the Consortium has removed the resolution from the site.

2. The preliminary activity.

With a note of the XX (prot. No. XX), the Office, on the basis of the elements acquired, the verifications carried out and the facts that emerged as a result of the investigation, notified the Consortium, 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, concerning the alleged violations of articles 5, par. 1, lett. a) and c), 6, paragraph 1, lett. c) and e), 2 and 3, lett. b), as well as art. 2-ter, paragraphs 1 and 3 and 2-septies, paragraph 8 of the Code, inviting the aforementioned holder to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code, as well as art.18, paragraph 1, of the l. 24 November 1981, n. 689).

The Consortium has sent its defense briefs, with note prot. N. XX of the XX representing that:

- “The Consortium published on the XXth Commission Resolution No. XX of the XXth with which a disciplinary measure was ordered against [the complainant]”;

- the Resolution was published directly in the Transparent Administration Section / Provisions in place of the Praetorian Register […]. The expedient of using the Transparent Administration Section / Provisions to replace the Pretorio Register entails the need to intervene manually to remove the documents from the section once the 15 days of publication have elapsed. In the case in question, this operation was not carried out at the expiry of the 15 days of publication, […] for mere forgetfulness ”;

- "as soon as [the complainant] reported the anomaly, [...] we proceeded to anonymize the subject of the provision and not to allow access to the resolution through the Transparent Administration Section, also asking the main search engines to delete from their archives the old page containing the same ";

- "on the provision de quo a page opens containing the words" the provision is kept in the records in compliance with the legislation on the protection of personal data (GDPR 679/2016-Legislative Decree 196/2003 ss.mm.ii) […] Immediate communication was given immediately / concerned about the prompt intervention. ";

- "on the merits of the particular nature of the disputed data (data relating to the state of health), and disseminated with the publication of the provision, it should be noted that in the body of the provision, initially published, there were two entries: the first referred to the delay in hearing of the interested party in relation to the behavior object of the complaint, following the repeated postponements requested by the same for health reasons; and the second, contained in the aforementioned report, in which "the employee admitted having made mistakes in the management and recording of her absences and asks for understanding because in recent years she has had health and family problems";

- "it must first of all be noted that both terms were absolutely generic, in any case such as not to reveal even indirectly any detailed reference to the sickness and / or psycho-physical conditions of the employee";

- “secondly, the (second) sentence was inserted in the narrative within the aforementioned Resolution for the sole purpose of justifying the adoption of a disciplinary measure which is absolutely mild in comparison with the alleged violations […]. The Administration at the time, also in consideration of the employee's health conditions (as well as declared by the same to justify her behavior), wanted to adopt an indulgent measure, justifying it with an understanding for the declared health and family problems " ;

- "Beyond the remark made by the Authority to this Body with the note that is found, it is noted that having indicated in the resolution this generic reference to the health conditions of the employee, in order to motivate the adoption of a provision mild, if not favorable, and justify at least in part the errors committed by the employee in the management of her work, thus safeguarding the workplace, has been used instrumentally by the same employee against those who have adopted it ".

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection discipline provides that public subjects, even if they operate in the performance of their duties as employers, may process the personal data of workers, also relating to particular categories of data - which also include " data relating to health "(see art. 9, par. 1, of the Regulation) - if the processing is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks provided for by national sector regulations (art. 6, par. 1, lett. c) and e); 9, par. 2, lett. b) and par. 4; 88 of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing, in accordance with paragraph 1, letters c) and e), by determining more

precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing […] ”(Article 6, par. 2, of the Regulation). In this regard, it should be noted that the "dissemination" of personal data (such as online publication), by public entities, is permitted only when provided for by a law or, in the cases provided for by law, by regulation (art.2-ter, paragraphs 1, 3 and 4, letter b), of the Code).

In any case, "data relating to health", ie those "relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health" (Article 4, par. 1, n. 15, of the Regulation), due to the greater guarantees that the Regulation and the Code recognize due to the particular sensitivity of this category of data, "cannot be disclosed" (art. 2-septies, paragraph 8 , of the Code and art.9, par. 4, of the Regulation).

The data controller is then, in any case, required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", on the basis of which personal data must be "Processed in a lawful, correct and transparent manner towards the data subject" and must be "adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter a) and c) of the Regulation).

3.2 The dissemination of personal data.

As a preliminary point, it should be noted that "personal data" means "any information concerning an identified or identifiable natural person", having to be considered "identifiable the natural person who can be identified, directly or indirectly [...]" (Article 4, par. 1, no. 1).

In the present case, the determination in question contained the express indication that the person concerned had "health and family problems", also referring to events in the private life of the same. Contrary to what was declared by the Consortium, according to which the resolution did not contain "any detailed reference to the illness and / or psycho-physical conditions of the employee", the deed to be published, while not indicating the specific pathology suffered, contained personal data relating to the health of the person concerned (see Article 4, paragraph 1, No. 15 and recital 35 of the Regulation). In fact, the notion of personal data relating to health also includes mere reference to "any information from which one can infer, even indirectly, the state of illness or the existence of pathologies of the subjects concerned" (see "Guidelines in subject to the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public entities and other obliged entities ", of 15 May 2014, web doc. no. 3134436. See also" Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the

public sphere "of the Guarantor, provision no. 23 of June 14, 2007, web doc. No. 1417809). This principle was reiterated in numerous decisions of the Guarantor with regard to individual cases (see among many, most recently, with specific regard to the working context, provisions n.68 of 25 February 2021 web doc. 9567429 and 255 of 24 June 2021 in course of publication ; in jurisprudence, cf. paragraph 50 of the judgment of the Court of Justice of the European Communities of 6 November 2003 C-101/01, Lindqvist, and Cass. civ. Section I, 8 August 2013, n. 18980, which states that “it cannot be doubted that an absence from work" due to illness "constitutes a personal data" relating to the health "of the person to whom the information refers"). For these reasons, the publication of this resolution led to an unlawful dissemination of data relating to the employee's health (articles 5, 6 and 9 of the Regulation and 2-ter and 2-septies of the Code).

Moreover, in the resolution to be published, containing the imposition of the disciplinary sanction against the interested party, specific events relating to the existing employment relationship with the same were also taken into account, a circumstance that connotes the conduct of the Consortium of further gravity (see Civil Cassation, section II, order no. 18292 of 3 September 2020, which confirmed the decision of the Guarantor no. 193 of 26 March 2015, adopted against a Municipality). The violation of the rules on the protection of personal data through the publication of deeds and documents containing references to events related to the employment relationship, assessments of the work of employees, disciplinary proceedings as well as details relating to the private sphere of the same, is in fact, it has been ascertained in numerous provisions of the Guarantor (see, most recently, provision of 24 June 2021, no. 256, currently being published; 25 February 2021, no. 69, web doc. no. 9565258; 25 February 2021 , no. 68, cited above; January 27, 2021, no. 34, web doc. no. 9549165).

Furthermore, from another point of view, the Consortium has not proved the existence of any specific regulatory provision that allows the publication of the determination that is the subject of the complaint, nor can the mere reference to the regulations concerning the publicity of the acts of local authorities on the praetorian register be considered sufficient (art. 124, legislative decree 18 August 2000, n. 267 as well as art. 32, law 18 June 2009, n. 69), considering that the publication continued, even if "for mere forgetfulness", well beyond 15-day deadline provided for by the legislation (see Civil Cassation, Section II, Order No. 18292 of September 3, 2020).

In any case, as clarified by the Guarantor on numerous occasions, even in the presence of a law that provides for the obligation to publish certain deeds and documents, the owner must comply with the principles of data protection, including the principle of " data minimization "(art. 5, par. 1, lett. c), of the Regulation; cf. part II, par. 3 (a), of the Guarantor's Guidelines

cited above), it being understood that data relating to health cannot be disseminated (Article 2-septies, paragraph 8, of the Code and Article 9, paragraph 4, of the Regulation). This also in consideration of the fact that, in order to comply with the principle of adequate motivation pursuant to art. 3 of the l. 241/1990, the publication of the full version of the determination is not necessary since the same, remaining in the records of the owner, is accessible, by qualified persons, in the ways and within the limits established by law.

Lastly, with specific regard to what was declared by the Consortium, in relation to the fact that the publication of the resolution was carried out in the Transparent Administration Section of the site instead of in the online praetorian register, it is recalled that, as clarified since 2014 by the Guarantor, Considering the profile of the different applicable legal regime, the provisions that regulate the disclosure obligations of the administrative action for transparency purposes must be kept separate from those that regulate forms of advertising for different purposes (eg: legal advertising; see Guidelines cit.).

4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller during the investigation the truthfulness of which one may be called to respond pursuant to art. 168 of the Code do not allow the findings notified by the Office to be overcome with the act of initiating the procedure and are insufficient to allow the filing of this proceeding, however, none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

It is also represented that for the determination of the applicable law, from a temporal point of view, the principle of legality referred to in art. 1, paragraph 2, of the l. n. 689/1981 which establishes as "Laws that provide for administrative sanctions are applied only in the cases and times considered in them". This determines the obligation to take into account the provisions in force at the time of the committed violation. From the documents of the investigation it emerged that the determination in its full text was published from the 20th to the 20th, the date on which, according to what was declared by the complainant and confirmed by the Consortium, it was removed from the site and, therefore, in full force of the provisions of the Regulations and the Code.

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Consortium of Reclamation of the Oristanese is noted, for having disclosed personal data relating to the complainant, also relating to health, contained in resolution no. XX of the XX, in the absence of suitable regulatory conditions, in violation of art. 6 of the Regulation and art. 2-ter, and 2-septies, paragraph 8 of the Code, as well as the basic principles of

processing contained in art. 5, par. 1, lett. a) and c) of the Regulations.

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulation, pursuant to art. 58, par. 2, lett. i), and 83, par. 3, of the same Regulation and art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the publication of the resolution in question on the Consortium website has ceased, the conditions for the adoption of further corrective measures referred to in '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 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, taking into account art. 83, par. 3, 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.

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.

In relation to the aforementioned elements, the nature of the data (data relating to health) and referred to a disciplinary procedure against an employee, which were disseminated, was considered; the period of time in which the personal data have been published; this also in light of the indications that, since 2014, the Guarantor has provided to all public entities in the Guidelines on the processing of personal data, also contained in administrative documents and deeds, carried out for the purpose of advertising and transparency on the web. by public entities and other obligated entities, mentioned above.

On the other hand, it was favorably acknowledged that the Consortium removed the determined object of publication and maintained a collaborative conduct with this Authority in order to remedy the violation and mitigate its possible negative effects.

There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction, in the amount of € 5,000 (five thousand) for the violation of Articles 5, par. 1, lett. a) and c), 6 of the Regulation and art. 2-ter and 2-septies, paragraph 8, of the Code, as a withheld administrative fine, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the time frame during which the aforementioned data were made available online, it is also believed that the additional 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 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

pursuant to art. 57, par. 1, lett. f), of the Regulations, declares unlawful the conduct of the Consortium of Reclamation of the Oristanese described in the terms set out in the motivation, consisting in the violation of Articles 5, par. 1, lett. a) and c) and 6 of the Regulations and articles 2-ter and 2-septies, paragraph 8, of the Code, in the terms set out in the motivation

ORDER

to the Oristanese Reclamation Consortium, in the person of the pro-tempore legal representative, with registered office in Via Cagliari, 170 - 09170 Oristano Tax Code 90022600952, pursuant to Articles 58, par. 2, lett. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 5,000 (five thousand) euros as a pecuniary administrative sanction for the violations indicated in the motivation;

INJUNCES

the aforementioned Consortium to pay the sum of € 5,000 (five 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 l. n. 689/1981. In this regard, it is recalled 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 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also Article 10, paragraph 3, of

Legislative Decree no. 150 of 1/9/2011);

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, considering that the conditions set out in art. 17 of the Guarantor Regulation n. 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, 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, September 16, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE DEPUTY SECRETARY GENERAL

Philippi