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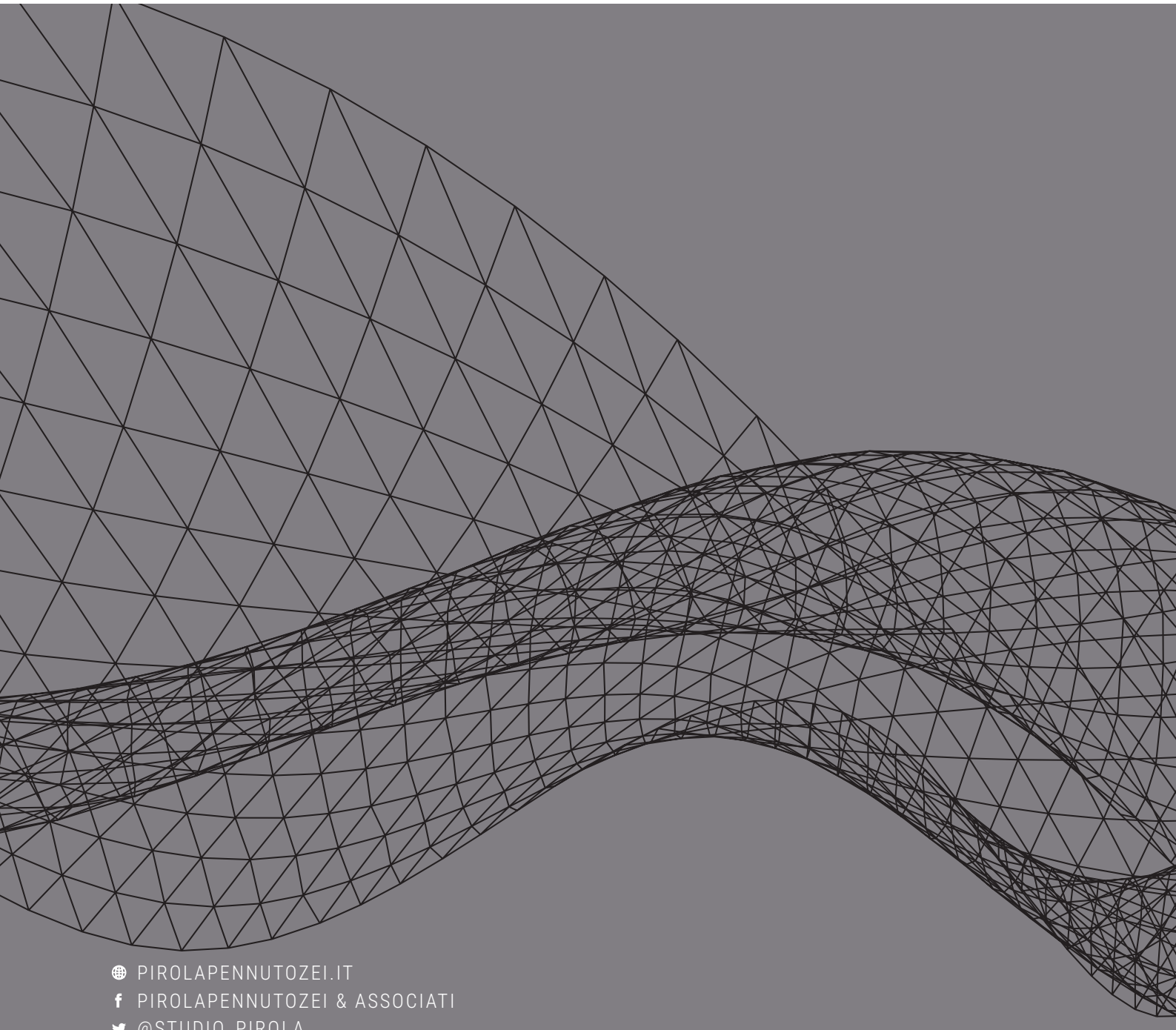
COMPLIANCE

NEWSLETTER / OCTOBER 2019



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LEGISLATION

1.1

The Fifth Anti-money laundering Directive has been implemented

Legislative Decree No 125 of 4 October 2019, implementing the Fifth AML Directive (No 2018/843) was published in the Italian Official Journal on 26 October and entered into force on 10 November 2019.
The Decree expanded and clarified the categories of persons liable to anti-money laundering obligations and introduced enhanced client due diligence measures for clients doing business in Countries at a higher risk of money laundering and terrorist financing, as well as the possibility for the supervisory authorities to introduce new ways of reducing Third Country risks, such as, for instance, denying foreign intermediaries the authorization to carry out business in Italy.
The rule sets the deadline for transmitting client due diligence information at 30 June.

1.2

The EU Council has approved the new Whistleblowing directive

On 7 October, the EU Council adopted the "*Proposal for a Directive on the protection of persons reporting on breaches of Union law*" (the Whistleblower Protection Directive), to harmonize the domestic legislation of member states on the matter of the protection of whistleblowers.
The Proposal requires the creation of whistleblowing channels for companies with more than 50 employees and towns with more than 10,000 inhabitants. Whistleblowers shall be encouraged to use first the channels internal to their organization and only subsequently external channels.
Additionally, there are measures to protect external whistleblowers, such as self-employed, consultants and freelancers, as well as additional measures for the families of, and the colleagues who support, whistleblowers.
The Directive also requires the entities receiving the reports to reply within three months.
The Member States will have to transpose the content of the Directive within two years from its publication in the Italian Official Journal.

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1.3

The filing of a false return has been added to the list of 231 offences

Decree Law 124/2019, containing urgent tax provisions and published in the Italian Official Journal on 26 October, added a new case to the list of predicate offenses pursuant to legislative decree 231/2001, i.e. article 25-*quinquiesdecies* named "*Tax offenses*", according to which: "*In the event of filing a false return by using invoices or other documents for non-existing transactions pursuant to article 2 of legislative decree No 74 of 10 March 2000, bodies corporate shall be liable to a pecuniary penalty of up to five hundred quotas*".
The new article shall enter into force on the date of publication of the conversion law in the Italian Official Journal.

GUIDANCE

2.1

New FIGC (Italian soccer federation) Guidelines concerning Organizational Models in the world of soccer

On 1 October, the federal council of F.I.G.C. (the Italian soccer federation) approved the guidelines for the adoption of organizational, management and control models to prevent actions contrary to principles of loyalty, integrity and probity. As is the case for the Models pursuant to legislative decree 231/2001, the new FIGC models are designed to avoid the soccer club's responsibility since, before the approval of the Guidelines, the club was always liable for a sporting offence committed by its members.
Consistently with the 231/2001 Models, FIGC Models must lay down measures to ensure that sports activities are carried out in accordance with the law and with sports regulations and to point out any risk situations. Furthermore, a code of ethics and a disciplinary systems to punish any violations are expected to be implemented. Finally, bodies corporate will be required to appoint an entity in charge of monitoring compliance with the model.

2.2

The Italian National Anti-corruption authority (ANAC)'s report on corruption in Italy

On 17 October, the Italian National Anti-corruption authority published the report named "*La corruzione in Italia (2016-2019): Numeri, luoghi e contropartite del malaffare*" (Corruption in Italy (2016-2019): the figures and places of corruption and the favors given in return), providing an overview of the status of corruption in the public sector for the three-year period 2016-2019.
The data derived from the analysis of the measures issued by courts in the relevant period show an interesting pattern: for example, the regions mostly affected by corruption are those in Southern Italy, immediately followed by Lombardy, with 11 cases of corruption, accounting for 7.2% of the total number of cases ascertained over the three-year period. Another significant element is that most cases of corruption (74%) are in connection with public contracts.
The report highlights a change in the method of corruption, including the amounts of the bribes, which have significantly decreased from the past (e.g., at the time of "*Tangentopoli*") and in most cases do not exceed a few hundred euro.

2.3

The legal basis in contracts for online services under the EDPB Guidelines

On 16 October, the European Data Protection Board ("EDPB") published the "*Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects*", to clarify the legal basis in contracts for online services.
The Guidelines are based on the consideration that not all online services are paid for in cash, as often online services are funded by advertising, which tracks user behavior in ways the user is often not aware of.
On this basis, the Guidelines intend to circumscribe the scope of article 6(1)(b), which authorizes personal data processing if "*necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*".
Specifically, the Guidelines require online service providers to carefully evaluate whether the personal data processing related to the service is justified by the legal basis pursuant to article 6(1)(b) or whether such processing falls within the scope of other lawful basis. In doing this, they must evaluate whether processing is necessary for the performance of a contract, or the steps prior to entering into a contract. In this context, the notion of 'necessity' includes all cases where process is less intrusive compared to other options for achieving the same goal.
Moreover, the Guidelines laid down rules for the identification of the legal basis for processing carried out after the termination of a contract, e.g., for the return of goods or services.

2.4

Overview of the situation after a few months of implementation of the GDPR in Italy

On 29 October, the Italian Data Protection Authority published a document summarizing the requests and notices received between 25 May 2018 (the implementation date of the GDPR) and 30 September 2019.
From the document, it appears that there is growing awareness of privacy in the civil society, as proven by a significant increase in the main indices observed, such as complaints and reports (+23%), data breach reports (+21%) and contacts with the Public Relations Office (+14.5%).
It is worth noting that there were 1,530 data breach reports during the relevant period, i.e. an average of 3 a day since the implementation of the GDPR, a clear sign of the vulnerability of the Country's IT systems.

CASE LAW

3.1

The ECJ on the Internet filters

On 3 October 2019, the ECJ issued a ruling on case C-18/18 concerning the obligation for host providers to remove information whose content is identical or equivalent to that of information previously declared to be unlawful.

In this specific case, a female member of the Austrian parliament had asked Facebook to remove a comment prejudicial to her honor, together with all identical or equivalent comments subsequently posted on the social network. She had won the case in the first two court levels; then, the Austrian Supreme Court, recognizing the supranational significance of the matter, had referred the matter to the ECJ.

Based on the provisions of Directive 2000/31 (the "*e-commerce directive*"), the ECJ confirmed the Austrian judges' interpretation and agreed with the decision to cancel information whose content was identical to the content of information previously declared to be unlawful and, in any case, to block access to that information, provided that "*the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality*". In other words, domestic courts may order host providers (Facebook or even simple blogs) to remove contents that are identical or similar to contents which have already been declared to be unlawful, within the limits of the statements issued by the judge in the previous decision declaring such contents to be unlawful.

The ECJ decision constitutes a change of direction from the past, as it abandons the principle according to which online service providers are not required to constantly monitor the internet resources through which they render their services, thus creating an obligation to do just that. Such obligation is in any case limited to contents declared to be unlawful by court decisions and, in evaluating whether or not a provider should be compelled to constantly monitor the contents exchanged on its platforms, the domestic judge will have to take into account the means available to the host provider involved.

3.2

The principal is de facto accountable for accidents at work: the Italian supreme court decision

By decision No 26614/2019, filed with the clerk's office on 18 October, the Italian Supreme Court stated the

obligation for the principal to take all the necessary measures to protect the health of workers, including the "*contractor's*" employees, whether or not a contract has been entered into.
The case originated from the death of two entertainers working at a holiday resort in Egypt, involved in a road accident while out on a night time excursion with a group of tourists.
The Employment Court and the Bologna Appeal Court had ruled that the victims' formal employer and the tour operator they were working for at the time of their death were jointly liable, although no contract was formally in place between the two entities.
The Italian Supreme Court judges confirmed the lower courts' ruling and stated that the tour operator's liability arose from the fact that the two entertainers were carrying out the instructions given to them both by a representative of their employer and by the tour operator's manager, triggering application of article 2087 of the Italian civil code.
On this basis, the Italian Supreme Court concluded that accident protection had to be afforded to all individuals carrying out a job, regardless of whether or not they had been formally hired, provided that it can be demonstrated that the company was aware of the activity carried out by the injured worker.

3.3

Italian supreme court decision: the dissolution of a company prevents continuation of proceedings

In its decision No 41082/2019, filed on 7 October, the Italian Supreme Court stated a key principle according to which the non-fraudulent dissolution of a company prevents the continuation of proceedings initiated pursuant to legislative decree 231/2001.
The case concerned a company which both the court of first instance and the court of appeal had found guilty of offences committed by top managers. During the proceedings, the company had gone bankrupt for "*natural*" causes and, at the time of the supreme court hearing, had already been deregistered from the Companies Registry. For this reason, the Supreme Court judges had dismissed the case, based on the provisions of article 35 of legislative decree 231/2001, which extends to companies the provisions applicable to the death of a defendant.

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COMPLIANCE NEWSLETTER | OCTOBER 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 OCTOBER 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