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studio di consulenza
tributaria e legale

COMPLIANCE

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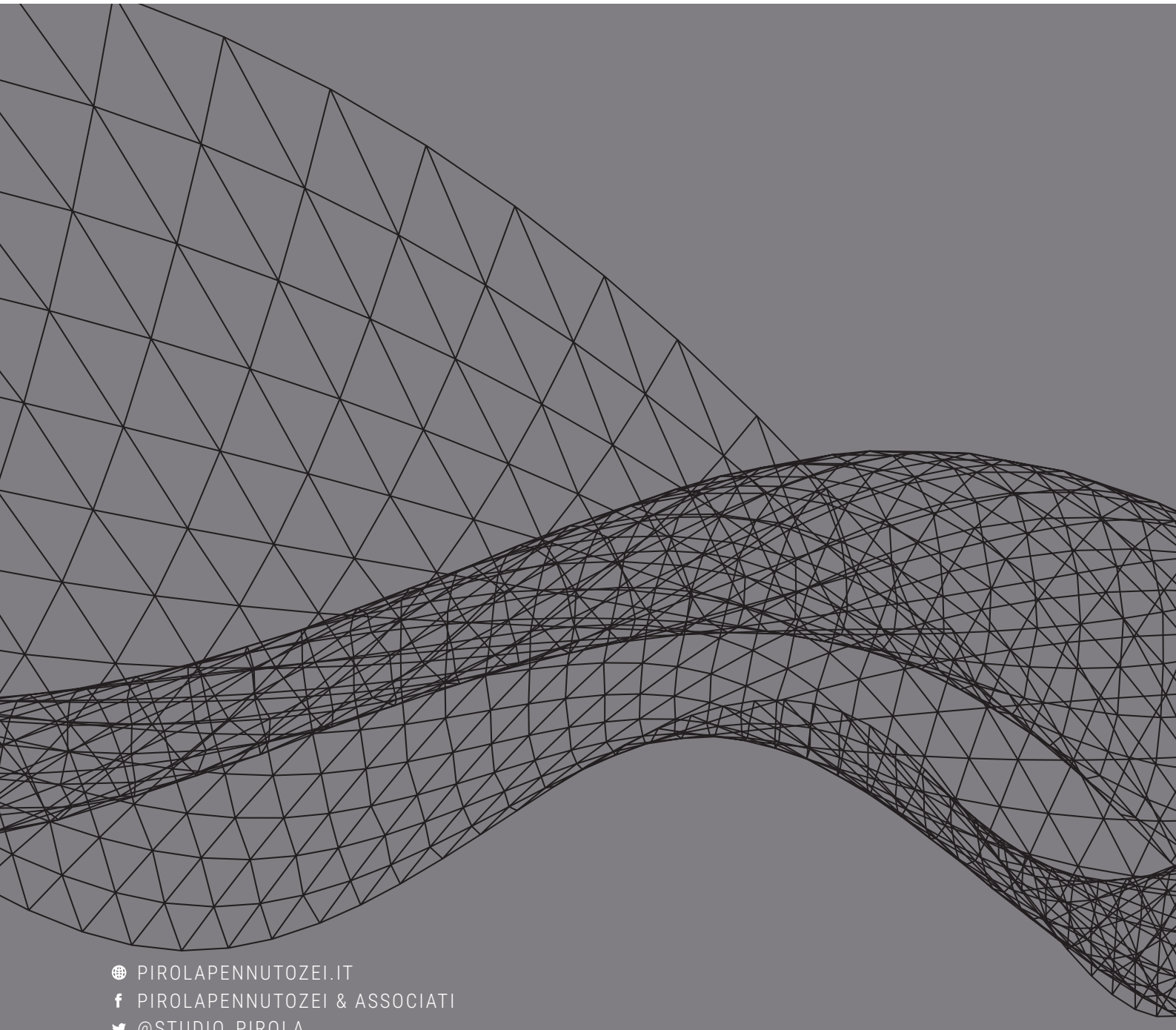

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LEGISLATION

1.1

New amendments to the Criminal Code: changes to Legislative Decree "*231*"

Legislative decree no. 21/2018, published in the Official Journal no. 68/2018 and entered into force on 6 April 2018, includes *provisions for the implementation of the principle that new crimes, in order to be regulated and punishable, must necessarily be contemplated by the Italian penal code (principio di delega della riserva di codice nella materia penale) pursuant to article 1(85)(q) of law no. 103/2017*".

The purpose of the decree is to reorganize the criminal law system, preserving the central role of the Penal Code and preventing the proliferation of fragmented provisions.

The law covers different areas (protection of individuals, the environment, the financial system, crimes of mafia-type association and for terrorist purposes), by abrogating the provisions not included in the Penal code and adding others.

With reference to corporate liability, the new law has eliminated article 3 of law no. 654/1975 to which reference is made in article 25*terdecies* of Decree 231 as part of "*Racism and xenophobia*" and article 260 of legislative decree no. 152/2006 "*Activities organized with a view to the illegal traffic of waste*" to which reference is made in article 25*undecies* regarding "*Environmental offences*".

However, there is no coordination between the amendments to predicate offences made by Legislative decree no. 81/2018 and the provisions of Legislative Decree no. 231/2001, which still refer to abrogated laws: while on the one hand, article 25*terdecies* introduced into Legislative Decree no. 231/2001 the offence of racism and xenophobia governed by article 3(3*bis*) of Law no. 654/75, on the other hand, Legislative Decree no. 21/2018 abrogated such article without making any changes to Legislative Decree no. 231/2001.

However, the abrogated provisions are still relevant for criminal purposes, since such cases are now directly governed by the Penal code, i.e. the new articles 604-*bis* ("*Propaganda and instigation to commit*

crimes for reasons of racial, ethnic and religious discrimination") and 452-*quaterdecies* ("*Activities organized with a view to the illegal traffic of waste*") respectively.

1.2

Crimes subject to private prosecution (*reati procedibili a querela*), changes to legislative decree "*231*"

The Council of Ministries has approved the Legislative Decree implementing Law no. 103/2017, amending the regulations on the prosecution of certain crimes.

According to this decree, the cases subject to private prosecution now also include crimes against the person and against property that are basically private crimes or misconducts characterized by low offensiveness.

The cases in question include two predicate offences set out by Legislative Decree no. 231/2001: fraud (article 640 of the penal code) and online fraud (article 640*ter* of the penal code), which are relevant for the purposes of decree "*231*" if committed to the detriment of the State or of another public body.

Online fraud will automatically be prosecutable solely if the conditions under article 61(1) par. 5 and 7 of the penal code occur, i.e. where the perpetrator has taken advantage of a person's conditions, including age, to prevent public and private defence, or has caused significant financial damage.

On the contrary, fraud will be automatically prosecutable if aggravated by significant financial damage.

GUIDANCE

2.1

Article 29 Working Party: the guidelines on consent and transparency have been adopted

At the end of the review phase, on 10 and 11 April the Article 29 Working Party has adopted the Guidelines regarding "*Consent*", including the provisions for the correct interpretation of article 4(11) of GDPR, and "*Transparency*", related to the measures which the controller must adopt in order to provide the data subjects with the information and notifications required by the Regulations.

As regards "*Consent*", the Group of European Data Protection Supervisors clarified that the requirements prescribed by the GDPR to obtain it are to be considered as a necessary precondition to legally authorize processing. In particular, the data subject must be free to give and to revoke his/her consent, since he/she actually has the power to choose. Consent must also be specific, in particular if the purposes of the processing carried out by the controller are diversified. A key condition is the clarity of the information provided to the data subject, which must be expressed in plain language.

As regards "*transparency*", the related guidelines include significant innovations, rooted in the principles of article 12 of the GDPR and in the resulting interpretation of articles 13 and 14, in relation to the information on the data received from the data subject and on those received from third parties.

The fundamental principle is that the concept of transparency must be construed as "*user-centred*", beyond the merely legal and formal aspects of article 13 and 14. Purpose of this principle is to strengthen the trust of the data subjects in the persons processing their data. For this reason, it is essential that information be clear and comprehensible: it will have to be provided in a concise, transparent, intelligible and easily accessible form, in plain and clear language.

In order to guarantee the transparency principle, the information must be adequate to enable the data subjects to understand the purposes and effects of processing prior to its start. Accordingly, the purposes and effects of processing must be stated in a manner adequate for an information notice addressed not

only to the data subjects, but also to potential data subjects, thus enabling them to consciously decide whether or not to accept the proposed processing.

It is also recommended that the information be provided in the language spoken by both the data subjects and the recipients. The controllers must provide for quality translations.

For information on minors it is also recommended utilising a specific language and taking into consideration the "*UN Convention on the Rights of the Child in Child Friendly Language*".

2.2

Code for procurement contracts: A.N.AC.'s Guidelines for public-private partnership arrangements

The Italian National Anti-Corruption Authority has issued the final version of Guidelines no. 9 on the "*Monitoring of contracting authorities on the activity of the economic operator in public-private partnership arrangements*".

The document, prepared in compliance with the new Code for procurement contracts (*Codice Appalti* - Legislative Decree no. 50/2016), includes instructions for identifying and evaluating the risks connected with public-private partnership arrangements, starting from the phase prior to the start of the tender procedure: this is when the contracting authority is required to identify and measure the specific risks, by defining the related management procedures. For this reason, the first part of A.N.A.C.'s Guidelines includes a detailed analysis of the different types of risks which may arise.

In the second part, there are instructions on the control procedure regarding the business conducted by the economic operators based on a public-private partnership arrangement, which must be considered binding pursuant to article 181(4) of the Code for procurement contracts.

The Authority's Guidelines stipulate that the invitation to tender must show the information sent by the economic operator to the authority.

It is therefore evident that the regulations show undoubted similarities with the system prescribed by Legislative Decree no. 231/2001. Therefore, an economic operator already adopting the compliance system prescribed by the above decree could benefit from the synergies deriving from the use of its risk assessment process, at the time of closing the public private partnership arrangement.

The Authority's guidelines will enter into force fifteen days after the publication in the Italian Official Journal.

COURT DECISIONS

3.1

Insider trading, the outcome of the crime corresponds to the aggregate value of the security

In the event of insider dealing, if the offender utilizes financial instruments to commit the crime, "*the result of the conduct is identified with the instrument which, due to the violation, has artificially changed its value, thus becoming not merely a profit but the result of the crime committed*".

As a consequence, as specified by the Court of Cassation in decision no. 8590/2018, pursuant to article 187*sexies* of the Consolidated Law on Finance, the mandatory confiscation cannot solely refer to the capital gain realized as a result of the unlawful transaction.

The Court of Cassation's judges had been requested to issue a decision after the *Turin* Court of Appeal had ordered the payment of a fine for insider trading by the director of a joint stock company and confiscation of the securities seized.

During trial, it had been ascertained that, in the performance of his activities at a stockbroker's, the director had obtained information on an imminent order to purchase shares and had purchased some for himself, thus earning a significant profit.

At the end of the trial, the Court of Appeal had ordered confiscation of the shares as to a value equal not only to the profit earned, but also to the original purchase value, which was the subject matter of the appeal before the Court of Cassation.

However, the Supreme Court rejected the appeal, stating first of all that the confiscation prescribed by article 187-*sexies* of the Consolidated Law on Finance (Legislative Decree no. 58/98) is mandatory, specifying that "*if the financial instrument, which was undoubtedly originally purchased by the offender with his/her own funds, constitutes the subject of the unlawful conduct, it becomes itself the profit of the crime and it will no longer be possible to distinguish between its lawful initial value and its final artificial value resulting from the illegal trading*".

Article 187-*quinquies* of the Consolidated law on Finance provides for corporate liability in the event that insider trading is committed by the persons specified in article 5 of Legislative Decree no. 231/2001 (top managers or their subordinates) in the interest or to the advantage of the company itself. This was not the case here, since the director acted in his own personal interest.

3.2
***Plea* bargaining may be requested by companies solely for the crimes set out in legislative decree no. 231/2001**

In its decision no. 14736/2018, the Court of Cassation has dealt with the application of the fine at the request of the company and clarified the relevant preconditions and limits.

In the case under examination, the companies involved have requested for a plea bargain "*with regard to the administrative offences depending on the crimes set out in articles 24ter*(2, 25, 25-*undecies*, 25-*septies of Legislative Decree no. 231/2001*": in rejecting the request, however, the *Taranto* Court of Appeal had wrongly referred to the crime stipulated by article 439 of the Criminal Code ("*Poisoning of water supplies or food*"), the penalty for which would have been such as to justify the rejection of the application for a plea bargain by the entities.

According to the Court, the request must be evaluated by the judge solely with reference to the predicate offences prescribed by legislative decree no. 231/2001, since it is not allowed to consider the seriousness of other claims brought against the individuals or the legal persons accused in the same legal action. According to the Supreme Court, for the purposes of the evaluation, taking into consideration a crime not covered by legislative decree no. 231/2001 would entail the violation of the principle of legality.

The Supreme Court judges have also pointed out that in the enactment appealed against the *Taranto* Court of Appeal had considered that in order for fine to be applied on request, the preconditions set out by article 63 of Legislative Decree no. 231/2001 had to be met jointly, although the wording of the provision of article 63 clearly shows that they are mutually exclusive.

Article 63 of Legislative Decree no. 231/2001 prescribes that "*the application of the fine on request is*

allowed if the legal action against the defendant is defined or can be defined pursuant to article 444 of the Code of criminal procedure, as well as in all cases where solely a pecuniary penalty is inflicted for an administrative offence".

Accordingly, it can be concluded that the application of a fine on request must be allowed either when the legal action against the defendant ends with a *plea* bargain or can be settled pursuant to the Code of Criminal Procedure, or when solely a pecuniary penalty is inflicted for an administrative offence.

3.3

There is no real service agreement if there is no business risk

By decision no. 1571/2018 the Council of State annulled an invitation to tender for the award of support activities to the offices of a contracting authority, since the arrangement had been wrongly identified as a service agreement and not as contract for the supply of staff (which, according to the law, is reserved to Labour agencies registered with the Ministry).

The distinction between the above two contract types has always been a very controversial issue and it has now become a matter of great interest following the inclusion of "*unlawful intermediation and exploitation of work*" (regulated by article 603-*bis* of the Criminal code) among the predicate offences prescribed by legislative decree no. 231/2001.

Administrative judges have referred to previous case law and have stated that a non-genuine procurement contract can be identified based on certain characteristics, such as the request by the principal that a given number of work hours be performed, the permanent employment of the contractor's staff in the principal's production cycle, the type of activity performed by the contractor's staff in respect of that of the principal's staff, the ownership by the principal of the equipment required, the organization of the staff's activities by the principal.

In the case at issue, the thorough analysis of the tender specifications has made it possible to learn that the service requested had been quantified as a lump-sum number of work hours and had not been

identified as an independent service aimed at the production of a result. The contractor hadn't even made available the instruments and equipment: the staff was supposed to use the principal's equipment (PCs, stationery, copying machine, etc.), working at the latter's premises.

The Council of State has also declared that the general clauses of the tender specifications according to which "*the services will be provided with the organization, under the responsibility and at the risk of the contractor only*" were immaterial, given the absence of elements demonstrating the contractor's business independence.

Finally, there is no business risk at all: the contractor had not borne any costs related to the purchase and organization of the instruments and there had been no proven contribution of capital, know-how and intangible assets.

3.4

Whistleblowing: the dismissed whistleblower must be fully reinstated

The European Court of Human rights has recently ruled in favour of a public employee who had been dismissed after disclosing confidential information (*Guja* VS *Moldova*).

The appellant, head of the press agency of the Prosecutor General's Office, had sent to a newspaper some letters from which it could be inferred that a high-ranking politician was putting strong pressure on the Prosecutor General. The whistleblower had been dismissed but the European Court judge had stated that the right to freedom of expression – stipulated by article 10 of the Convention – had been violated and, after the intervention of the Supreme Court of Justice of *Moldova*, had ordered that the employee be reinstated to his job.

The journalist had been reinstated, but was not given work, a badge or any operating tasks. In addition, after a short time, he had been dismissed again due to a change at the head of the Prosecutor General's Office.

The Court analysed the manner and timing in which the facts had occurred and concluded that the second dismissal appeared to be a further act of retaliation connected to the disclosure of the letters, pointing

out that the Supreme Court of *Moldova* had failed to comply with the first decision issued in favour of the employee.

3.5

Safety at work: actual liability in the event of accident at work

By decision no. 6410 of last 14 March, the Court of Cassation pointed out that the merely formal appointment of an employee as person in charge of safety issues did not exclude the employer's liability in the event of accidents at work.

In the case at issue the employer, in its capacity as entity in charge of guaranteeing the safety at work, had been sentenced by the competent Court to reimburse to *INAIL* (the Italian workers' compensation authority) the damages paid to the employee who had suffered a serious accident resulting in the partial amputation of a leg.

The appellant stated that the accident suffered by the employee could not be attributed to it, since at that time the employee had been appointed head of the building site, thus acting as representative of the employer with the obligation to supervise safety at work.

The judges pointed out that, in order to actually separate the employer's liability from that of its employees, it was not sufficient to appoint an employee as safety manager, but it was also necessary that the employee "*… had been specifically instructed to be liable for safety issues and accordingly had the required technical skills for the performance of such task*".

Therefore, according to the Court, although the employer had appointed the employee as the person in charge of supervising compliance with the regulations against accidents at work, it was not exempted from liability and continued to be solely liable for compliance with safety at work regulations.

Pirola
Pennuto
Zei
& Associati
studio di consulenza
tributaria e legale

Via Vittor Pisani, 20
20124 Milano

T. +39.02.669951
F. +39.02.6691800

info@studiopirola.com
www.pirolapennutozei.it

COMPLIANCE NEWSLETTER | APRIL 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 APRIL 2018.
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