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Injunction against Deca s.r.l. - March 9, 2023

Register of measures

no. 66 of 9 March 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter, the "Regulation");

HAVING REGARD TO the Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 (legislative decree 30 June 2003, n. 196, as amended by legislative decree 10 August 2018, n. 101, hereinafter "Code");

CONSIDERING the complaint presented pursuant to art. 77 of the Regulation by Messrs XX, XX, XX, XX, XX, XX and XX against Deca s.r.l.;

HAVING EXAMINED the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary pursuant to art. 15 of the Guarantor's regulation n. 1/2000;

SPEAKER Dr. Agostino Ghiglia;

WHEREAS

1. The complaint against the company and the preliminary investigation.

With a complaint dated 10 January 2020, Messrs. XX, XX, XX, XX, XX, XX and XX complained about alleged violations of the Regulation by Deca s.r.l. (hereinafter, the Company), with reference to the failure to respond to the request to access personal data relating to the detection of the presence on duty (beginning and end of work), carried out using a badge device.

It was also complained that the data processing carried out using the video surveillance system installed at the premises of the commercial operation managed by the company would have been illegal.

The Company, in responding to the request for information dated 4 June 2020 with a note dated 14 July 2020, stated that:

to. "due to the Covid19 emergency in recent months our business has been closed and has only recently resumed work in a very limited form";

b. "even the activity of our labor consultants and accountants [...] takes place with reduced efficiency by the smart working regime forcibly adopted to ensure compliance with the rules of social distancing";

c. "in recent weeks it has not been possible for us to have the support of the administrative staff, who are on layoffs, and of our employment consultant", consequently, with regard to the questions relating to the requests for access to the data referring to the attendance survey , the Department was asked for an extension of the terms to provide feedback;

d. with reference to the video surveillance activity, "the system was designed with the aim of providing support for the safety of the company and of the workers vis-à-vis third parties and the installation of the cameras only took place on 30 January 2015 after the regular communications and authorizations obtained from the Ministry of Labour, but [...] the often plant was never completed and put into operation".

Following the start of the additional deadline for providing feedback on requests for access to employee data, after a new reminder from the Office (dated 16 November 2020), with a note dated 7 December 2020, the company declared that:

to. “Up until the period prior to the lockdown in March 2020, attendance was recorded using a badge system. The attendance data were "downloaded" by the administrative staff on a monthly basis [...] and were sent to the labor consultant's office for processing payroll" (note 7/12/2020, p. 1);

b. "since the cafe was reopened [...] attendance is recorded manually by administrative staff" (note cit., p. 1);

c. "an agreement was signed with the labor consultant [...] pursuant to art. 28 of the Regulation which also governs the methods of collaboration in the event of requests for access to data" (note cit., p. 2);

d. "net of the organizational difficulties due to the ongoing epidemiological emergency, on the basis of relations with the consultancy firm, the company was today able to satisfy the requests for access received" (note cit., p. 2).

With a note sent by e-mail on 14 January 2021, the complainants reiterated their requests, considering in particular that "the company, following the lockdown, resumed operations in May and it is hardly credible that after eight months no managed to obtain from its consultants the records of the income and expenses of the employees, especially in consideration of the repeated requests [...] to access the aforementioned records since 2019".

In response to the subsequent request to provide further clarifications on the facts subject to the complaint (note dated

16/7/2021), relating to the indication of the specific methods with which the Company would have provided a response to requests to access the data relating to the presence in service of employees, producing suitable supporting documentation, the Company has not provided any response.

Against a further reminder (note of 21/1/2022), the Company, on 11 February 2022, sent a note having the same content as the note previously sent to the Authority, on 7 December 2020, without however provide specific feedback to new requests.

In order to define the procedure, the Department has therefore delegated the Special Privacy and Technological Fraud Unit of the Guardia di Finanza to acquire the elements already requested from the Company.

As part of the investigations carried out on 5 April 2022 at the office of the lawyer delegated by the legal representative, the Company stated that:

to. “the company has only received informal and non-detailed requests from some workers […]. As regards the stamping of the badge, the company did not keep a copy after it was delivered to the Donati studio for the preparation of the pay slips” (inspection report 4/4/2022, p. 2);

b. "the Donati studio, after having used the stampings for the preparation of the payslips, kept a copy of them for a certain period of time, for the event of any disputes [...], except that the requests, in particular [of one of the complainants], they referred to the period prior to 2015 and it was not possible to recover a copy of the documentation so dating" (report cit., p. 2-3);

c. "the communication sent by PEC on 11 February 2022 at 23.51 to the Privacy Guarantor was erroneously the same already sent via PEC on 6 December 2020 at 14.00 due to a mere material error in saving the computer file. In this regard, I provide you with a copy of the communication dated February 10, 2022 in response to note no. 4627.21/1/2022 of the Guarantor with attached copy of the agreement pursuant to art. 28 GDPR with the Donati studio" (report cit., p. 3);

d. currently "the video surveillance system is not active and never has been in the sense that although powered by electricity [...] it has never been able to take images because it has never been connected to a monitor or to a DVR” (report cited, p. 3);

And. the note dated 10 February 2022, addressed to the Guarantor and never sent, attached to the inspection report, contains the following sentence: "part of the employees who had requested the documentation relating to service hours (and in particular [four employees, three of whom complained]) have terminated their employment relationship with the undersigned company and have not requested any additional documentation other than that already made available to them". Furthermore,

the attached Appointment as data processing manager (employment consultant) of Studio Donati Consulenti del lavoro associati, by the company, dated 14 May 2018, in point 7 provides that "the manager, in compliance with art. 28, paragraph 3, lett. e) of Regulation (EU) 2016/679 assists the owner by providing him with suitable assistance in order to satisfy the obligation of the data controller to follow up on requests for the exercise of rights by the interested parties".

With a note dated 8 April 2022, resolving the reservations formulated during the inspection, the Company attached a copy of a communication, received on 18 October 2019 by e-mail from one of the complainants, requesting, among 'another "the attendance counter in reference to the period October 2014-October 2019".

Finally, with a note received on 3 June 2022, in response to a further request for clarification and sending of documents dated 11 May 2022, aimed at acquiring a copy of the feedback provided to employees in relation to the recording of service hours or in any case documentation useful for represent the concrete ways in which a response to the requests presented was provided, the Company claimed "to have complied with the request for personnel access [...] in the terms already referred to in the previous answers, however, we did not prepare a report of the delivery of the documentation that was brevi manu".

2. The initiation of the procedure for the adoption of corrective measures and the deductions of the company.

On 6 September 2022, the Office carried out, pursuant to art. 166, paragraph 5, of the Code, the notification to the Company of the alleged violations of the Regulation found, with reference to articles 12 and 15 of the Regulation.

With defense briefs, sent on October 13, 2022, the Company stated that:

to. the "management of the employment relationship, as well as interpersonal relationships with [one of the complainants was] particularly complex and it is also for this reason that there was no lucidity to formalize - as it should have been - the delivery of the requested documentation by the worker with a view to filing his judicial appeal";

b. the request was "completely specious given that all the documentation object of the [...] requests [of one of the complainants] and of the Complaint to the Guarantor dealing with us was actually in his possession, as proved by the copious documentary production [...] in labor law proceedings";

c. the judicial proceeding initiated by one of the complainants in relation to employment profiles ended with the drafting of a "judicial conciliation report [...]" with which "he renounced" any claim by way of: [...] any other reason , even if not expressly mentioned, in any case connected, even indirectly, with any employment relationship between the Parties";

d. therefore it is requested "that this esteemed Authority wishes to believe that any defaulting conduct possibly put in place by

the Company has by now already been sufficiently understood and "obvious"".

3. The outcome of the investigation and of the procedure for the adoption of corrective and sanctioning measures.

3.1 Outcome of the investigation.

Following the examination of the statements made to the Authority during the proceedings as well as the documentation acquired, it appears that the Company, as owner, has carried out some processing operations, referring to some of the complainants (XX, XX and XX) , which are not compliant with the regulations on the protection of personal data.

In this regard, it should be noted that, unless the fact constitutes a more serious offence, anyone who, in a proceeding before the Guarantor, falsely declares or attests news or circumstances or produces false deeds or documents, is liable pursuant to art. 168 of the Code "False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor".

On the merits, it emerged that the Company received, at least with the written communication from one of the complainants (XX, e-mail present in the documents), the request to access the data referring to it relating to the detection of presence in the workplace carried out through badges.

In addition to what is claimed in this regard with the complaint, the same Company has in fact produced a copy of an e-mail dated 18 October 2019 with which one of the complainants requests, among other things, "the attendance counter with reference to the period October 2014- October 2019".

Furthermore, the same Company, with the note dated 10 February 2022, addressed to the Guarantor but not sent via certified e-mail due to an error, according to what was declared, and subsequently attached to the inspection report of 5 April 2022, also represented the circumstance that some employees "had requested the documentation relating to working hours" (among these expressly include three of the complainants before the Authority: XX, XX and XX, plus another worker who did not file a complaint).

In this regard, the Company claimed, first with the note dated 7 January 2020, that it had satisfied the requests for access received. Also with the subsequent note of June 3, 2022, he reiterated "that he had complied with the request for personnel access". Nonetheless, in the face of the requests repeatedly formulated in this regard by the Authority, no evidence was provided regarding the concrete methods with which the access requests would have been processed.

As regards, on the other hand, the video surveillance system, no suitable elements were found during the investigation to

substantiate the violations complained of in the complaint.

3.2 Violation of articles 12 and 15 of the Regulation.

Based on what was noted in point 3.1 above, it therefore does not appear that the Company has provided a reply to the requests for access to data relating to attendance, collected with the badge system, made by the employees.

This regardless of the ways in which these requests have been made, given that the legislation on the protection of personal data does not provide that the request to exercise the rights must have a particular formal capacity (see Article 15 of the Regulation) .

It also emerged that the request presented by e-mail dated 18 October 2019, contrary to what was claimed by the Company, concerns data relating to attendance recorded through badges even beyond 2015, in particular up to the month of October 2019.

The Company could have dealt with the request, also taking into account that it directly had the data collected with the badge, at least until it was sent to the employment consultant, on a monthly basis, for the processing of payslips.

Moreover, the deed of designation of the labor consultant as manager expressly provides for the obligation to collaborate with the owner in the event of requests to exercise the rights (point 7), also considering that the consultant kept data on attendance, collected through badges, for an unspecified period of time but in any case probably congruous with respect to the objective, declared by the Company, of being able to deal with any disputes.

In any case, also taking into account what has been declared by the Company regarding the impossibility of providing feedback to the request of the interested party for the cancellation of the data, it should be noted that the owner is required to provide feedback to the interested party even in the event that fails to comply with the requests of the latter, specifying the reasons and informing about the possibility of submitting a complaint to the Supervisory Authority and of filing a judicial appeal (Article 12, paragraph 4, of the Regulation).

As for the methods for responding to requests to exercise rights, art. 12, par. 1 of the Regulation establishes that “The information is provided in writing or by other means, including, where appropriate, by electronic means. If requested by the interested party, the information can be provided orally”.

Therefore, the acknowledgment declared to have taken place through "short hand" delivery of the data (in any case not otherwise documented and whose execution was contested by the complainants) does not comply with the provisions of the

aforementioned art. 12 of the Regulation.

In this regard, similarly, the art. 15, par. 3 of the Regulation establishes that "If the interested party submits the request by electronic means, and unless otherwise indicated by the interested party, the information is provided in a commonly used electronic format".

Finally, on this point, it should be noted that it is up to the data controller, in accordance with the principle of accountability (Article 5, paragraph 2 of the Regulation), to document the activities carried out to comply with the provisions of the legislation on the protection of personal data (with reference to the specific matter of the right of access see Guidelines 01/2022 on data subject rights - Right of access, adopted on 18 January 2022 and subjected to public consultation concluded on 11 March 2022, paragraph 5.2.1, no. 129 , "In accordance with the accountability principle, a controller must document their approach to be able to demonstrate how the means chosen to provide the necessary information under Art. 15 are appropriate in the circumstances at hand"; unofficial translation: "In accordance with the principle of accountability, the controller must document its approach in order to be able to demonstrate how the means chosen to provide the information necessary under Article 15 are appropriate in the specific circumstances".

Furthermore, the absence of documentation of the response that would have been provided to requests to exercise rights is not consistent with the provisions of the internal regulation, attached to the note of 7 January 2020 ("Regulation and instructions for the security in the processing of personal data "), which provides for the activation of a specific procedure to regulate the taking charge, management and processing of requests (point 5: Instructions regarding the exercise of the rights of the interested parties).

In fact, the activation of a procedure such as the one described in the annexed regulation necessarily presupposes the possibility of being able to reconstruct the various steps carried out.

Lastly, it is believed that conciliation report no. 1457/2022, relating to the position of one of the complainants, concerning purely employment profiles and not related to data protection, is not suitable for determining the closure of the proceeding against the Company.

This also taking into account that the power of assessment attributed to the Guarantor is not subject to the initiative of the party (see on the point of the Court of Cassation, civil section, ord. 22/9/2021, n. 40635: although the ruling refers to the regulatory framework prior to the amendments referred to in Legislative Decree no. 101 of 2018, the current articles 57 of the Regulation

and 154 of the Code similarly regulate the powers of the Authority).

The Company has therefore failed to respond to requests for access to data relating to attendance recorded with the badge until the time of decommissioning of this system (decommissioning which, according to what was most recently declared in a note dated 8 April 2022, "during the lock down of March-May 2020"), in the terms indicated above, in violation of the provisions of articles 12 and 15 of the Regulation.

4. Conclusions: declaration of illegality of the treatment. Corrective measures pursuant to art. 58, par. 2, Regulation.

For the aforementioned reasons, the Authority believes that the declarations, documentation and reconstructions provided by the data controller during the investigation do not allow the findings notified by the Office to be overcome with the act of initiating the procedure and are therefore unsuitable to allow the filing of this proceeding, since none of the cases envisaged by art. 11 of the Regulation of the Guarantor n. 1/2019.

The processing of personal data carried out by the Company and in particular the failure to reply to the access requests presented by three complainants, is in fact illegal, in the terms set out above, in relation to articles 12 and 15 of the Regulation.

The violation ascertained in the terms set out in the reasoning cannot be considered "minor", taking into account the nature, gravity and duration of the violation itself, the degree of responsibility, the manner in which the supervisory authority became aware of the violation (see Recital 148 of the Regulation).

Therefore, given the corrective powers attributed by art. 58, par. 2 of the Regulation, a pecuniary administrative sanction is ordered pursuant to art. 83 of the Regulation, commensurate with the circumstances of the specific case (Article 58, paragraph 2, letter i) of the Regulation).

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i), and 83 of the Regulation; art. 166, paragraph 7, of the Code).

At the end of the proceeding it appears that Deca s.r.l. has violated the articles 12 and 15 of the Regulation. For the violation of the aforementioned provisions, the application of the pecuniary administrative sanction envisaged by art. 83, par. 5, letter. b) of the Regulation, through the adoption of an injunction order (art. 18, l. 24.11.1981, n. 689).

Considering it necessary to apply paragraph 3 of the art. 83 of the Regulation where it provides that "If, in relation to the same treatment or related treatments, a data controller [...] violates, with willful misconduct or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction does not exceed amount specified for the most serious

violation", the total amount of the fine is calculated so as not to exceed the maximum prescribed by the same art. 83, par. 5.

With reference to the elements listed by art. 83, par. 2 of the Regulation for the purposes of applying the pecuniary administrative sanction and the relative quantification, taking into account that the sanction must "in any case [be] effective, proportionate and dissuasive" (Article 83, paragraph 1 of the Regulation), it is represented that In the present case, the following circumstances were considered:

a) in relation to the nature and seriousness of the violation, the nature of the violation which concerned the exercise of the rights of the interested party was considered relevant (article 83, paragraph 1, letter a) of the Regulation);

b) with regard to the degree of responsibility of the owner, the conduct of the Company was taken into consideration, which did not comply with the data protection regulations in the context of the employment relationship with its employees and did not observe the internal procedures adopted regarding the exercise of rights (Article 83, paragraph 1, letter b) of the Regulation);

c) with regard to the degree of cooperation with the Supervisory Authority, it was considered that during the proceeding it was necessary to request feedback several times and to delegate the acquisition of the data to the Special Privacy and Technological Fraud Unit of the Finance Police elements already requested (Article 83, paragraph 1, letter f) of the Regulation);

d) with reference to the intentional or negligent nature of the violation, it was considered that the conduct of the company was merely negligent (article 83, paragraph 1, letter b) of the Regulation);

e) in favor of the company, account was also taken of the absence of previous violations regarding the protection of personal data, the small number of interested parties involved and the management difficulties that arose during the health emergency, as well as the turnover (art. 83, paragraph 1, letters a), e) and g) of the Regulation).

It is also believed that they assume relevance in the present case, taking into account the aforementioned principles of effectiveness, proportionality and dissuasiveness with which the Authority must comply in determining the amount of the fine (Article 83, paragraph 1, of the Regulation), in firstly, the economic conditions of the offender, determined on the basis of the revenues achieved by the Company with reference to the condensed financial statements for the year 2021.

In the light of the elements indicated above and the assessments made, it is believed, in the present case, to apply against Deca s.r.l. the administrative sanction of the payment of a sum equal to 1,600 (one thousand six hundred) euros.

In this context, it is also considered, in consideration of the type of violations ascertained that concerned the exercise of the

rights of the interested party, that pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019, this provision must be published on the Guarantor's website.

It is also believed that the conditions pursuant to art. 17 of Regulation no. 1/2019.

ALL THAT BEING CONSIDERED, THE GUARANTOR

notes the illegality of the processing carried out by Deca s.r.l., in the person of its legal representative, with registered office in Piazza Navona, 80, Rome (RM), P.I. 05117161009, pursuant to art. 143 of the Code, for the violation of the articles 12 and 15 of the Regulation;

ORDER

pursuant to art. 58, par. 2, lit. i) of the Regulations to Deca s.r.l., to pay the sum of 1,600 (one thousand six hundred) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

then to the same Company to pay the aforementioned sum of Euro 1,600 (one thousand six hundred), according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law n. 689/1981. It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the attachment - an amount equal to half of the fine imposed, within the term referred to in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09.01.2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph 8, of the Code);

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and of the art. 16, paragraph 1, of the Guarantor Regulation n. 1/20129, and believes that the conditions pursuant to art. 17 of Regulation no. 1/2019.

Pursuant to art. 78 of the Regulation, as well as articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to the ordinary judicial authority may be lodged against this provision, with an appeal lodged with the ordinary court of the place identified in the same art. 10, within the term of thirty days from the date of communication of the measure itself, or sixty days if the appellant resides abroad.

Rome, 9 March 2023

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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