

Injunction against Faiella Nicola s.r.l. - June 14, 2018

Register of measures

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#### THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of dott.ssa Giovanna Bianchi Clerici and of prof.ssa Licia Califano, members and of dott. Giuseppe Busia, general secretary;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

NOTING that the Guardia di Finanza, special privacy unit, with report no. 94/2017 of 30 November 2017 (notified on 12 December 2017), which must be understood as fully reported here, challenged Faiella Nicola s.r.l., in the person of its pro-tempore legal representative, with registered office in Torre del Greco (NA), viale Europe, no. 40, tax code 03687501217, the violation of the provisions of articles 13, 33, 37, 154, paragraph 1, lett. c), 161, 162, paragraphs 2-bis and 2-ter, and 163 of the Code regarding the protection of personal data (legislative decree no. 196 of 30 June 2003, hereinafter referred to as the "Code");

NOTING that from the examination of the documents of the sanctioning procedure initiated with the contestation of administrative violation, the following emerged, in summary:

- following an inspection carried out by the Guardia di Finanza at the company's headquarters on 8 and 9 November 2017, it was found that Faiella Nicola s.r.l., which carries out management activities for environmental services (collection, transport and disposal of waste) and complementary services to environmental protection, carries out personal data processing using, among other things, a geolocation system installed on a large part of the fleet of vehicles that the company has, and a video surveillance system made up of no. 4 cameras placed in the external courtyard of access to the corporate offices, n. 2 monitors located inside the offices and a video recording system;
- with reference to the geolocation system, the company represented that it was provided by Visirun S.p.A. (formerly Mobivision) and was installed on 13 vehicles in 2012;
- the purpose of the treatment carried out using the geolocation system is "linked to the transport of waste and the compulsory

registration with SISTRI [Waste traceability control system] as well as the protection of people and goods, given the high crime rate present in the territories where our customers are present”;

- based on the company's statements, the employees received oral information on the characteristics of the geolocation system and they attended training courses for the correct use of the system terminals;

- again with reference to geolocation, the company has not presented the notification to the Guarantor and does not appear to have designated the system supplier as data processor, as prescribed in provision no. 370 on vehicle tracking systems in the context of the employment relationship, adopted by the Guarantor on 4 October 2011 (in [www.gdpd.it](http://www.gdpd.it), web doc. n. 1850581);

- with reference to the video surveillance system, it does not appear that the company has provided the information in the simplified forms envisaged by the provision on video surveillance, adopted by the Guarantor on 8 April 2010 (in [www.gdpd.it](http://www.gdpd.it), web doc. n 1712680);

- with reference to the complex of treatments, and therefore also to those relating to administrative tasks, reception and accounting, the company has not proceeded to designate the persons in charge of the treatment;

NOTING that with the aforementioned deed of November 30, 2017 Faiella Nicola s.r.l. was challenged:

- a) pursuant to art. 161 of the Code, the violation of the provisions on information pursuant to art. 13, with reference to the treatments carried out through a geolocation system;

- b) pursuant to art. 162, paragraph 2-ter, of the Code, non-compliance with the provisions of a provision of the Guarantor adopted on the basis of the provisions of art. 154, paragraph 1, lett. c);

- c) pursuant to art. 163 of the Code, failure to comply with the provisions on notification pursuant to articles 37 and 38;

- d) pursuant to art. 161 of the Code, the violation of the provisions on information pursuant to art. 13, paragraph 3, and in point 3.1. of the provision on video surveillance adopted by the Guarantor on 8 April 2010;

- e) pursuant to art. 162, paragraph 2-bis, of the Code, the violation of the provisions on minimum security measures pursuant to articles 33 et seq. and rules no. 1-11, 12-14, 15, 27 and 28 of the technical specification referred to in Annex B) of the Code;

HAVING REGARD TO the report relating to the dispute notice referred to above, pursuant to art. 17 of the law of 24 November 1981, n. 689, from which the reduced payment does not appear to have been made for the violations referred to in points a),

b), c) and d); having also noted that for the violation referred to in point e) the reduced payment is not envisaged;

READ the defense writings of 10 January 2018 and the hearing report of Faiella Nicola s.r.l. of 29 May 2018, which are

understood to be referred to in full here and which, in summary, represent:

a) "with "REPORT I", an alleged omitted or unsuitable disclosure pursuant to articles 13 and 161 of Legislative Decree no. 196/2003 by "FAIELLA NICOLA S.r.l." in its capacity as "owner" of the processing of personal data" as "through the "geolocation" system installed on board n. 13 company vehicles, does not issue the employees assigned to drive the aforesaid vehicles, suitable information [...]. In this regard, it should first of all be noted that from the contract stipulated with Visirun (formerly Mobivision), the actual data controller was the latter. [...]. Also from a technical point of view, Visirun holds the data relating to geolocation, without communicating them to third parties, for a period of 12 months. Therefore, the undersigned Company does not hold any data and simply has access to the service offered by Visirun. In line with this approach, the art. 7 of the information attached to the contract with Visirun expressly provided that "Mobivision (now Visirun) has fulfilled its legal obligations as notified to the Guarantor. [...] Nonetheless, it should be noted that all the Company's employed drivers were punctually informed by Faiella regarding the purposes of installing tracking devices. Firstly, the employment contract of the employees included, as attachment no. 7, the information pursuant to article 13 of Legislative Decree no. 196/2003 for the processing of data personal data, specifically signed by the interested party, in which the latter was informed on the purposes and methods of processing, as well as on the fact that "the position of the vehicles equipped with satellite and therefore of the drivers is known at all times to the personnel in charge to logistics". [...] Secondly, consider that the employed drivers periodically took part in specific training courses relating to "Employee information - Location of company vehicles" [...] during which they were adequately informed about the nature of the data processed, the characteristics of the system as well as all the elements prescribed by art. 13 of the Code and by art. 4 of the resolution "Vehicle tracking systems in the context of the employment relationship - 4 October 2011". On these occasions, the employed drivers were informed about the nature of the data processed and the characteristics of the system, as well as being clearly informed of the location to which the company vehicles are subject.";

b) "With reference to "RELIEVE 2" it was disputed that Faiella would not have "(...) proceeded to designate Visirun S.p.A. as "responsible" [...]. This finding, directly connected to the first, does not first of all, it seems to take due account of the letter of the contract stipulated between Faiella and Visirun, in which the latter defined itself as "data controller", which as such had "acquitted its legal obligations", due to the User (i.e. Faiella ) exclusively the communication to the drivers, promptly carried out, firstly, with the signing of the information by the interested party pursuant to art. 13 of the legislative decree n. 196/2003,

as well as secondly with the launch of ad hoc courses on vehicle tracking. Secondly, attachment no. 7 to the employment contract signed by individual drivers [...], containing the information pursuant to art. 13 of Legislative Decree no. 196/2003 and consent for the processing of personal data, specifically signed by the interested party sato, expressly identified both the data controller and the manager";

c) ""REPORT No. 3" also stems, in the opinion of the undersigned Company, from an incorrect assessment of the actual content of the localization services contract. On this point, it is disputed that the Company "by means of the Geolocation system installed on board the company vehicles has not fulfilled the notification obligation pursuant to articles 37 and 38 of the Code". [...] As highlighted above, the contract stipulated with Visirun clearly specifies that the notification obligation in question has already been fulfilled by Visirun S.p.A., the sole owner of the processing of personal data, which holds the data relating to the localization of the thirteen vehicles of the Faiella company [...]. In fact, it should be reiterated that, pursuant to art. 7 of the information attached to the service contract, "Mobivision (now Visirun) has fulfilled its legal obligations as notified to the Guarantor [...]. In the light of the effective regulation of interests that emerges from the contract, it does not seem attributable to Faiella, both from an objective and a subjective standpoint, the disputed finding No. 3. In any case, it must be noted that, in the light of the described purposes of the geolocation service, the system is aimed at locating the vehicles and not the user of the vehicle. The tools used, in fact, do not have connotations such that they can be assimilated, even for purposes, to the remote control of work activities, nor do they constitute a tool for following or monitoring the movements of personnel. [...]";

d) "With reference to "REPORT n. 4", in which the Company is contested for the failure to provide information pursuant to art. 13 of Legislative Decree 30 June 2003, n. 196 regarding video surveillance systems, it is emphasized that this information was provided orally to the Company's employees, who were informed on all the elements identified by art. 13 of the Code (purposes and methods of treatment, rights granted to the interested parties, etc.) and their consent has been acquired. [...] As documented [...], no portion of the internal company premises is affected by the video surveillance system. The employees, personally informed by the sole director of the Faiella Company, agreed to the installation of the video surveillance system. All the more in the light of a validly expressed consent by the workers, the observation in question appears seriously erroneous";

e) Lastly, with reference to "REMARK No. 5", relating to "administrative duties", "reception" and "accounting", which contests the failure to designate the data processors with the relative instructions, in the alleged violation of the art. 33 of the Code, it should be noted that, also from this point of view, the provision appears to be seriously erroneous. In fact, recalling the above

considerations regarding the effective ownership of the processing, it should first of all be pointed out that the appointment of the person in charge, like that of the manager, is left to the actual owner (i.e., Visirun). [...] In any case, the measures prescribed in cases of processing with electronic instruments have been adopted. In fact, the sole director of the company Faiella personally accesses the system by connecting to the customer area of the website [www.visirun.com](http://www.visirun.com), entering the company e-mail address [info@faiellanicolasrl.it](mailto:info@faiellanicolasrl.it) and a specific 14-character password, which is provided via email by Visirun and modified upon first access to the geolocation service. Furthermore, data relating to the location of company vehicles are collected by Visirun, through the Service Centre, and the Faiella Company can access it via a secure internet connection (HTTPS) and protected by appropriate access credentials. With regard to data retention, it should be reiterated that the Faiella Company does not directly acquire data relating to the geolocation system, but allows the direct and/or indirect transfer to Visirun of the information necessary for the use of the service, as well as their storage in banks data in the exclusive availability of Visirun, pursuant to art. 13 of the General Conditions of the contract [...]. Furthermore, access to each company PC is permitted to employees who process personal data exclusively through credentials conferred by the Sole Director of the company Faiella, consisting of a username and password of at least eight alphanumeric characters. These measures appear to fully comply with those prescribed by Annex B of the Code, which first of all requires the provision of computer authentication, as well as the adoption of credential management procedures”;

CONSIDERING that the arguments put forward are not suitable for determining the closure of the sanctioning procedure initiated with the above dispute, for the following reasons:

a) as regards the first violation profile (failure to provide information in treatments carried out using geolocation systems) it cannot be doubted that the ownership of the treatments must be traced back exclusively to Faiella Nicola s.r.l.. In fact, as declared during the inspection and reiterated in the defense briefs on the part, the purposes of the treatments are connected to the exercise of the company's business activities ("transport of waste and compulsory registration with SISTRI as well as protection of people and goods") and are aimed at locating the fleet of vehicles of Faiella Nicola s.r.l. and, as a result, of the related drivers, employees of the aforementioned company. It is evident that the broad decision-making powers granted to Visirun by the contractual provisions for the configuration and management of the system derive exclusively from the fact that the aforementioned company has specific technical expertise in relation to the geolocation activity, which is why Faiella Nicola s.r.l. made use of its services. It should also be noted that Visirun does not process personal data through the geolocation

system pursuing independent purposes but only on the basis of the assignment of the service by Faiella Nicola s.r.l. As for the defensive observation on the basis of which the latter company would have in any case provided oral information to the employees, it must be noted that the content of the aforementioned information was not documented in any way. Furthermore, it is not possible to speak of suitable information for geolocation treatments with reference to the brief and generic sentence reported in the employment contract signed by the company's employees "the position of vehicles equipped with satellites and therefore of drivers is known at all times to the personnel in charge of logistics", which does not provide interested parties with all the elements required by art. 13 of the Code;

b) with reference to the failure to designate the data controller, as prescribed, pursuant to art. 154, paragraph 1, lett. c), of the Code, by the provision of the Guarantor n. 307 of 4 October 2011, the same emerges per tabulas and in this regard the observations referred to in letter a) above regarding the ownership of the processing must be recalled, to reiterate that this burden fell on Faiella Nicola s.r.l.;

c) with reference to the obligation to submit the notification to the Guarantor, envisaged, for treatments involving the geolocation of people or things, by art. 37, paragraph 1, lett. a), of the Code, it must be premised that the Authority, with provision of 23 April 2004 (in [www.gpdp.it](http://www.gpdp.it), web doc. n. 993385) clarified that "the rule refers to the location of people or objects, and it therefore refers to the detection of their presence in certain places, through electronic communication networks managed or accessible by the data controller. The location must be notified when it allows the location on the territory or in certain geographical areas to be identified on an ongoing basis, even with possible intervals, on the basis of equipment or electronic devices held by the owner or by the person or placed on the objects. The location must in any case allow the identity of the interested parties to be traced, even indirectly through appropriate codes". The exclusion from the obligation to present the notification to the Guarantor, established by provision n. 1 of 2004 referred to in the defense briefs of Faiella Nicola s.r.l., concerns only the "processing of data that indicate the geographical position of means of air, naval and land transport, carried out exclusively for transport safety purposes"; delimited as above the perimeter of operation of the law, and recalling all the considerations previously expressed in relation to the ownership of the treatments, it must be highlighted that the geolocation activity carried out by the company, on the basis of the declarations made by the same, appears to be aimed not exclusively at safety of land transport but, in the first place, the execution of the legal obligations connected to the registration in the waste traceability control system (SISTRI), in order to proceed with the monitoring of hazardous waste. Furthermore, the company

declared, in a note received by the Authority on March 1, 2018 in response to a request for elements, that the system provided by Visirun makes it possible to "increase occupational safety and ensure more efficient management and maintenance of the vehicle fleet [...]. More specifically, as mentioned, the system provided by Visirun consists of certified devices for acquiring the position of company vehicles via satellite (GPS) and for its transmission via the GSM/GPRS network. The Visirun devices acquire and send the position of the company vehicle at predefined intervals (up to 30 seconds) and send the data to the Visirun Service Centre, owned by Visirun S.p.A. who supplies the devices. The data relating to the location of company vehicles are collected by the Visirun Service Center managed by the company Visirun S.p.A. and the Faiella Company can access the aforementioned data via a secure internet connection". It therefore appears that the activity of detecting the position of vehicles and employees of Faiella Nicola s.r.l., takes the form of geolocation since it is suitable for identifying on an ongoing basis, even with possible intervals, the location on the territory, based on equipment or electronic devices, of employees themselves. Geolocation, as emerges from the documents referred to above, was aimed from the outset at increasing workplace safety and at more efficient management and maintenance of the vehicle fleet, as well as at fulfilling the provisions regarding registration with the SISTRI. This activity cannot therefore fall within the cases removed from the obligation to submit the notification to the Guarantor, identified with provision no. 1/2004;

d) with reference to the finding relating to the omitted information in video surveillance processing, it should be noted that in this matter, information provided orally (moreover, only to company employees) is inappropriate since it must be provided, in a simplified form, through the affixing of signs bearing the "minimum" elements indicated in the provision of 8 April 2010, signs that must be placed before the range of action of the television cameras. This method of issuing information is the only one that guarantees adequate knowledge of the presence of a video surveillance system also to subjects other than company employees who can be filmed by the cameras (also due to the fact that the system in question is been installed in areas outside the factories);

e) as regards the finding relating to the omitted designation of the persons in charge of processing and, consequently, the failure to adopt the minimum security measures that the Code refers to the designation of the persons in charge of the treatment themselves, it must once again be reaffirmed the ownership of Faiella Nicola s.r.l. in all treatments carried out within the company, obviously including those relating to administrative, accounting and reception duties. In this regard, it should be emphasized that the designation of the persons in charge of processing does not constitute a mere formal fulfillment, but is

configured as an indispensable prerequisite for the application of the most significant part of the security measures to be adopted for the processing of personal data and is closely related to the activity of those in charge of processing (or those who ordinarily operate on personal data). This designation aims to provide the persons in charge with the instructions to follow for the correct processing of the data; for these reasons, failure to designate the appointees in writing, pursuant to art. 30, determines the non-application of all those minimum security measures, pursuant to art. 33 and following, which the technical specification (Annex B) of the Code) leads back to the activity of those in charge of the same treatment (rules no. 1-10; 12-14; 15 and 27-28 of Annex B);

NOTING, therefore, that Nicola Faiella s.r.l., on the basis of the considerations referred to above, appears to have committed, in its capacity as data controller, pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, the violation:

- a) of the provisions on information, pursuant to art. 13 of the Code, with reference to treatments carried out using a geolocation system, sanctioned by art. 161;
- b) the provisions adopted with the provision of the Guarantor of 4 October 2011, pursuant to art. 154, paragraph 1, lett. c), of the Code, sanctioned by art. 162, paragraph 2-ter;
- c) of the provisions on notification, pursuant to articles 37 and 38 of the Code, for treatments that indicate the geographical position of people or objects via an electronic communication network, sanctioned by art. 163;
- d) of the provisions on information, pursuant to art. 13, paragraph 3, of the Code and in point 3.1. of the provision on video surveillance, adopted by the Guarantor on 8 April 2010, sanctioned by art. 161;
- e) of the provisions on minimum security measures, pursuant to articles 33 et seq. of the Code and rules no. 1-11, 12-14, 15, 27 and 28 of the technical specification referred to in Annex B) of the Code, sanctioned by art. 162, paragraph 2-bis;

SEEN the articles:

- 161 of the Code, which punishes the violation of the provisions of articles 13 with a fine ranging from 6,000 to 36,000 euros;
- 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 33 and following, with a fine ranging from 10,000 to 120,000 euros;
- 162, paragraph 2-ter, of the Code, which punishes non-compliance with the provisions of the Guarantor adopted pursuant to art. 154, paragraph 1, lett. c), with a fine ranging from 30,000 to 180,000 euros;
- 163 of the Code, which punishes the violation of the provisions of articles 37 and 38, with a fine ranging from 20,000 to



120,000 euros;

CONSIDERING that, in relation to the non-compliance with the provisions on notification pursuant to articles 37 and 38 of the Code, the conditions for applying art. 164-bis, paragraph 1, of the Code according to which “if any of the violations pursuant to art. 161, 162, 162-ter, 163 and 164 is less serious, the minimum and maximum limits established in the same articles are applied to an extent equal to two fifths”;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

WHEREAS, in the present case:

- a) in terms of the aspect of gravity with reference to the elements of the extent of the injury or danger and the intensity of the psychological element, the violations are not characterized by specific elements, also having regard to the concrete methods of use by the companies of geolocation and video surveillance systems, as inferred from the records of the inspection activity;
- b) for the purposes of evaluating the work performed by the agent, it must be highlighted that the company, following the query of the general register of processing, does not appear to have presented, following the inspection assessment and the notification of the violations, the notification to the Guarantor , for treatments using the geolocation system;
- c) regarding the personality of the author of the violation, the fact that the company is not burdened by previous sanctioning proceedings defined briefly or following an injunction order must be considered;
- d) with regard to the economic conditions of the agent, the elements of the ordinary financial statements for the year 2017 were taken into consideration;

CONSIDERED, therefore, of having to determine, pursuant to art. 11 of Law no. 689/1981, the amount of the pecuniary sanction, based on the aforementioned elements assessed as a whole, to the extent of:

- 12,000 (twelve thousand) euros, for each of the two violations pursuant to art. 161 of the Code, for a total of 24,000 (twenty-four thousand) euros;
- 20,000 (twenty thousand) euros, for the violation pursuant to art. 162, paragraph 2-bis, of the Code;
- 60,000 (sixty thousand) euros, for the violation pursuant to art. 162, paragraph 2-ter, of the Code;
- 8,000 (eight thousand) euros, for the violation pursuant to art. 163 of the Code;

HAVING REGARD to the documentation in the deeds;

CONSIDERING the law n. 689/1981, and subsequent modifications and additions;

GIVEN the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Antonello Soro;

ORDER

to Faiella Nicola s.r.l., in the person of its pro-tempore legal representative, with registered office in Torre del Greco (NA), viale Europa, n. 40, tax code 03687501217, to pay the sum of 112,000 (one hundred and twelve thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the same company to pay the sum of Euro 112,000 (one hundred and twelve thousand), 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 of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree lg. no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 14 June 2018

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

Busia