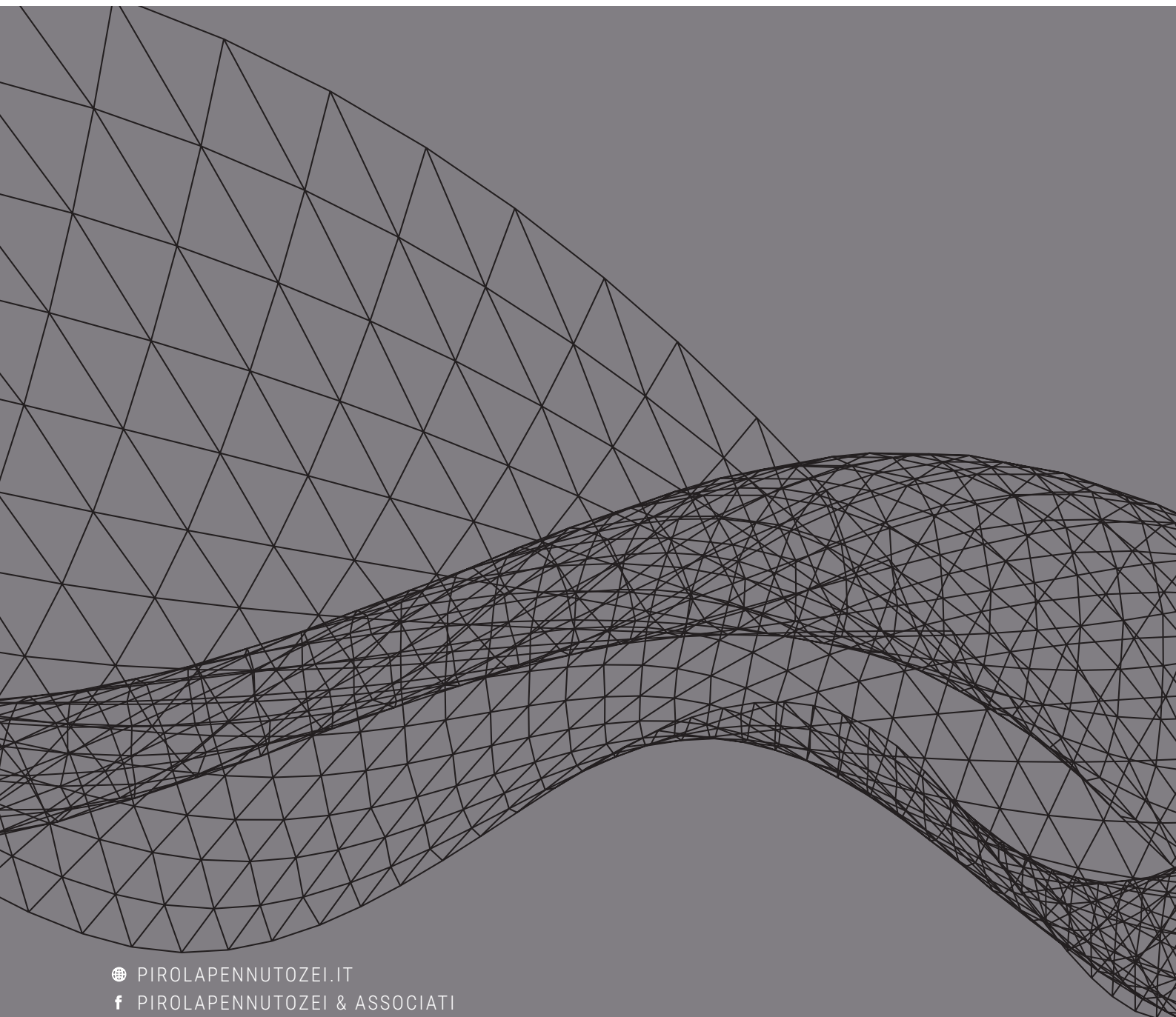


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# COMPLIANCE

NEWSLETTER / JANUARY 2019



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## LEGISLATION

### 1.1

#### **The Anti-corruption law (“Spazzacorrotti”) has entered into force**

Law No 3 of 9 January 2019 introducing “*Measures to combat crimes against the Public Authorities, concerning the time-barring of offences and the transparency of parties and political movements*” entered into force on 31 January 2019. As mentioned in our earlier Newsletters, the law, published in the Official Journal on 16 January 2019, also affects the rules on administrative corporate liability.

In addition to enhancing the penalties for corruption-related offences, the law also added undue peddling of influence, regulated by the new article 346-*bis* of the Italian Penal Code, to the list of predicate offences. The new penal code article now covers also those conducts that used to fall within the scope of *millantato credito* (fraudulent claim to influence with public officials, made so as to obtain a bribe).

Purpose of the rule is to crack down on cronyism in political and administrative decisions, and in particular to punish anyone who - taking advantage of actual or claimed influence with public officials – receives undue advantages, financial or otherwise, for him/herself or any third parties, as well as for the person who offers such advantages or promises to reward the influence peddler for his/her real or claimed influence.

### 1.2

#### **The Council of Ministries has approved the new code on insolvency and business crisis**

The Council of Ministry has approved the legislative decree containing new legislation on insolvency and business crisis (without prejudice to the special laws regulating *amministrazione straordinaria delle grandi imprese* - management of large-sized companies in financial difficulties by a government-appointed receiver - or *liquidazione coatta amministrativa* - administrative compulsory winding up).

Purpose of the reform is, among others, to promptly identify the companies in financial difficulties, including via an alert procedure, and to introduce single judicial assessment proceedings.

As regards administrative corporate liability, the law did not implement the proposed differentiation between natural persons and bodies corporate in the application of the precautionary measures provided by legislative decree 231/2001 as an alternative to bankruptcy proceedings. Therefore, the same rules

on attachments and seizures in criminal proceedings apply regardless of the person affected by the measures.

## 1.3

### **Peru: Publication of the implementing regulation on Organizational Models**

Regulation No 2/2019 concerning the organizational models provided by the Peruvian corporate liability law of July 2917 (*Ley N 30424, "Ley que regula la responsabilidad administrativa de las personas jurídicas"*) was published in Peru on 9 January 2019.

Purpose of the regulation is to develop the minimum prevention standards and measures, which companies may voluntarily implement to mitigate the risk of committing the crimes covered by the Ley. The regulation applies to private and public entities which may be exposed to the commission of one of the crimes provided by article 1 of the law, and focuses on the stages of risk management and the conditions to be included in the models, with specific provisions for SMEs.

## GUIDANCE

### 2.1

#### **The French Authority imposed a €50 million penalty on Google**

On 21 January 2019, the restricted committee of the CNIL (France's "*Commission nationale de l'informatique et des libertés*") imposed a penalty against Google for violating the General Data Protection Regulation (GDPR). This is the first time in which the penalties provided by the GDPR have been applied in France.

During 2018, the CNIL had received appeals from various French trade associations who complained of the lack of sound legal basis for the processing of personal data by Google, with particular regard to the customization of ads.

The French Authority acceded to the appeals and acknowledged the lack of transparency and information in the processing of users' personal data by Google.

The consent given to ad customization was not acceptable on the grounds that the purpose of (the massive and intrusive) processing was considered unclear. Furthermore, the subject person's consent did not appear to have been properly obtained, since there was no way of knowing all of the services and applications involved in the processing.

Therefore, the CNIL sentenced the US giant to a 50 million euro penalty.

### 2.2

#### **The Whistleblowing app is available for state employees**

In its communiqué of 15 January 2019, the President of the Anticorruption authority disclosed that the state employees' whistleblower application was available for use, as part of the process for the implementation of the whistleblowing legislation introduced by article 54-*bis* of legislative decree 165/2001 as amended by law 179/2017 "*Provisions for the protection of anyone reporting crimes or irregularities they became aware of within the scope of their public or private employment*".

Whistleblowers may use the application to report alleged offences to the person in charge of corruption prevention and transparency (the RPCT (*Responsabile della prevenzione corruzione trasparenza*) who may send confidential messages to the whistleblowers and, if necessary, ask them to disclose their identity, subject to the authorization of a third party (the "*keeper of the [whistleblower's] identity*").

The software is available on an open source basis and its distribution is regulated by EU Public Licence v. 1.2 <https://eupl.eu/1.2/it/>, which allows its use as free software without any further authorization by the Italian anticorruption authority.

This is a major opportunity to encourage the spreading of whistleblowing management systems ensuring full protection of whistleblowers, as required by article 54*bis* of legislative decree 165/2001, and of companies, which may take advantage or inspiration from the app made available by the authority (since the EU PL allows free use of the software by anyone concerned).

## 2.3

### **A new protocol of understanding has been signed between the Italian Privacy Authority and the Rome Procura (public prosecutor's office)**

On 8 January 2019, the Italian Privacy Authority signed a protocol of understanding with the Rome public prosecutor's office for the implementation of the new personal data protection legislation introduced by legislative decree 101/2018, which has significantly affected the old data protection code. In particular, the new articles 167(4), 167-*bis*(3) and 167-*ter*(2) require that the public prosecutor should inform the Privacy authority without delay of any offences in connection with personal data protection.

The privacy notice will have to contain the information necessary for the initiation by the Authority of any related administrative proceedings.

## 2.4

### **New environmental Guidelines issued by Assolombarda (the association of companies doing business in the Milano, Lodi, Monza e Brianza area)**

The Environmental quality working party (*Gruppo di Lavoro Qualità Ambientale*) of Assolombarda (the association of companies in the Milano Monza Brianza and Lodi area) published operating environmental guidelines for the purposes of legislative decree 231/2001.

After the 2011 reform resulting in the inclusion of environmental offences among predicate offences, no official guidance on how to word the relevant section of the Organizational Model had been issued.

The current guidelines are a follow-up to the preliminary guidance issued by Assolombarda in 2013 and deal with the additional conditions imposed by new legislation (e.g., law 68/2015, introducing environmental crimes - Title VI-*bis* of the Italian Penal Code) and by the 2015 version of the ISO 14001

standard, incorporated into the European EMAS regulation, focusing on the interaction between the Environmental Management System and the 231 Model and the use of the former as an effective component of the latter.

Particular attention is given to the assessment of risks and to the responsibilities and the role of the Supervisory Body in preventing the commission of environmental crimes.

## 2.5

### **CNDCEC (the national council of the association of chartered accountants and accounting experts) has published the principles for the drawing up of Models 231**

The national council of the association of chartered accountants and accounting experts has approved the document named "*Principi consolidati per la redazione dei modelli organizzativi e l'attività dell'organismo di vigilanza e prospettive di revisione del d.lgs. 8 giugno 2001, n. 231*" (Common principles for the drawing up of the organizational models and the role of the supervisory body and possible reexamination of legislative decree No 231 of 8 June 2001), drawn up jointly with the Italian banking association (ABI), the National Lawyers' council (*Consiglio Nazionale Forense*) and the Italian Employers' Association (*Confindustria*), which shared their expertise with a view to the identification of high-level principles concerning the preparation of Models 231 and the role of the Supervisory Body. CNDEC has also proposed some changes to the current rules.

The document has been uploaded for public consultation on CNDEC's website.



## CASE LAW

### 3.1

#### **Supreme Court decision: companies' in-house rules are always mandatory**

On 3 January 2019 the Supreme Court filed decision No 5/2019 providing interesting clarification on the corporate governance and internal audit of listed companies: in the opinion of the Court, companies' in-house rules are always mandatory, even if stricter than the legislation in force.

In the case at issue, a statutory auditor (*"sindaco"*) had been found guilty of failing to inform CONSOB - the Italian securities exchange commission - of the non-approval of a press release. Article 149 of the Italian consolidated law on financial intermediation (*Testo Unico della Finanza*) provides that statutory auditors shall notify *"CONSOB without delay of any irregularities identified in the performance of their supervisory activities and deliver the minutes of meetings and of the audits conducted as well as other relevant documentation"*. The rule does not expressly require statutory auditors to inform the Supervisory Authority of the non-approval of press releases. However, the Company's internal policies imposed this obligation, as well as the obligation to report any breach of internal procedures.

The Supreme Court considered that this violation constituted a case of failure to perform supervision in a corporate governance matter and a violation of proper management duties, since in general terms the board of statutory auditors is in charge of monitoring the proper management of the company from an administrative and accounting perspective but also to ascertain the consistency of business choices with corporate objects and the reasonableness of the transactions carried out by the Board of Directors and other management bodies, having regard to the company's financial circumstances, the existence of any actual or potential conflict of interest and in general any other event relevant for the company.

### 3.2

#### **Rome judge of pre-trial hearings (*Giudice Udienza Preliminare - GUP*): the company is liable for its failure to include the geopolitical risk in its *"Document on the risks generated by interference between activities conducted simultaneously in the same workplace"* (DUVRI - *documento unico per la valutazione rischi da interferenze*)**

On conclusion of fast-track trial proceedings (*rito abbreviato*), the Rome judge of pre-trial hearings found the top management of a Company (*Bonatti*) guilty, and sentenced them to the payment of a penalty pursuant to legislative decree 231/2001 for negligent cooperation (*cooperazione colposa*) in the murder



## CASE LAW

of two company employees: in 2015 four employees were kidnapped near Mellitah, Libya during their transfer to the ENI sites they were working and two of them lost their lives as a result.

The judge upheld the liability of the Company's president and board of directors in this connection and charged a euro 150,000 penalty on the company for failing to prepare a risk assessment document in connection with the employees' work abroad and in particular for neglecting to consider the geopolitical risk in the relevant foreign Country.

## COMPLIANCE NEWSLETTER | JANUARY 2019<sup>e</sup>

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JANUARY 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)