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studio di consulenza
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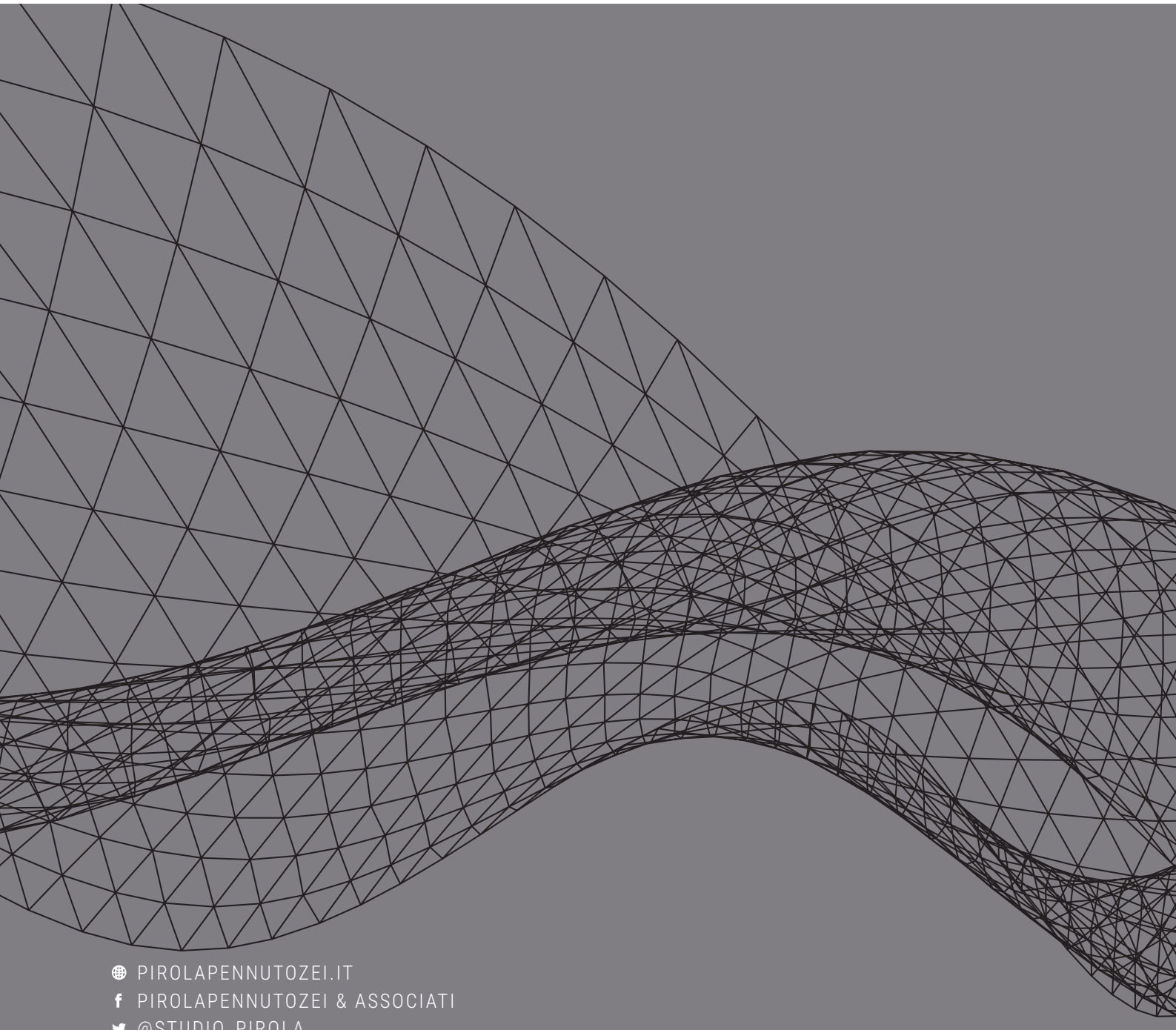
COMPLIANCE

NEWSLETTER / DECEMBER 2017



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LEGISLATION

1.1

The Government provides new rules on agrifood offences

In its meeting of 1 December last, the Council of Ministers approved the Bill introducing new rules on agrifood offences.
The Bill deals with several matters. With regard to criminal code issues, the new rules concern crimes against public health and safety: article 439 (Poisoning of water or food); article 439-*bis* (Contamination or corruption of waters or food); article 440 (Production, import, export, trade, transport, sale or distribution of hazardous or counterfeit food); article 442 (Failure to recall hazardous food); article 444 (Dangerous and deceitful trade information); article 445-*bis* (Health disaster); article 452 (Negligent conduct affecting public health); article 516 (Fraud in the trade of food products); article 517 (Sale of foods with deceitful labelling); article 517-*quater* (Counterfeiting of food products covered by the protected food name scheme) and article 517-*quater*.1 (Agrifood piracy).

The enactment is aimed at remedying the current deficiencies of criminal law and specifically sanction "*frauds against end users, in the light of the growing role of food as an indispensable part of the culture of a territory, of local communities and small local producers, which essentially constitute the "food heritage*"".

Part of the new rules deal with changes in terms of corporate liability: new predicate offences will be introduced and the content of the "*Models for the organization of entities identified as food company*" will be regulated (art. 6-*bis*).

With regard to predicate offences, two additional articles will be added to legislative decree "*231*": article 25-*bis*.2 and article 25-*bis*.3, concerning the new or the amended offences regulated by the criminal code,.

Article 25-*bis*.2 deals with crimes regarding commercial fraud, currently generically governed by article 25-*bis*.1, and specifically provides for the punishability of food frauds.

Article 25-*bis*.3 governs crimes against public health and safety (for example, poisoning, contamination or

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corruption of waters or food, production, import, export, trade, transport, sale or distribution of hazardous or counterfeit food).

Also, the Bill provides that small and medium enterprises may appoint a sole supervisory officer, who must satisfy specific criteria regarding professional standing and know-how in the field, as attested by the registration in the relevant Chamber of Commerce list.

1.2

Data Protection: the UNI 11697:2017 standard has been published

The Italian Standardisation Agency has published the new UNI 11697:2017 standard, providing specific information on the professional activities that are not regulated by the data protection rules.

The standard, jointly developed by UNINFO and UNI, is very interesting for the many companies that by 25 May 2018 are required to appoint their sensitive data protection officers in accordance with EU Regulation 2016/679 and with the recent Guidelines by the European Data Protection Supervisors. It has also been developed according to the EQF-European Qualification framework, which provides the guidelines for developing rules applicable to non-regulated professional activities.

The standard better defines the professional profile of the Personal Data processor and the Data protection officer, as well as of the Privacy Specialist and the Privacy Auditor.

A Privacy Specialist shall have received at least 24-hour specific training and can support the Personal data processor for example at the company's various places of business in the relevant region.

The Privacy Auditor shall have attended a course of at least 40 hours and can provide the Personal data processor and the Data protection officer with more complex assistance.

1.3

The Whistleblowing Act has been published

The new act no. 179/2017 on whistleblowing ("*Provisions for the protection of the persons reporting offences or irregularities they have become aware of within the scope of a public or private working relationship*"), definitively approved by the Chamber of Deputies and by the President of the Republic, was published in Italian Official Journal No. 291 on 14 December last.

The act entered into force on 29 December.

GUIDANCE

2.1
Whistleblowing: A.N.A.C. (the Italian Anti-Bribery Agency) at the forefront in laying down the relevant guidelines

By a notice of 15 December last, the Italian anti-bribery national agency notified that it was "*working on preparing specific Guidelines for dealing with reports and establishing an office exclusively dedicated to whistleblowing*".

New art. 54-*bis* of Legislative Decree 165/2001, amended by Act 179/2017, provides that A.N.AC., after obtaining the Data Protection Authority's opinion, will adopt its own Guidelines for the management of the cases of whistleblowing, thus playing a proactive and crucial role in anti-bribery activities.

A.N.AC. is required to monitor the adoption of any retaliatory measures against whistleblowers and can make preliminary investigations to ascertain whether discriminatory measures have been adopted, which may result in administrative fines being inflicted on the manager who has taken such measures or on the Authorities that have failed to adopt whistleblowing management procedures.

To perform the new tasks assigned to it, the anti-bribery Authority has taken on the task of drafting specific guidelines to handle whistleblowing reports, and establishing an office that will exclusively deal with whistleblowing issues.

2.2
Working Party 29: the "*Guidelines on Consent*" have been published

Working Party 29 (the working party pursuant to art. 29 of Directive 95/46) published new guidelines on consent and guidance on the correct interpretation of arts. 4 and 11 of the GDPR (General Data Protection Regulation), the importance of the principle of transparency and the measures to be adopted by the Data Controller to provide data subjects with the information and communications laid down in the Regulation.

The importance of WP 29's Guidelines also lies in that they contain express reference to the principle of accountability of the Controller pursuant to art. 5.2 of the Regulation, under which the Data Controller shall at any time be responsible for and must be able to demonstrate that it has applied the basic processing principles including lawfulness, correctness and transparency, the latter governed by art. 12.

WP29 specifies that compliance with art. 12 will have to be ensured throughout the processing lifecycle: before, during processing and every time a new event, such as a data breach, occurs.

The principle of transparency thus affects the content of the information and the way and timeframe in which such information must be provided to the data subjects.

Once again it has been clarified that at the time of entry into force of the new Regulation, Data Controllers will be accountable for compliance of the privacy notices with the principle of transparency. Furthermore, their failure to comply with the new rules will result in the ongoing processing being unlawful regardless of the current provisions of the Italian Data Protection Code.

In this respect WP29 refers to Whereas no. 171, under which any processing already under way on the date of application of the Regulation should be aligned to the new rules by 25 May 2018, including with regard to consent that has already been given, which can be considered valid only if given in accordance with the Regulation.

The Guidelines contain key changes, which arise out of the principles contained in art. 12 of the GDPR and the resulting interpretation of arts. 13 and 14 (i.e. regarding the privacy notices on the information gathered from the data subject and from third parties, which WP 29 considers to be on the same level).

The basic principle underlying the document is transparency, on which the entire GDPR is based, and which goes beyond the merely legal-formal aspects of arts. 13 and 14, since its purposes is to build up the trust of the persons concerned by data processing.

Therefore the information must be provided in a concise, transparent, intelligible and easily accessible

manner, using a simple and clear language and taking into account the most common characteristics of users and their level of understanding.

It is specifically recommended that information should be given in the language used not only by data subjects but by the recipients as well. Data Controllers must ensure that quality translations are made which as a general rule must be understandable to the targeted language group.

Finally, the GDPR clarifies that the information does not need to be in writing but can be given by means of icons (which will have to be specified by the Commission in the future) and/or by other electronic means.

CASE LAW

3.1

The working relationship as the "*price*" of a bribery arrangement

By decision no. 53469/2017 the Court of Cassation ruled on the distinction between the proceeds from and the price of the offence, and on the possibility of seizing assets of an equivalent value, following the new rules introduced by the Severino Act.

Article 1(75) (o) of Act no. 190/2012 has amended article 322-*ter* (1) of the Criminal Code to allow the seizure of both the price of and the proceeds from the bribery offence, unlike it was the case in the past.

The Court of Cassation reiterates that "*while the term "proceeds" means the profit earned as a result of the commission of the offence, the "price" should be identified as the "consideration" agreed and earned for committing an offence*".

In the case at issue, the difference between the two definitions was the basis for the Court's decision to cancel the precautionary seizure against the indicted persons which had been ordered by the Judge for Preliminary investigations.

In particular, a public officer had been accused of having facilitated the award of the public lighting service contract to a company (without an invitation to tender) and having been hired by that company "*in "consideration" for the unlawful arrangement*".

The trial court judge had identified the order of the Judge for Preliminary investigations as seizure of assets of a value equivalent to the proceeds and not to the price for the offence, and as such not applicable to the case at issue because the amendment made by Act 190/2012 was introduced at a time subsequent to the alleged crime.

However the Court of Cassation, which did not agree with this reconstruction, had cancelled the Court order, clarifying that "*the subject of the unlawful arrangement […] is the negotiation and the beginning*

of the work relationship as consideration for the bribery arrangement; the relationship implied both the payment by the employer (Srl), and the provision of work by the worker".

The conclusion of the agreement was not the result of a lawful and free decision of the parties but was the consideration (i.e. the "*price*") for a bribery arrangement between the employer, "*who intended to use the arrangement to obtain advantages not allowed by the legislation*", and the worker "*who intended to profit from his public function to obtain advantages not connected to his public office*".

3.2

Inadequate safety at work, training and information trigger liability pursuant to legislative decree 231

The obligation to comply with employees' training and information requirements, lying with the employer "*is not excluded nor can be replaced by the worker's personal know-how, that is the result of a long work experience, or the transfer of knowledge that usually occurs between co-workers, including workers at different hierarchical levels*".

This was established by the Court of Cassation in decision no. 53285/2017, confirming the ruling against an employer and the company with relation to (criminally and non-criminally relevant) negligent bodily harm.

In the case at issue the employee – while disassembling a machine – had followed a completely different procedure from that laid down in the user manual in order to reduce the time of the procedure. Specifically, the worker had failed to ensure the stability of the equipment, resulting in a piece of the equipment falling down on him and causing him a serious injury.

After the event it emerged that the Risk Assessment Document and the worker's training had been inadequate, because of the wish to save money and to increase profitability thanks to a reduced processing time.

To no avail did the defence argue that the worker had behaved inconsistently with the effective training received and with his experience (especially considering that he had actively contributed to the description

of the machine disassembling procedure contained in the manual kept at the company's): the Court of Cassation confirmed the Court of Appeal decision, which had pointed out that the manual did not specify the conduct to be avoided and the related risks, that the training was about the use of forklifts and not about the use and disassembly of the machine in question and that the verbal warnings issued to the employee had never been followed by disciplinary measures.

Thus, according to the Court of Cassation, the worker's personal knowledge could not replace the employer's safety obligations which had not been complied with.

The judges claimed the company's liability pursuant to legislative decree 231 due the inadequacy of the Risk Assessment Document and of the worker's training and information (both causes of the injury) and – with reference to the company's advantage/interest – pointed out "*the incidence of the company's incorrect practice on the cost-benefit ratio*".

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COMPLIANCE NEWSLETTER | DECEMBER 2017

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 DECEMBER 2017.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM