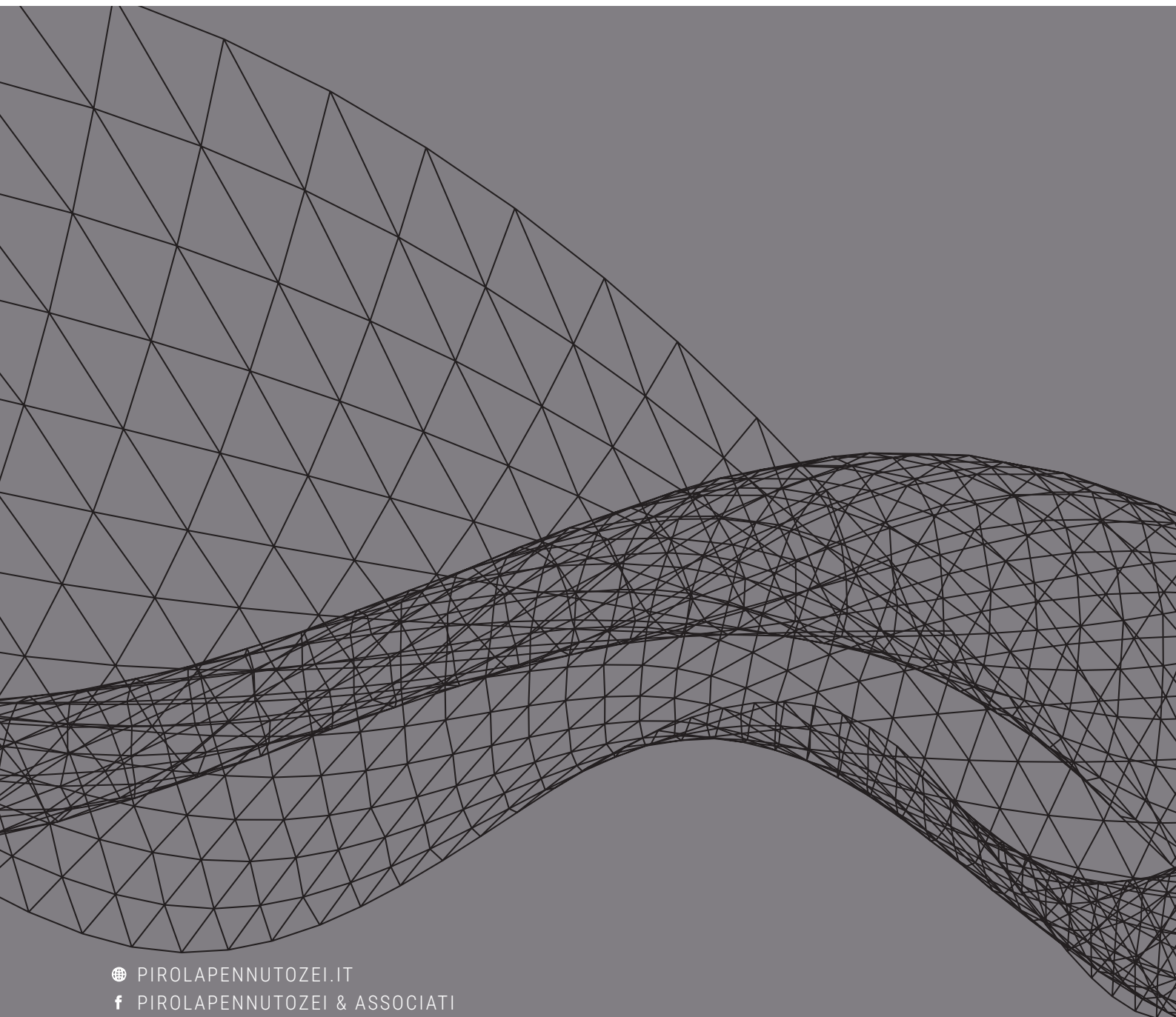


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# COMPLIANCE

NEWSLETTER / MAY 2019



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## LEGISLATION

### 1.1

#### **The new EU Directive on combating fraud and counterfeiting of non-cash means of payment has entered into force**

The new EU Directive on combating fraud and counterfeiting of non-cash means of payment entered into force on 31 May.

European lawmakers considered that fraud and counterfeiting of non-cash means of payment are threats to security, as they represent a source of income for organized crime and are therefore enablers for other criminal activities such as terrorism, drug trafficking and trafficking in human beings.

Therefore, they requested Member States to adopt measures to ensure that the fraudulent use of tangible and intangible non-cash means of payment unlawfully obtained and fraud related to information systems are punishable as a criminal offence.

Member States shall therefore impose penalties on both natural and legal persons where the above crimes are committed for the benefit of a legal person by anyone *“acting either individually or as part of an organ of the legal person, and having a leading position within the legal person”*.

Furthermore, legal persons shall be held liable where the lack of supervision or control by a person having a leading position within them has made possible the commission of any of the offences in question by a person under its authority.

Therefore, the list of predicate offences under legislative decree 231/2001 will possibly be extended.

Member States shall have until 31 May 2021 to incorporate the Directive.

### 1.2

#### **Sports frauds have been included in the list of crimes relevant for the purposes of legislative decree 231/2001**

As mentioned in the April Newsletter, Law No 39 of 3 May 2019 - ratifying and implementing Council of Europe Convention on the Manipulation of Sports Competitions, done in Magglingen on 18 September 2014 - was published in the Italian Official Journal on 16 May.

The law introduced article 25 *quaterdecies* - *“Fraud in sports competitions, illegal gambling or betting and gambling using illegal devices”* - among the predicate offences listed in legislative decree 231/2001 and provides as follows:

*“1. As regards the commission of the offences referred to in articles 1 and 4 of law 401 of 13 December 1989, the following pecuniary penalties apply: up to five hundred units (quote) for the commission of felonies (“delitti”); up to two hundred and sixty units for the commission of misdemeanors (“contravvenzioni”).*

*2. Anyone sentenced for any of the offences referred to in paragraph 1(a) of this article shall be liable for disqualification pursuant to article 9(2) for at least one year”.*

Corporate liability may be triggered by conducts leading up to sports fraud pursuant to article 1 of law 401/1989, which punishes anyone offering or promising cash or other valuable interests or advantages to any participant in a sport competition organized by recognized federations, or commits fraudulent actions, with a view to an outcome other than that which would result from fair competition.

The rule also punishes the participant in the competition who accepts the cash or other valuable interests or advantages, or the promise thereof.

On the matter of illegal gambling or betting, article 4 of law 401/1989 punishes the performance, organization or sale of gambling or betting activities without administrative authorization.

Law 39/2019 – and therefore the amendments to legislative decree 231/2001 – entered into force on 17 May 2019.

### 1.3

#### **Changes to the rules on “voto di scambio” (trading electoral votes for short-term benefits, pay or favors)**

On 14 May, the Italian Senate approved Bill 510-B concerning the amendment of article 416-ter of the Italian Penal Code on “voto di scambio politico-mafioso” (trading of electoral votes), which extends the scope of article 416-ter of the Penal Code: in addition to punishing the person who accepts the promise to procure votes through members of an organized crime group (*mafia*), in exchange for cash or other valuable interest, the law also punishes anyone “promising to procure votes, either directly or through an intermediary”, in the same manner.

Harsher penalties have also been introduced (imprisonment between ten and fifteen years, and perpetual ban from holding public offices, as well as aggravating circumstances for politicians elected as a result of a trade of electoral votes).

Article 416-ter of the Penal Code is also relevant for the purposes of corporate liability since it is expressly referred to in article 24-ter of legislative decree 231/2001 (“Organized crime activities”).

## 1.4

### **“Decreto sblocca cantieri” amends article 2477 of the Italian civil code, introducing new thresholds for the appointment of a Board of Statutory Auditors/Sole Auditor/Audit Company**

Decree law No 32 of 18 April 2019 containing urgent provisions for relaunching public works and accelerating infrastructure projects, urban regeneration and after-earthquake reconstruction (“Decreto Sblocca cantieri”) was converted into law on 12 June 2019 and, in the process, the thresholds triggering the obligation to appoint a Board of Statutory Auditor/Sole Auditor or Audit Company have been revised, as follows:

*“A Board of Statutory Auditor/Sole Auditor or Audit Company shall be appointed if a company:*

- a) Is required to prepared consolidated financial statements;*
- b) Controls a company subject to audit;*
- c) Exceeded any of the following limits for two consecutive fiscal years:*
  - 1. Total assets in the balance sheet: 4 million euro;*
  - 2. Revenue from sales and services: 4 million euro;*
  - 3. Average number of employees during the year: 20.*

*The obligation to appoint the Board of Statutory Auditor/Sole Auditor or Audit Company [...] shall cease when none of the above limits is exceeded for three consecutive fiscal years”.*

As a result of the changes, the limits originally prescribed by the Business Crisis and Insolvency code have increased twofold, thus avoiding the obligation for small and medium-sized enterprises to appoint a Board of Statutory Auditor/Sole Auditor or Audit Company.

The deadline for Italian Srls (limited liability companies) to appoint a Board of Statutory Auditor/Sole Auditor or Audit Company and amend the memorandum and articles of association, if required, has remained unchanged (16 December 2019).

## GUIDANCE

### 2.1

#### **A Memorandum of understanding has been signed between the Italian Data Protection Authority and the Vasto Public prosecutor's office (*Procura*)**

On 22 May 2019, the Italian Data Protection Authority signed a memorandum of understanding with the Vasto Public Prosecutor's office (*Procura*) for the implementation of the new data protection rules introduced by legislative decree 101/2018 which has significantly amended the prior Italian Data Protection Code; the new articles 167(4), 167-bis(3) and 167-ter(2) of the decree require the public prosecutor (*pubblico ministero*) to inform the Data Protection authority without delay of any data protection offences reported to the judicial authorities. To this effect, the authority must be provided with complete information in order to be able to implement the appropriate administrative measures.

This is the second MoU entered into by the Authority with a Public Prosecutor's Office to encourage the implementation of the new data protection legislation (and which exactly replicates the first one signed on 8 January with the Rome Public Prosecutor's office).

### 2.2

#### **The Italian anticorruption authority (ANAC) and the Italian Insurance Supervisory Authority (IVAss) have signed the Memorandum of Understanding for joint contracting strategies**

On 9 May, the Italian Anti-corruption authority disclosed in a press release that it had signed a memorandum of understanding concerning joint contracting procedures in accordance with the Italian Public Contracts Code (*Codice dei contratti pubblici*), signed in November 2018 by the Bank of Italy, CONSOB (the Italian securities exchange authority) and the Italian Antitrust Authority.

By a special-purpose addendum, the contents and the effect of the MoU have been extended to the Italian anticorruption authority (ANAC) and the Italian Insurance Supervisory Authority (IVAss).

The November 2018 MoU lays down the procedure for coordinating the Authorities that are parties to the agreement in order to identify joint strategies in public works, supply and procurement contracts and improve the level of transparency and the anti-corruption measures adopted, as well as ensure greater cost savings.

A technical round table – composed of two members for each of the authorities concerned - is going to be set and shall meet twice a year, to provide guidance, coordination and supervision.



## 2.3

### **"Decreto Sbocca cantieri" (the decree promoting the relaunch of building and development activities): issues identified by the Italian anticorruption authority**

On 17 May, ANAC published the outcome of its study of the main changes introduced by decree law 32/2019 ("*Decreto Sbocca cantieri*") and any issues identified ("*Approfondimento sulle principali novità introdotte e le possibili criticità contenute nel D.L. 32/2019*").

In particular, the Anticorruption authority criticized the choice to replace the implementation measures of the Public Works Code with a single regulation, which may not be adequate to cover all the areas dealt with by the guidelines and ministerial decrees composing the Code.

ANAC also raised some criticism against the changes affecting the reasons for exclusion from calls for tender, which could give rise to disputes and ultimately slow down the award of public contracts.

In the Authority's view, the repeated amendments to the Code (legislative decree 50/2016) will result in the sector legislation becoming unclear, fluid and constantly changing, with the risk that industry players could meet with difficulties in the application of the relevant rules.



## CASE LAW

### 3.1

#### **The Trani Court ruled that it is possible to join criminal proceedings as a civil party seeking damages in trials pursuant to legislative decree 231/2001**

On 7 May 2019, the Trani Court, in decree No 689/2019, pronounced on the age-old issue of whether it is possible to join criminal proceedings as a civil party seeking damages in corporate liability proceedings. The trial concerned the railway disaster of 12 July 2016. During the trial, the Judge of the pre-trial hearing had rejected the request by a consumer association to join the criminal proceedings as a party seeking damages against the railway company, charged with negligent homicide and grievous or very grievous bodily harm committed in violation of health and safety at work rules, which constitutes a predicate offence pursuant to article 25-*septies* of legislative decree 231/2001. In the absence of express legislation on the matter, the Italian Supreme Court's general opinion (shared by some lower courts) is that this possibility should be denied.

However, after examining the matter at length, the Trani court departed from the prevalent case law and allowed the possibility for the party who suffered harm to claim damages directly from the company.

### 3.2

#### **The employer is not liable for accidents at work if it was not aware that its employees adopted careless practices**

On 15 May 2019, the Italian supreme court filed decision No 20833/2019 concerning accidents at work and providing significant insight on employer liability issues.

The case concerned an employee who had hurt his hand in a cutting machine. The lower court judges had charged the employer with involuntary bodily harm pursuant to article 590 of the Italian penal code, due to the violation of article 71 of legislative decree 81/2008 on the grounds that it had failed to check the safety of the equipment (it had been ascertained that the workers regularly removed the safety device before using the cutting machines).

The Italian Supreme Court noted that there was no certainty that the employer was actually aware of such incorrect practice, and ruled that in the event of accidents resulting from the removal of equipment safety devices, including where this constituted a recurring practice, the employer could not be held liable for the employees' failure to use the safety device unless it could be ascertained that it was aware of such practice or that it had negligently ignored it.

This is a significant decision in terms of interpretation of corporate liability rules, since negligent bodily harm caused in breach of safety at work rules is a predicate offence pursuant to article 25-*septies* of legislative decree 231/2001.

### 3.3

#### **Contractor liability for accidents and work**

In decision No 15335/2019 of 9 April 2019, the Italian Supreme Court (*Corte di Cassazione*) analyzed the issue of corporate liability for negligent homicide pursuant to article 25 *septies* of legislative decree 231/2001 in respect of contracting and sub-contracting companies.

In the case at issue, a contractor that had been hired to build a pool had sub-contracted some of the works to a third party, one of whose laborers (an irregular worker) had died on the job. After being acquitted at the end of the lower court trial, the company had however been sentenced by the appeals court for failure to coordinate the management of the risks to the workers' safety with the sub-contractors. The Supreme Court subsequently confirmed the appeals court decision, confirming that with respect to construction sites involving more than one company, the principal was required to:

- Prepare the document on the risks generated by interference between activities conducted simultaneously in the same workplace (DUVRI - *documento unico per la valutazione dei rischi da interferenze*);
- Appoint the project coordinator in charge of drawing up the safety and coordination plan (*piano di sicurezza e coordinamento, PSC*);
- Appoint the works coordinator, in charge of checking the adequacy of each company's safety plan, both in connection with the safety and coordination plan (PSC) and with the works to be carried out.

In the case at issue, it was noted that no coordinator had been appointed and that the company's safety plan was severely deficient; in particular, the judges considered that the deficiencies were designed to save on the costs for the implementation of adequate safety measures which would have prevented the tragic occurrence from happening.

### 3.4

#### **Caporalato (gangmaster system) and companies managed by a court-appointed receiver (amministrazione giudiziaria)**

On 14 May 2019, the Milan Court ordered the seizure of all assets of, and appointed a receiver for, a



## CASE LAW

logistics company charged with Illegal staff leasing and labor exploitation (article 603-*bis* of the Italian Penal Code). The company had knowingly used the services of cooperatives who adopted illegal working practices, to the detriment of workers.

The Court order was designed to remove such illegal practices, analyzing and amending the contracts entered into with the cooperatives, while at the same time protecting jobs.

Furthermore, the company under receivership was ordered to prepare a new Organizational model, since the one currently in place was judged to be inadequate.

## COMPLIANCE NEWSLETTER | MAY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 2019.  
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](mailto:UFFICIOSTUDI@STUDIOPIROLA.COM)