

Injunction order against Federpol - April 29, 2021

Record of measures

n. 165 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 (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 presented to the Guarantor pursuant to article 77 of the Regulation, with which Mr. XX complained about alleged violations of the regulations on the processing of personal data by the Italian Federation of private investigative institutes, for information and security (hereinafter, "Federpol" or "the Federation"), with particular reference to the communication of information concerning him to the other members;

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 prof. Pasquale Stanzione;

WHEREAS

1. The complaint and the preliminary investigation.

1.1 With the complaint presented on 22 April 2020 against the Italian Federation of private institutes for investigations, information and security, Mr. XX, a member of the Federation, complained about the unlawfulness of the processing of personal data that concern, with particular reference to the legitimacy of the circulation of the same within the associative structure, also representing the unsuitable response obtained to its requests for rectification and cancellation made pursuant to

articles 16 and 17 of the Regulation.

The Office, with a note dated May 27, 2020 (prot. No. 19454) invited Federpol to provide information and clarifications on the facts that are the subject of the complaint; the latter, represented and defended by the lawyers Francesco Sardi De Letto and Marco Martorana, with communication dated 15 June 2020 (prot. no. 21745), in reconstructing the affair, represented that:

a) on March 25, 2020, Mr. XX, as associate and "Former President of the Federpol Legislative Studies Committee" - sent an undated letter by e-mail addressed to the Federpol National Council "with respect to which some members immediately highlighted that the itself contained "untruthful and disparaging statements against the national President and the Executive Council"; therefore, on 26 March 2020, the Executive Council (hereinafter "C.E."), meeting by videoconference, discussed the items on the agenda, including, in point 5, "resolutions regarding the letter from shareholder XX received to some members of the Executive Council and the National Council "; on this occasion it was reported that, with regard to the aforementioned letter from shareholder XX, the Executive Council, "after extensive discussion" resolved "to send it to the Board of Arbitrators to assess any measures against the shareholder"; the same issue was addressed the following day (March 27, 2020) by the National Council (hereinafter "C.N.") which shared (and recorded) "the decision of the Executive Council to send the letter of XX to the Board of Arbitrators for the appropriate measures (...) ";

b) subsequently, on 7 April 2020, the complainant sent a letter to the C.N. and to the President of the Board of Arbiters, with whom he complained that the "Newsletter no. 5 of 6.4.2020 containing minutes of the C.E. and of the C.N. " (in which he was "accused of having drafted a letter with untrue and disparaging contents of the national President" with consequent referral to the Board of Arbitrators) and at the same time asked:

the. the correction of the minutes of the C.E. and of the C.N., "by amending them in the parts where my name is indicated (...);

ii. to know the outcome of the voting of the minutes themselves;

iii. to send all the shareholders the letter with untrue and disparaging contents so that they could "objectively appreciate the contents and not through an intermediary instrumental interpretation";

c) with regard to the aforementioned requests of the complainant, which were "promptly" met with a note dated 8 April 2020, it should be noted that:

the. the request for rectification of the minutes cannot be accepted as they cannot be rectified a posteriori, given that the

"minutes are responsible for reporting only the facts that occurred in the Executive Council and in the National Council.

Specifically, the respective observations of those present were reported in these minutes from which appropriate considerations can be drawn "; moreover, the claim of the complainant "does not constitute an expression of the right of rectification pursuant to art. 16 of the GDPR which operates only and exclusively in the presence of inaccurate and / or incomplete personal data, on the other hand excluding the correction of evaluations expressed by the members of the governing bodies of Federpol in relation to a behavior held by the interested party "; nor can the request "qualify as an expression of the right of cancellation pursuant to art. 17 of the GDPR as the conditions listed in the aforementioned article are not met, in addition to the fact that the name on the report cannot be deleted "nor could it be considered" susceptible to being limited pursuant to art. 18 of the GDPR ";

ii. regarding the request to know the outcome of the vote on the minutes in question, given that in the note of 8 April it was communicated to the complainant that the "C.E. resolved unanimously ", the request in question is not however" qualifying as the exercise of the right of access pursuant to art. 15 GDPR, not being aimed at accessing specific information with reference to the treatments carried out by Federpol on the personal data of Mr. XX ";

iii. as for the request for forwarding to all the shareholders of the letter sent by Mr. XX to all the colleagues of the CN, even though it was deemed to be in contrast with the requests for rectification / cancellation indeed exposed, the same was "fully accepted".

1.2 The office, having examined the documentation on file, with a note dated 12 November 2020 (prot. 42799) has formulated a request for clarification to the Federation, inviting it to specify whether they have been identified, in the Statute or in any other resolution that may be adopted, the scope and methods of circulation of information relating to members within the associative structure.

Federpol, with a note dated 25 November 2020, stated that:

a) the Statute, "although based on compliance with the general principles of the GDPR pursuant to art. 5, does not currently describe a specific process governing the procedure for referring a shareholder to the Board of Arbitrators. Art. 19 of the Articles of Association, on the other hand, governs the preliminary and deliberative activity delegated to the Board of Arbitrators only after the referral has taken place, failing to regulate the referral phase prior to the activation of the preliminary proceedings "; with a view to "implementing the level of compliance with the general principles of the GDPR, the revision of the Statute and the Deontological Code of the association was started, including the regulation and definition of the procedure for

managing the disputes referred to in the draft of the works to the competence of the Board of Arbitrators (...) taking care to regulate the referral phase prior to the activation of the preliminary proceedings (...). The new Statute and the new Code of Ethics will be submitted to the vote of the General Assembly at the next ordinary Congress scheduled for May 2021, the earliest date to do so ";

b) with regard to "the association's management policy, the same intended to base the entire activity on the principles of correctness and transparency" and with regard to "the work of the statutory bodies, the Statute itself provides that the general secretary must send "Concise communication of the resolution to all shareholders", taking care of its implementation (Article 15, paragraph 1, letter h). This duty of communication is to be considered extended to the resolutions adopted by the associative bodies (General Assembly, National Council and Executive Council) of which he takes care of the keeping of the books and the minutes of the meetings. Therefore, as a principle underlying the Statute of Federpol, there is that of informing the members of the resolutions of the corporate bodies that affect the life of the association by means of communication, even in summary form, of the content of each resolution ".

1.3 With a note dated January 26, 2021 (prot. No. 5043), the Office, on the basis of the elements acquired during the investigation, notified Federpol, pursuant to art. 166, paragraph 5, of the Code, the alleged violations found, with reference to art. 5, par. 1, lett. a) and c) and 6 of the Regulations, inviting you 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).

1.4 Federpol sent its defense brief on 25 February 2021 (prot. 11316), with which, in formulating a request for a hearing, it highlighted that:

a) "the minutes of the referral to the Board of Arbitrators of Mr. XX had been carried out for the sole purpose of allowing the Board to evaluate the incident and take the necessary decisions, treating the question in a unitary manner (and therefore in order to avoid a multiplication of probable complaints or reports from other subjects) 'due to the resonance of the story among the many members of the association who had received the email sent directly by Mr. XX to the national President (Mr. XX), containing derogatory and offensive comments regarding the person and the physical appearance of the latter ";

b) in any case, with a view to a "continuous implementation of internal procedures and the relative level of compliance with the provisions of the Regulations (...)", "the plan is confirmed to include in the agenda of the next Ordinary Congress the

amendment of the Statute in the part in which the process of referral "to the Board of Arbitrators" of disputes of relative competence is regulated, declaring himself available "to the receipt of any instruction or indication" from the Authority;

c) "the attention that has always been shown to the protection profiles of the personal data of its members makes this case an isolated case, as Federpol has never previously been the addressee of any complaint regarding the procedures for managing shareholder data and the relationship with them ";

d) this is a "non-profit association body, whose revenues consist mainly of membership fees, contributions set by the corporate bodies and voluntary contributions from members", a profile to be taken into consideration in the unlikely event that it occurs, in this case, a personal data breach; at the same time, possibly, "the non-application of the ancillary sanction provided for by art. 166, paragraph 7, of the Code "and, in any case," the anonymization of personal data referable to the pro-tempore president, Mr. XX, as well as the company name of the association, by using only the initials ".

1.5. At the hearing, held on March 16, 2021, Federpol, in referring to its defensive writings, underlined that, as a "trade association established in 1957 (...), since 1997 it has interacted and collaborated with the Guarantor also for the best drafting of the Code of Conduct on investigations (...); has launched an internal audit activity aimed at maximum compliance with the provisions of Regulation (EU) 2016/679. It should be noted, by way of example only, that in 2019, the Association organized 15 "privacy" training sessions for the benefit of members ". The Federation therefore reiterated that as regards the subject of the complaint in question, "even if there has been an error, it is an error committed in absolute good faith and at a time when the activity of revision of the statute and code of ethics of the association ", not yet completed" given the impossibility of convening the Federpol Assembly due to the emergency situation that the country has been experiencing for over a year "; therefore, in reiterating his willingness "to comply with any indication or suggestion that the Guarantor intends to propose (...)", he underlines how "the possible imposition of a sanction against Federpol would represent a mark that is difficult to recover from the reputational level"; asks, therefore, that "in addition to what has already been indicated in the defense briefs, the actual smallness of what happened in this case" be taken into account. With a subsequent email received on the same date (March 16, 2021, prot. N. 14534) Federpol sent a copy of the minutes of the general meeting of the shareholders of September 5, 2020, in which "(sub 9) the commission for statutory changes was presented to be voted on at the next meeting in 2021 which, to date, it is not yet possible to call. It should be noted that the Executive Committee, in the meeting of 10.5.2019, had already resolved to approve the changes to be discussed at the shareholders' meeting ".

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.

Federpol is a trade association which, as reported in art. 2 of the Statute approved on 11 May 2019, "represents the interests and the unitary expression" of the members for the pursuit of the associative purposes identified in art. 3 of the same Statute.

In this context, the processing of personal data of members, with reference to common data, is lawful where they have given their consent (Article 6, paragraph 1, letter a) or the processing is necessary for the pursuit of legitimate interest of the association or of third parties provided that the interests or fundamental rights and freedoms of the interested parties do not prevail (Article 6, paragraph 1, letter f)) "taking into account the reasonable expectations of the interested party on the basis to his relationship with the owner "and the circumstances in which the interested party cannot" reasonably expect further processing of his data "- cf. Cons. 47 Regulation). Having said this, it is to the internal rules of the association that reference must necessarily be made to identify the conditions of the so-called legitimate interest in the processing of the associate's data, with the consequence that the processing is lawful, pursuant to art. 6, paragraph 1, lett. f), in cases where the same falls within the performance of the activities of the association for the pursuit of specific and legitimate purposes as identified in the statutory provisions and within the limits in which the interested party, at the time of collection of his data, could reasonably expect the same treatment. Outside this area, the assumption of lawfulness of the associate's data processing can be found in the consent expressed by the associate, adequately informed, at the time of joining the association.

In the present case, having ascertained the absence of a precise regulation (and of a related and more complete information), in the statutory regulations or in any other act possibly adopted by Federpol, of the cases and conditions in which the personal data of a member may be communicated to the other members and considering that the consent given by the complainant at the time of joining the Federation concerns the treatments put in place by the same for the pursuit of the association purposes as identified in the Statute, the treatment object of this complaint is illegal. In particular, the communication - via newsletter - to all associates (over a thousand) of the information relating to the complainant - as contained in the resolutions adopted by the corporate bodies (information that is purely personal) is unlawful as it is carried out in the absence of the consent of the interested party or other legitimate presupposition (Article 6, paragraph 1), as well as in violation of the general principles of lawfulness, correctness and minimization in the processing of data with respect to the purposes pursued pursuant to art. 5,

par. 1, lett. a) and c) of the Regulations. Although, in fact, it is part of the exercise of private autonomy to establish the cases, methods and limits of the circulation of data referring to the members within the associative structure, even in the absence of the consent of the individuals provided that in compliance with the principle of purpose, it remains provided that the owner is required to ensure that the treatments are adequate, relevant and limited to what is necessary with respect to the association purposes pursued.

3. Conclusions: illegality of the treatment.

3.1 In the light of the foregoing assessments, it is noted that the statements made by the data controller in the defense briefs and during the hearing, although worthy of consideration and whose truthfulness may be called upon 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 archiving, however, none of the cases provided for by art. 11 of the regulation of the Guarantor n. 1/2019, concerning the internal procedures of the Authority having external relevance.

3.2. For the above reasons, therefore, the complaint submitted pursuant to art. 77 of the Regulations, for the unlawfulness of the treatment put in place by the Federation in violation of the conditions of lawfulness referred to in art. 5, lett. a) and c) and 6, par. 1 of the Regulation.

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 166, paragraph 3, of the Code.

3.3 Considering, however, that Federpol has declared that it has started a revision of the Statute and the code of ethics aimed at complying with the principles of protection of personal data and taking into account that the requests for rectification and cancellation of data formulated by the complainant do not may be taken into consideration, also due to the fact that the minutes of the corporate bodies cannot be amended as they concern the performance of the associative activity and have the aim of giving an account with certainty of the acts and facts described therein as well as historically having occurred, it is believed that the conditions for the adoption of further corrective measures pursuant to art. 58, par. 2, of the Regulation.

4. Order of injunction.

4.1 Pursuant to art. 58, par. 2, lett. i) of the Regulations and art. 166, paragraphs 3 and 7 of the Code, the Guarantor provides for the application of the pecuniary administrative sanction provided for by art. 83, par. 5, lett. a) of the Regulation, through the adoption of an injunction order (Article 18, Law 24 November 1981, no. 689), in relation to the processing of personal data

referring to the complainant, whose unlawfulness has been ascertained, within the terms above, in relation to articles 5, par. 1, lett. a) and c) and 6, par. 1.

With reference to the elements listed in art. 83, par. 2, of the Regulation for the purpose of applying the pecuniary administrative sanction and its quantification, taking into account that the sanction must "in any case [be] effective, proportionate and dissuasive" (Article 83, par. 1 of the Regulation), it represents that, in the present case, the following circumstances were taken into consideration:

- a) with regard to the nature, gravity and duration of the violation, the nature of the violation was considered relevant, which concerned the general principles of lawfulness in the processing of personal data and the gravity of the same, with reference to the extent of the number of recipients of the unlawful communication;
- b) the fact that the Federation has started the revision of the statutory rules in order to regulate the cases and conditions that allow the personal data of individual members to be communicated to all members was positively considered;
- c) the fact that the association has actively cooperated with the Authority during the procedure;
- d) the fact that there are no previous violations committed by the data controller or previous measures pursuant to art. 58 of the Regulation;
- e) the circumstance that the personal data affected by the violation are common data of a certain delicacy, but not belonging to the category of particular data referred to in art. 9 of the Regulations.

Furthermore, it is believed that it assumes relevance in the present case, in consideration of the aforementioned principles of effectiveness, proportionality and dissuasiveness (Article 83, paragraph 1, of the Regulation) to which the Authority must comply in determining the amount of the sanction, the fact that the offender is a non-profit association.

On the basis of the aforementioned elements, assessed as a whole, it is considered that the administrative sanction of the payment of a sum equal to Euro 5000 (five thousand) will be applied to Federpol.

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 and of the pro-tempore president of the Federation.

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 Federpol for the violation of Articles 5, par. 1, lett. a) and c), 6 par. 1, lett. a) of the Regulations;

ORDER

pursuant to art. 58, par. 2, lett. i), of the Regulations, to Federpol, based in Rome, Via Milano 51, P.I. 12048461003, in the person of the pro-tempore legal representative to pay the sum of Euro 5000 (five thousand) as a pecuniary administrative sanction for the violations indicated in the motivation.

INJUNCES

then to the same Federation to pay the sum of Euro 5000 (five thousand), according to the methods indicated in the annex, within 30 days of the 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 the 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, April 29, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei