

Order injunction against Poste Italiane S.p.a. - May 27, 2021

Record of measures

n. 210 of May 27, 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 (hereinafter the "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 (Code regarding the protection of personal data, hereinafter the "Code") as amended by Legislative Decree 10 August 2018, n. 101 on "Provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679";

GIVEN the complaint submitted to the Guarantor pursuant to Article 77 of the Regulation by Mr. XX against Poste Italiane S.p.a. (hereinafter "Poste" or "the company"), with which the same has complained about the alleged unlawful communication of accounting data referring to his postepay card to an unauthorized third party;

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. The complaint and the preliminary investigation.

1.1 With the complaint regularized on 20 April 2020, Mr. XX complained about the unlawfulness of the processing of personal data concerning him put in place by Poste Italiane S.p.a., with specific reference to the unlawful communication, by an operator of the the post office of Barbarasco (Municipality of Tresana, province of Massa) of the data referring to the balance of the prepaid Postepay card, of which the same was the holder to an unauthorized third party (specifically, the mother). With a subsequent note dated 7 July 2020, the complainant asked the Office to "put the proceedings on standby pending the choices

of the Italian Post Office" against which an "out-of-court claim for compensation" had been made. Below, with a communication dated 6 August 2020, the interested party, in informing the Authority that Poste had "ascertained the violation and apologized for the violation", made a request to continue the preliminary investigation.

The Office therefore invited the company to provide information and clarifications on the facts of the complaint; the latter, with a communication dated February 5, 2021 (including 10 attachments), in reconstructing the story and the conversations with the complainant, specified that:

- a) with the notes of February 19, 2020 and June 18, 2020, the complainant was informed that the checks carried out had "ascertained that the release of the balance of the Postepay card in the same name, which took place simultaneously with the execution of a top-up operation on the paper itself, it is to be traced back to a mere material error "and that the operator had" proceeded to call the operator to observe greater attention in carrying out his duties ";
- b) subsequently the complainant, with a note dated 2 July 2020, asked Poste for the adoption of measures against the operator who had carried out the top-up, also highlighting how the aforementioned behavior "had caused him unfair damage pursuant to art. 2043 of the Civil Code ";
- c) with reference to the incident, the company structures in charge ascertained that, on the occasion of a top-up operation for an amount of € 30 carried out by the complainant's mother on the Postepay card in the same name, the counter operator had "performed a inquiry on the balance of the recharged card ". In this regard, the company declared that it had provided its employees and collaborators, with respect to the performance of operations to be carried out on the prepaid Postepay cards of individuals, "specific operating instructions, especially with regard to the identification of the applicant" and that, also in the present case - although "the top-up operation of Postepay cards is not bound by a coincidence between the applicant and the cardholder" - the operator in question identified Ms. (...), acquiring her code tax and the details of the identity document; the operator, however, made "a material error -" for which he has already been asked to pay more attention in carrying out his duties "- by releasing the balance of the movement just put in place to the applicant," probably to give confirmation to Mrs. ra (...) of the successful outcome of the operation ".

1.2. The Office, on the basis of the elements acquired during the investigation, with a note dated February 24, 2021, notified the data controller, pursuant to art. 166, paragraph 5, of the Code, the alleged violations found, with reference to art. 5, par. 1, lett. a) and 6 of the Regulations as well as the measures and measures referred to in par. 3.1. and 3.2 of the provision of the

Guarantor of 25 October 2007 concerning "Guidelines on the processing of personal data of customers in the banking sector" (par. 3.1 and 3.2 - web doc. no. 1457247), as they are compatible with the new regulatory framework pursuant to art. 22, paragraph 4 of the legislative decree n. 101/2018. With the same note, the company was invited to produce defensive writings or documents or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, law no. 689 of 24 November 1981).

1.3 The company, on March 29, 2021, sent its defense writings, which are referred to here in full, with which it represented that:

a) as already highlighted in the previous note of 5 February 2021, Poste Italiane S.p.a., "taking into account the particular market in which it operates (including the banking, insurance, telephone, real estate and postal sectors)" and "always aware of the risks associated with erroneous management of its products (...), has adopted and implemented technical and organizational measures aimed at guaranteeing effective protection of personal data ". In particular, it provided for:

1. "a privacy organizational model" which, in addition to the designation of a Data Protection Officer and the definition and formalization of employee roles and responsibilities, identifies in the company organization chart an office in charge of managing the relevant issues relating to the protection of personal data ;
2. "procedural models that allow accountability at multiple levels and continuous monitoring of the activities carried out by personnel operating throughout the national territory";
3. an organizational "privacy documentary corpus", also for the purpose of constant updating on the subject, which includes, among other things, "Privacy by design and by default guidelines, guidelines on the management of consents, manuals operational procedures, instructions for employees in which the prohibition on communicating personal data referable to its customers to unauthorized third parties is expressly referred to ";
4. "a company training plan (...);

b) in the present case, "the operator deviated from the privacy instructions he had received (...) and committed, from an objective point of view, a material error"; from the investigations carried out, however, it emerged that the operator in question "acted in complete good faith (...) since in the past Ms had already been delegated by her son to act on her behalf in that same post office and never the Mr. XX had contested anything on such occasions (neither with regard to the top-ups carried out nor with respect to other profiles related to the management by Poste Italiane of his prepaid card "); this circumstance, if nothing

else, would have "induced him to legitimately rely on the existence of a suitable power of attorney" on the part of the complainant to make the mother fulfill "the specific requests to top up the card and view the balance on her behalf"; the above must also be contextualized, given that it is a fact dating back to 2014 "which occurred in a fraction of a small town in the province of Massa Carrara (...) where personal acquaintance among the citizens of the country could well have induced the operator not to request details of the powers of representation of Ms (...), who later turned out to be *falsus procurator*, especially if already legitimately exercised by the same in the past "; Poste then further underlined how "all of the factors set out above have generated an appearance of law such as to justify the innocent reliance of the postal operator pursuant to art. 1398 of the Italian Civil Code ";

c) following the reporting of the interested party to the company's Privacy Service Center, the latter, upon the outcome of the investigations, called the postal operator responsible for the erroneous communication to pay more attention in carrying out their duties; however, this is "an isolated case dating back over time" that "cannot be taken as symptomatic of a lack of attention by the company to the relevant profiles in the field of personal data protection or, more generally, of a systematic lack of security, integrity, confidentiality, lawfulness and transparency of the processing of personal data put in place by the same ";

d) with reference to the possible imposition of a sanction, it is necessary to consider what is specified in the WP-253 Guidelines where it is understood that the concept of "minor violations" referred to in recital no. 148 of the Regulation "must be applied in a general way, provided that in compliance with the assumption that a significant risk has not been generated for the rights of the data subjects", as appears in the present case; in any case, even if the Authority were to deem it necessary to inflict a pecuniary administrative sanction, in assessing the elements referred to in art. 83, par. 2, should take into account, in particular, that "the disputed facts", in addition to the fact that "they could be the result of an innocent trust, date back over time and are characterized by a particular tenuousness (see the small amount of the balance shown (...))" and that" (...) the company promptly moved, following the grievances of Mr. XX, to bring again to the attention of its employees the importance of respecting the principles of correctness, lawfulness and transparency of treatments (...) ".

2. The outcome of the investigation and the sanctioning procedure.

Upon examination of the declarations made by the data controller during the procedure referred to in art. 166, paragraph 5 of the Code, as well as the documentation acquired in the acts, this Authority formulates the following considerations.

2.1 It is established that, in the present case, at the post office of Barbarasco (municipality of Tresana, province of MS) the

postal operator who recharged the prepaid Postepay card in the name of the complainant at the request of the applicant, despite having after correctly identifying the applicant (as per operating instructions received from the data controller), it has - immediately afterwards - released the balance referring to the recharged card, in the absence of the cardholder's consent or other legitimate condition; from what emerged, the unlawful conduct, of which the holder became aware only following the reports made by the complainant in conjunction with the presentation of the complaint to the Authority, represented an isolated event - dating back to 2014 - which did not have any effect on the processing of the complainant's personal data beyond the time when the offense was committed. Therefore, considering that the offense in question was ascertained in the course of these proceedings but occurred on a date prior to the entry into force of the Regulation, for the purposes of determining the applicable law, it is necessary to recall the principle of legality referred to in art. 1, paragraph 2, of law no. 689/1981 according to which "the laws that provide for administrative sanctions are applied only in the cases and times considered in them". This determines the obligation to take into consideration, in this case, the provisions of the previous regulatory framework on data protection (Legislative Decree no. 196/2003, "Code regarding the protection of personal data" , in the formulation prior to the changes that took place following the entry into force of Legislative Decree 101/2018), which however, with reference to the offense in question, bear a substantial identity of precept with respect to the new regulatory system introduced by the Regulation ; in particular, the communication of personal data to third parties, in the absence of the consent of the interested party or other legitimate presupposition, is unlawful both in light of the provisions in force prior to the Regulation (for violation of articles 11, paragraph 1, lett. a), 23 and 24 of Legislative Decree no. 196/2003 as well as the specific measures and precautions referred to in par. 3.1. and 3.2 of the provision of the Guarantor of 25 October 2007 concerning "Guidelines on the processing of personal data of customers in the banking sector", doc. web n. 1457247) is, substantially overlapping, based on the provisions of Articles 5, par. 1, lett. a) and 6 of the Regulations.

3. Conclusions: the unlawfulness of the processing and the applicable sanction.

In light of the above considerations, taking into account that the unlawfulness of the processing in question was ascertained in compliance with the provisions of the Regulations and Legislative Decree no. 196/2003 as amended by Legislative Decree 101/2018, reference must be made to the same for the procedural profiles of this proceeding, due to the abrogation of the previous regulatory references; on the other hand, based on the aforementioned principle of legality, it is necessary to take into account the rules in force at the time of the commission of the offense for the purpose of determining the relevant sanction

Having said that, in the previous regime, art. 162, paragraph 2-bis of the Code punished the violation of the provisions indicated in Article 167 of the Code itself, including those of art. 23, with the administrative sanction of payment of a sum from ten thousand to one hundred and twenty thousand euros and, for the purpose of determining the amount of the sanction, it was necessary to take into account the criteria set out in art. 11 of the law n. 689/1981 cited (including the work carried out by the agent to eliminate or mitigate the consequences of the violation and the seriousness of the violation itself); it follows that, in the case in question, the extent of the sanction that must be imposed by the Authority - based on the powers it has at the time of submitting this complaint - pursuant to art. 58, par. 2, lett. i) of the Regulation and 166, paragraph 3 of the Code, must be identified on the basis of the parameters indicated above.

4. Order of injunction.

Pursuant to art. 58, par. 2, lett. i) of the Regulations and art. 166, paragraphs 3 and 7 of the Code, the Guarantor orders the application of the pecuniary administrative sanction by adopting an injunction order (Article 18, l. November 24, 1981, n. 689), in relation to the processing of personal data to the complainant, whose unlawfulness has been ascertained, in the terms set out above, in relation to the principles and conditions of lawfulness of the processing already contained in articles 11, paragraph 1, lett. a) and 23 of Legislative Decree no. 196/2003 and reproduced in a similar way in the articles. 5, par. 1, lett. a) and 6 of the Regulations.

Therefore, on the basis of the considerations referred to in point 3 of this provision, taking into account the tenuousness of the violation in question - in particular due to the context and circumstances in which the conduct took place (as represented by the owner during the proceedings), the considerable amount of time that has elapsed since the event and the set of technical and organizational measures adopted by the data controller, also with reference to the instructions that have been given to employees (see p. 1.3, letter a)), it is deemed necessary to impose an administrative fine of € 10,000 (ten thousand). In this context, in consideration of the type of violations ascertained, which concerned the non-compliance with general principles on data protection, it is believed that, pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the regulation of the Guarantor n. 1/2019, this provision should be published on the Guarantor's website, by omitting the personal details of the complainant only.

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, pursuant to art. 57, par. 1, lett. f) and 83 of the Regulations as well as art. 166 of the Code, the unlawfulness of the processing carried out, in the terms set out in the motivation, by Poste Italiane S.p.a. for the violation of the principles and conditions of lawfulness of the processing pursuant to art. 11, paragraph 1, lett. a) and 23 of Legislative Decree no. 196/2003 (in the formulation prior to the changes made following the entry into force of Legislative Decree 101/2018), reproduced in a similar way in Articles 5, par. 1, lett. a) and 6 of the Regulations;

ORDER

pursuant to art. 58, par. 2, lett. i), of the Regulation, to Poste Italiane S.p.a. having its registered office in Rome, Viale Europa n. 190, P.I. 01114601006, in the person of the pro-tempore legal representative to pay the sum of € 10,000 (ten thousand) as a pecuniary administrative sanction for the violations indicated in the motivation.

INJUNCES

then to the same company to pay the sum of € 10,000 (ten 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. It is represented that pursuant to art. 166, paragraph 8 of the Code, the offender has the right to settle the dispute by paying - again in the manner indicated in the annex - of an amount equal to half of the sanction imposed within the term referred to in art. 10, paragraph 3, of d. lgs. n. 150 of 1 September 2011 envisaged for the submission of the appeal as indicated below;

HAS

pursuant to art. 166, paragraph 7, of the Code and art. 16, paragraph 1, of the regulation of the Guarantor n. 1/2019, the 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.

Pursuant to art. 78 of the Regulation, of art. 152 of the Code and 10 of Legislative Decree 1 September 2011, n. 150, 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, May 27, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Ghiglia

THE SECRETARY GENERAL

Mattei