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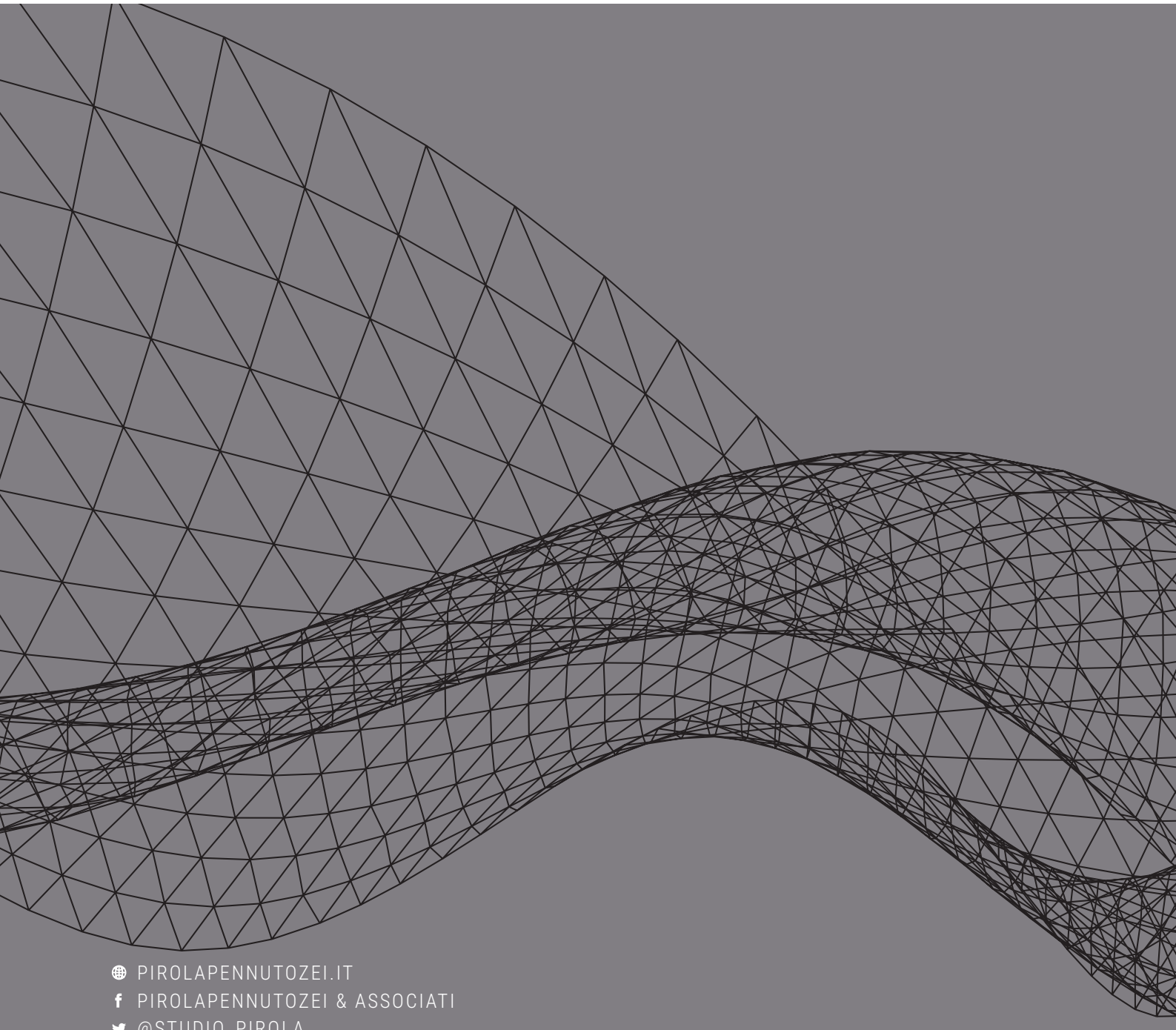
studio di consulenza
tributaria e legale

COMPLIANCE

NEWSLETTER / MAY 2018



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INDEX

LEGISLATION

1.1 4
GDPR, the implementation of the delegation law is postponed to 21 August 2018

1.2 4
The new Regulations on legality rating have entered into force

1.3 5
Market abuse: the decree for the harmonisation of Italian regulations and European law

1.4 5
Anti-mafia code: two implementing decrees have been approved

GUIDANCE

2.1 7
Data Protection Authority: the procedure to notify the name of the Data Protection Officer has been made available

2.2 7
Bank of Italy adopts a whistleblowing procedure

2.3 8
Whistleblowing: the European Commission proposes a more efficient protection of the reporting entities within the EU

COURT DECISIONS

3.1 9
Labour exploitation: the adjustments carried out by the firm must be evaluated for the purposes of judicial control

BACK TO TABLE OF CONTENTS ↑

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

3.2 Negligent offences regarding health and safety 9

3.3 Non-authorised waste management 11

3.4 Failure to report in the financial statements the amounts to be recorded under "*Contingency provision*" 11

BACK TO TABLE OF CONTENTS

LEGISLATION

1.1

GDPR, the implementation of the delegation law is postponed to 21 August 2018

Starting from 25 May 2018 the GDPR no. 2016/679 applies in the territory of the European Union.

In view of the full effectiveness of the European regulations on personal data protection, the Italian Government should have exercised the delegation for the adoption of a legislative decree adjusting and harmonizing the Italian regulations to EU regulations.

The decree implementing the GDPR has been sent by the Government to the Special committees on 10 May last but, after having examined it for some weeks, the speakers of the Parliamentary committees in charge of evaluating the legislative decree have not accepted it due to several critical areas and constitutional unlawfulness profiles.

Although the Data Protection Authority has accepted the legislative decree, it has pointed out the critical areas of its wording regarding, *inter alia*, the storage of phone traffic data, the provision of the parental consent for children and the re-utilisation of data for scientific research.

The deadline for the implementation of the delegation law by the Government is therefore postponed to 21 August 2018.

For these reasons, there will be a period in which either the European regulations and the Italian Privacy code (legislative decree no. 196/2003) will simultaneously be in force. The latter will apply provided that it is not in conflict with the GDPR.

1.2

The new Regulations on legality rating have entered into force

The Decision of the Antitrust Authority no. 27165 of 15.5.2018 including the new Regulations on legality rating has been published in the Official Journal no. 122 of 28.5.2018. The legality rating has been

introduced during 2016 by the Antitrust Authority and is aimed at rewarding virtuous companies by way of initiatives and investments regarding compliance, ethics and transparency in the business management.

The Decision states some amendments regarding the requirements for the attribution of the rating, in respect of which new compliances related to health and safety at work have been introduced, the procedures to verify and attribute the rating, which now must be carried out by the Antitrust Authority only, with the support of the Anti-bribery Authority, if necessary.

1.3

Market abuse: the decree for the harmonisation of Italian regulations and European law

The Council of Ministries has approved the decree adjusting Italian regulations to Regulation (EU) no. 596/2014 on market abuse.

As stated in the Council of Ministries' decree, market abuse includes "*insider dealing, market manipulation and unlawful disclosure of inside information*", i.e. all actions preventing and threatening the transparency necessary for correct business operation. Accordingly, these are cases prescribed and punished by the Italian Consolidated Law on Finance (*TUF – Testo unico della Finanza*), under articles 184, 185 and 187 and represent the entities' responsibility.

According to the decree, *Consob* (Italian securities exchange commission) is the Administrative authority in charge of guaranteeing the correct application of the Regulation, vested with functions and powers to apply administrative measures. The rules on the infliction of fines have been tightened up as well.

1.4

Anti-mafia code: two implementing decrees have been approved

On 16 May last the Council of Ministries approved two legislative decrees implementing the new Anti-mafia code (Law no. 161/2017).

The decree named "*Rules governing the regime of incompatibility of receivers, their assistants and other bodies for insolvency proceedings, implementing article 33(2 and 3) of Law no. 161/2017*" prescribes

the incompatibility of the persons listed for kinship, affinity, cohabitation and, anyway, close liaisons with magistrates working at the judicial office of the magistrate giving the authority and ordering to supervise the President of the Court of Appeal in respect of the such authorities.

The decree named "*Protection of work for enterprises confiscated from mafia for the purposes of article 34 of Law no. 161/2017*" introduces provisions to facilitate the emergence of unlawful work at confiscated enterprises and to tackle unlawful intermediation and exploitation of labour, thus allowing, if necessary, income support programs.

The new provisions are aimed at supporting the continuation or restart of the business activity of the confiscated enterprises, in receivership, with the purpose of "*tackling the existence of criminal organizations in the economy and offering an actual work opportunity, as well as facilitating the maintenance and development of the professionalism achieved, by preventing the enterprises confiscated from mafia from going bankrupt, which would entail significant costs from an economic and social perspective*".

The decree also provides for specific rules regarding the certificate of social security compliance (*Documento Unico di Regolarità Contributiva - DURC*) and the enforceability of enactments regarding labour and social legislation.

GUIDANCE

2.1
Data Protection Authority: the procedure to notify the name of the Data Protection Officer has been made available

By notice dated 18 May 2018, the Data Protection Authority has informed that the online procedure to notify the name of the Data Protection Officer is available on its website.

Pursuant to article 37 of Regulation (EU) no. 679/2016, public and private entities which must appoint a DOP must notify the Data Protection Authority with the name of the DPO, after his/her appointment. This is aimed at guaranteeing that the DPO acts as an intermediary between the entity and the Authority, as required by article 39 of the Regulation.

2.2
Bank of Italy adopts a whistleblowing procedure

By notice published on 2 May last on its website, the Bank of Italy has explained the whistleblowing procedure.

There are two channels by which reports regarding regulations' violations or presumed non-compliances at the intermediaries can be sent.

Employees or partners of intermediaries may send reports to the email address *whistleblowing-vigilanza@bancaditalia.it* or by ordinary mail according to the procedures described on the website. In compliance with the related provision (article 52-*ter* of the Italian consolidated banking law – *TUB Testo Unico Bancario*) article 4-*duodecies* of the Italian consolidated law on finance and law no. 179/2017), the Bank of Italy assures the confidentiality of the name of the person making the report.

Those who are not employees or partners of an intermediary may send reports to the email address *segnalazioniaziendali-vigilanza@bancaditalia.it* or by ordinary mail according to the procedures described on the *website.*

Clients who want to make a report must utilize different tools, specifically aimed at the protection of the consumers of banking and financial services.

2.3
Whistleblowing: the European Commission proposes a more efficient protection of the reporting entities within the EU

The European Commission has evaluated that, in respect of the current regulations, the persons reporting to the competent institutions or publicly disclosing unlawful actions at work are not adequately protected for their personal safety and for the public interest.

Article 1 of the directive proposed includes a list of the European law subject matters to which the minimum standard protection of whistleblowers should apply, including: contracts, financial services, money-laundering and terrorism financing, product safety, transport safety, environment protection, nuclear safety, safety of food and feed and health and wellness of animals, public health, consumers' protection, protection of private life, protection of data and network and IT systems safety.

Article 4 will introduce the obligation to provide a system to report offences and of follow-up of reports for either the private sector (all firms with more than 50 employees or with an annual turnover higher than Euro 10 million) and the public sector (all State and regional authorities and municipalities with more than 10,000 inhabitants).

The instruments proposed by the European Commission aim, on the one hand, to guarantee the confidentiality of the reporting person and prevent retaliation against the latter, and, on the other hand, to adequately disclose the case, should it be important for public interest.

The proposal will have to be approved by the European Parliament and Council.

COURT DECISIONS

3.1

Labour exploitation: the adjustments carried out by the firm must be evaluated for the purposes of judicial control

By decision no. 17939/2018, the Court of Cassation has pronounced on illicit brokering and labour exploitation, as set out in article 603-*bis* of the Criminal Code, which are a predicate offence for the administrative liability of entities pursuant to article 25-*quinquies* of Legislative Decree no. 231/2001.

Following criminal proceedings for labour exploitation, a farm located in *Campania* had undergone judicial control aimed at preventing recurrences of the offence.

In its appeal before the Supreme Court, the farm had objected, *inter alia*, that the Court had not correctly evaluated the adjustment actions taken in the meanwhile in compliance with the regulations of that sector.

The Supreme Court had therefore reversed the judgement regarding the judicial control and remanded the case to the court for further examination.

According to the Supreme Court, the judges' arguments "*did not refer to the defensive findings supported by documentation regarding the regularization of workers and the farm's adjustment to the anti-accident provisions*", which are aspects which had been considered to be essential for the application of the judgement resulting in the judicial control.

3.2

Negligent offences regarding health and safety

By decision no. 16713/2018, the Supreme Court has pronounced on the administrative liability of entities with specific reference to negligent offences.

The case refers to the death of a worker who fell from the roof of a building, on which he was performing

maintenance of gutters, as high as twelve metres after the fiberglass sheet on which he was standing had broken down.

The entity was punished pursuant to Legislative Decree no. 231/2001 before two courts. Specifically, the court of appeal ordered the payment of a fine of Euro 258,230 on the basis that the company had derived an advantage from the failure to adopt the accident prevention regulations, such as appointment of a prevention and protection manager, evaluation of the specific risk, securing the workplace and professional trading of workers.

The defence counsel appealed against the Court of Appeal's decision arguing that *"there was no interest as prescribed by article 25septies of legislative decree no. 231/2001 necessary to establish the entity's liability for the offence*", since the company could not receive any interest or advantage from the worker's death.

With its decision, the Court of Cassation reiterated the concept of interest and advantage and specified that the interest arises "*when the failure to adopt accident prevention measures results from a choice orientated towards the saving of business costs, and not from a simple underestimation of risks or a wrong consideration of the necessary prevention measures*".

The advantage arises "*when an individual, acting on behalf of the entity and not wishing the occurrence of a death or an accident, has violated the accident prevention regulations and, accordingly, has implemented a business policy disregarding the safety at work and allowing the reduction of costs with a consequent maximisation of the profit*".

According to the Court of Cassation, the court should verify again and actually if the violation of safety regulations derives from the company's interest or has allowed the latter to obtain an advantage: in the case at issue, the judges had ascertained that the company had received an indirect economic advantage by way of saving of the costs incurred.

3.3

Non-authorised waste management

By decision no. 18891/2018 the Court of Cassation declared that the appeal filed by an entity charged with non-authorised waste management (non-dangerous waste) was inadmissible; this offence is punished according to article 256(1)a) and (4) of Legislative Decree no. 152/2006, which is a predicate offence of entities' administrative liability as set out by article 25-*undecies* of Legislative Decree no. 231/2001.

In 2014 the above mentioned waste management plant had undergone an inspection and the body in charge thereof verified the maximum quantity of waste which could be stored by the facility by including waste already stored but not yet subjected to performance test.

The appellant had challenged that the maximum quantity had been wrongly determined. The appeal had however been rejected by the Court of Cassation, which stated that if the defensive theory had been adopted, it would have been allowed to extend in an uncontrolled and indiscriminate manner the maximum quantities of waste which may be stored by waste processing plants.

According to the Court, for the purposes of verifying that the maximum quantities of waste to be stored are observed, such quantity must include waste which, although being subject to recovery, the recovery procedure has not yet been completed.

3.4

Failure to report in the financial statements the amounts to be recorded under "*Contingency provision*"

The Court of cassation issued decision no. 21672/2018 regarding false representation as set out in article 2621 of the Civil Code, which is a predicate offence for entities' liability under legislative decree no. 231/2001.

In the case at issue, an entrepreneur had been charged with failure to report in the financial statements under "*Contingency provision*" the amount of about Euro 1 million related to the aggregate price received for the sale of a property.

Since in the meanwhile the Court had been asked to pronounce on the legitimacy of the building permit, the defendant had committed to pay back to the purchasers the amounts paid in the event of demolition of the property ordered by the Court.

In its appeal before the Court of Cassation the defence counsel had pointed that such case did not fall within those for which the Civil code prescribes the record in the financial statements. On the contrary, the Court of Cassation declared that the offence of false representation in the financial statements can arise in the event of commitments taken in connection with a pending litigation.

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COMPLIANCE NEWSLETTER | MAY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 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