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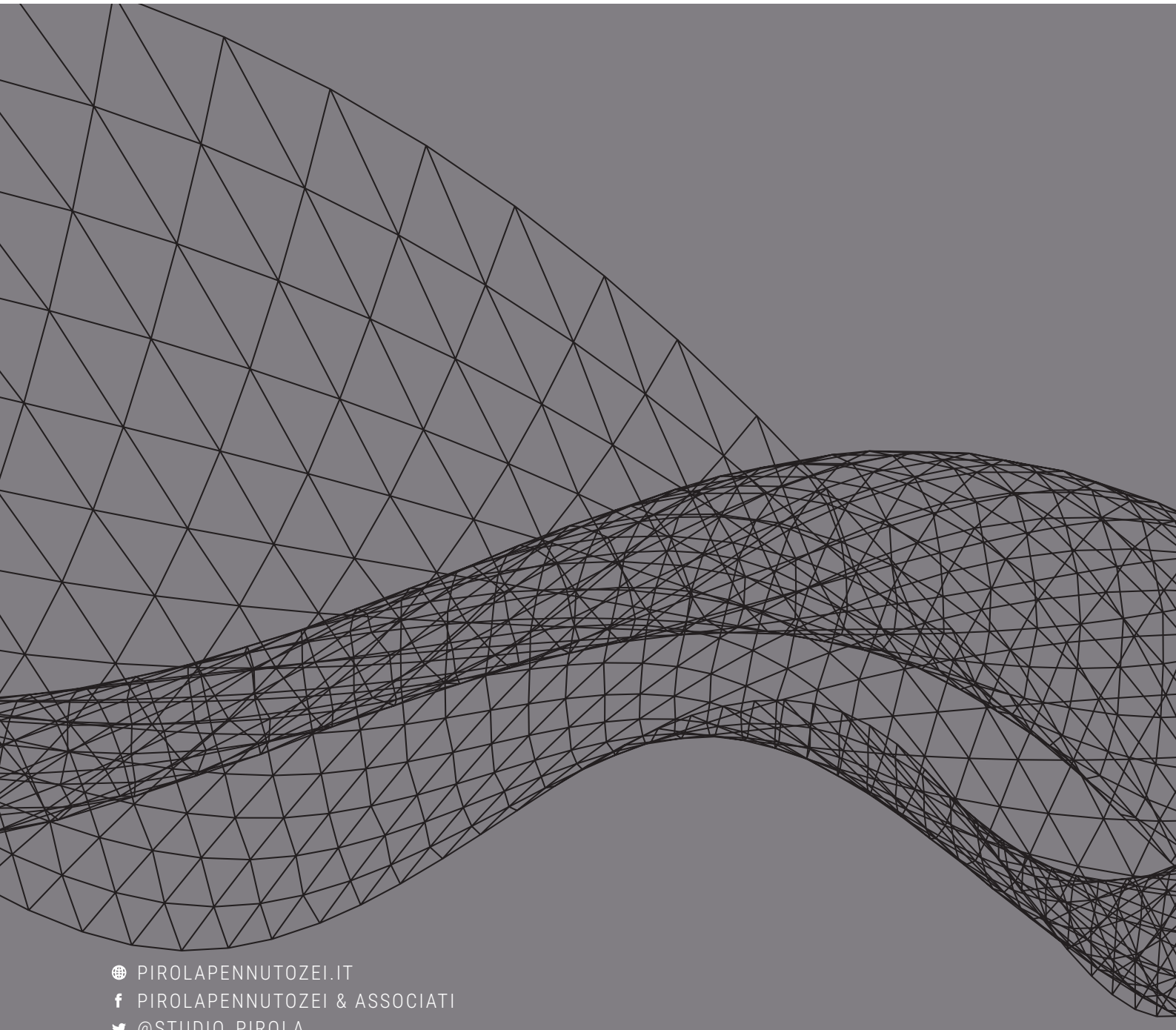
COMPLIANCE

NEWSLETTER / FEBRUARY 2019



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LEGISLATION

1.1

The "*Simplification Decree*" has been converted into law and the waste traceability control system (SISTRI) has been abolished

Law No 12/2019, which converted decree law No 135/2018 containing "*Urgent support and simplification provisions for companies and the public authorities*" (the Simplification Decree), entered into force on 27 February and, among other things, definitively abolished the waste traceability control system (SISTRI), replacing it with the "*National electronic waste traceability register*".

Companies which:

- carry out waste processing activities;
- produce hazardous waste;
- collect or transport hazardous waste on a professional basis;
- carry out business as traders and intermediaries in hazardous waste

will have to be entered in the register. The Register will be kept directly by the Ministry for the Environment and the Protection of the Territory and the Sea.

Pecuniary penalties apply in the event of breach of the registration obligation or non-payment, or partial payment, of the contribution.

Pending implementation of the new waste traceability register, companies will comply with the obligations imposed by SISTRI.

1.2

The proposal to include sports fraud among the predicate offences regulated by legislative decree 231/2001 has been submitted to the Italian Senate

Bill No 337 on the "*Ratification and implementation of the Council of Europe Convention on the Manipulation*

of Sports Competitions, done in Magglingen on 18 September 2014" - currently under study by the Italian Senate – suggested significant changes to Legislative Decree 231/2001.

In particular, article 5 of the Bill introduced the new article 25-*quaterdecies* into Legislative Decree 231/2001 ("*Fraud in sports competition, illegal gambling or betting and gambling using illegal devices*").

In the event of commission of these offences, a pecuniary penalty of up to five hundred quotas and disqualification measures may apply.

GUIDANCE

2.1
Information note by the European Data Protection Board on data transfers under the GDPR in the event of a no-deal Brexit

On 12 February, the European Data Protection Board (EDPB) issued an "*Information note on data transfers under the GDPR in the event of a no-deal Brexit*".

The note, which provides information to commercial and public organizations, stated that in the absence of an agreement between the EEA and the UK (no-deal Brexit), the UK will become a third country from 00.00 am CET on 30 March 2019. This means that the transfer of personal data to the UK has to be based on one of the following instruments as of 30 March 2019:
- standard data protection clauses
- ad hoc data protection clauses
- binding corporate rules
- codes of conduct and certification mechanisms
- specific transfer instruments available to the public authorities.

The derogations provided by article 49 of the GDPR can be used only in the absence of Standard Data Protection Clauses or other alternative appropriate safeguards.
As regards instead Data transfers from the UK to EEA Members, according to the UK Government, the current practice, which permits personal data to flow freely from the UK to the EEA, will continue in the event of a no-deal Brexit.

2.2
The French Anticorruption Authority has published the new guidelines for the application of *Loi Sapin II*

On 4 February, the French Anticorruption Authority (*Agence française anticorruption* - AFA) published the new guidelines for the application of *Loi Sapin II*, the French anticorruption law, which provide *inter alia* guidance on the position of the corruption prevention manager within an organization and clarify his/her responsibilities in the implementation of the obligatory compliance measures imposed by article 17 of *Loi Sapin II*.

2.3

The Guidelines on "*Models 231*" have been published on the website of the National Association of Chartered Accountants and Accounting Experts

On 19 February 2019, the National Association of Chartered Accountants and Accounting Experts published the final version of the "*Principles for the preparation of the organizational models and the activities of the supervisory body, and proposed changes to legislative decree 231 of 8 June 2001"*.
Purpose of the guidelines is to identify high-level principles for the preparation of Models 231 and the performance of the Supervisory Body's role. The Association has also proposed a number of changes to current legislation: for example, it suggested revising the procedure for judicial assessment of an offence and introducing rewarding mechanisms to incentivize companies to draw up the Organizational Model 231.

2.4

The National Association of Chartered Accountants and Accounting Experts has published the new Code of Ethics for auditors of local authorities

On 22 February 2019, the National Association of Chartered Accountants and Accounting Experts published the updated version of the "*Principles of supervision and control by the Auditors of local authorities*", consisting of twelve documents which provide significant guidance on the composition, operation and function of the audit company and the frequency of its controls.

2.5

European Data Protection Board: Guidelines on Codes of Conduct and monitoring bodies

On 12 February, the European Data Protection Board published Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under the GDPR.
The Guidelines specify the nature and function of the codes of conduct as well as the criteria for their approval. The Codes are voluntary accountability tools, which lay down specific data protection rules for categories of controllers and processors. They also specify the accreditation mechanisms for Monitoring Bodies.

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2.6

Association of Members of Supervisory Bodies: Supervisory Body and Privacy issues

On 25 February, the Association of Members of Supervisory Bodies published a draft document on the Role of the Supervisory Body pursuant to data protection legislation, as the entry into force of the GDPR had triggered a debate on the possibility that the Supervisory Body may be regarded as Controller or Processor. This is a matter of some significance since, as part of its duties, the Supervisory Body carries out data processing in respect of the data and information it receives from the performance of its control and supervisory tasks and from any reports of illegal activities.

The Association has examined in detailed corporate administrative liability rules and data protection regulations and concluded that the Supervisory Body may not be regarded either as a Controller or as a Processor, on the basis that – despite its autonomy and independence – it forms "*part of the company*" and therefore cannot separately hold either role in accordance with data protection regulations.

CASE LAW

3.1

Autoriciclaggio: clarification from the Supreme Court on intercompany transfers

On 5 February, the Italian Supreme Court filed decision No 5719/2019 on the crime of *autoriciclaggio* (laundering of proceeds of criminal conduct by the same person who committed or contributed to the commission of the predicate offense which resulted in the realization of such proceeds – a predicate offence under Decree 231) in intercompany transactions.

In the case at issue, a manager in the healthcare sector had been investigated for fraudulent bankruptcy and *autoriciclaggio* on the grounds that he had misappropriated cash from a number of subsidiaries which he had then paid into the ultimate parent company's current account. The money was subsequently used, *inter alia*, as loan collateral and to pay mortgage instalments.

The manager's defense lawyer appealed to the Supreme Court against the Reggio Calabria lower court decision, on the grounds that such transfers constituted a mere misappropriation of funds and not a case of *autoriciclaggio.*

Instead, in the Italian Supreme Court's view if all the conditions of the crime under article 648-*ter* (1) of the Penal Code are met, the perpetrator is liable to punishment, regardless of whether he ultimately "*merely*" used or actually took advantage of the assets for personal reasons.

Therefore, any withdrawal or transfer of funds made by the perpetrator of the predicate offence, including the mere transfer of illegally obtained funds between funds open in the name of different holders and with different banks, constitutes a case of *autoriciclaggio.* For this reason, the Court rejected the appeal.

3.2

Commercial fraud and calculation of the profits from the crime

On 31 January, the Italian Supreme Court – 3rd Criminal section – filed decision No 4885/2019 on a matter of commercial fraud (a predicate offence regulated by article 515 of the Italian Penal Code), establishing a key principle concerning the determination of the profits from this crime.

In this specific case, the lower court judges had ordered the seizure of the profits realized by a Company investigated for commercial fraud, and determined such profits as the difference between revenue and the purchase cost of raw materials, without deducting the costs incurred to process the raw materials.

The legal representative of the Company appealed against the decision but the Supreme Court clarified that profits from a crime cannot be determined using regular business criteria, and therefore, the costs for any – albeit legal – activities leading up to the commission of a crime are not deductible in determining the profits. For this reason, the Court rejected the appeal.

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 | FEBRUARY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 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