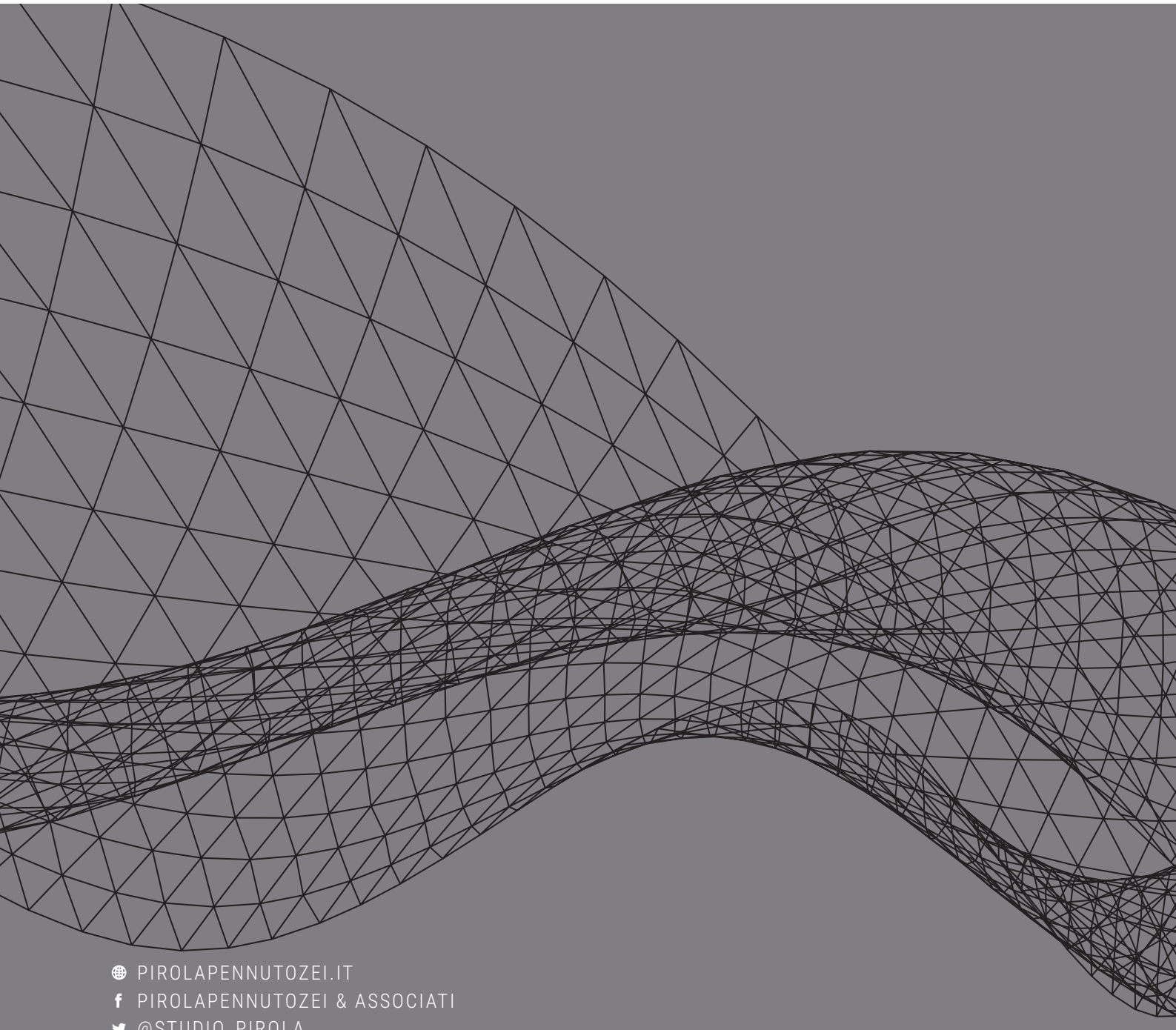
Pirola
Pennuto
Zei
& Associati

studio di consulenza
tributaria e legale

COMPLIANCE

NEWSLETTER / JANUARY 2018



PIROLAPENNUTOZEI.IT
PIROLAPENNUTOZEI & ASSOCIATI
@STUDIO_PIROLA
PIROLA PENNUTO ZEI & ASSOCIATI

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

LEGISLATION

GUIDANCE

CASE LAW

BACK TO TABLE OF CONTENTS ↑

LEGISLATION

1.1

Italian Budget Act 2018: new provisions with a view to the entry into force of the GDPR

Act no. 205 of 27 December 2017 - the Budget Act 2018 – which entered into force in January, introduced new obligations on the Italian Personal Data Protection Authority.

Paragraphs 1020 to 1025 provide that, following the entry into force of EU Regulation 2016/679, the Personal Data Protection Authority shall ensure the protection of the basic rights and freedoms of citizens by implementing, within two months of the entry into force of the GDPR, an enactment:

"*a) governing the procedure by which the Authority monitors the application of EU Regulation 2016/679;*

b) governing the method of checking - including by acquiring information from controllers of personal data processed by automated means or digital technology, - the presence of adequate infrastructure for the interoperability of the formats in which the data are made available to the data subjects for the purposes of both data portability pursuant to article 20 of the GDPR and of the timely adjustment to the provisions of the regulation;

c) provides for an information form to be completed by the controllers who carry out processing based on a legitimate interest which provides for the use of new technologies or automated means;

d) sets guidelines or good practices concerning personal data processing based on the controller's legitimate interest".

A specific section of the act deals with the use of new technologies or automated tools.

Pursuant to par. 1022: "*a data controller, identified pursuant to article 4(7) of the GDPR, carrying out processing based on a legitimate interest using new technologies or automated tools, shall timely inform the personal data protection authority accordingly. To this end, before starting the processing, the data*

controller shall send to the personal data protection authority a report on the subject, purposes and context of the data processing using the form as per paragraph 1021(c)."

The personal data protection authority will have 15 days to analyze the above information and if at the end of this period no response is received from the authority the controller will be allowed to carry out the processing.

If, instead, a risk of potential harm to the rights and freedoms of the data subjects is identified, the Authority has a maximum of thirty days to ask the controller for further information and additions, and prohibit the use of personal data in the event of continuing harm to the rights and freedoms of the data subjects.

1.2

Extension of the "*double track*" SISTRI regime – hard copy ledgers

The full entry into force of the waste traceability control system (SISTRI) has been deferred to 31 December 2018 and therefore paragraph 1134 of the Italian Budget Act 2018 has extended the period for the application of the formalities and obligations on matters of responsibility for waste management, waste registry, registers of in-and-out movements and waste transport in force before the issue of the new rules.

Therefore throughout 2018, the penalties provided by the SISTRI rules will not apply, except those concerning the failure to register with SISTRI and to pay the relevant registration fee (the latter penalties, provided for by paras 1 and 2 of the article 260-*bis* of Legislative Decree 152/2006, have been in force since 1 April 2015 and have been reduced by 50 cent).

Paragraph 1135 has added article 194-*bis* to the Environmental Code (legislative decree 152/06) introducing rules to streamline the waste traceability process and the recovery of any contributions due under the SISTRI system.

GUIDANCE

2.1

Consob implements its whistleblowing channels

Consob has implemented two new dedicated – telephone and electronic – channels for the immediate, and anonymous, submission of whistleblowing reports by staff of entities subject to regulatory supervision (SIMs, SGRs, Sicavs, banks and other entities) in connection with presumed violations.

Consob has been receiving whistleblowing reports from the staff of investment firms and banks in respect of alleged violations of the Italian Consolidated Law on Finance Law and of Union legal acts on the same subject matters since 3 January 2018.

2.2

Privacy: the data protection authority has issued new guidance on the European Regulation

The Italian personal data protection authority has published some FAQs regarding the Data Protection Officer which, although regarding government workers, provide clarification on the European General Data Protection Regulation also applicable to the private sector.

The Frequently Asked Questions supplement the information provided with the Guidelines adopted by the 29 Working Party.

The first considerations regard the designation of the Data Protection Officer (DPO) to be identified among highly professional persons who carry out their activity independently.

The Data Protection Authority "*strongly recommends*" the designation of the Data Protection Officer also for private entities who carry out public functions (such as concessionaires of public services).

As already clarified by the Guidelines "*in the performance of the tasks attributed to him/her pursuant to article 39*" the DPO shall not be subordinated to anyone nor shall he/she receive instructions on the approach to be adopted in the specific case ("*what are the expected results, how to conduct investigations*

following a complaint, whether or not the authority is to be consulted") or the interpretation of a given issue concerning data protection legislation.

Furthermore, pursuant to article 38(3) of the Regulation, the DPO shall "*directly report to the controller or processor's top officers*".

The possibility of assigning other tasks to the DPO shall be evaluated on a case-by-case basis. Although in principle this is allowed, the Authority stated has that with regard to large-sized companies, characterized by the processing of particularly complex and sensitive personal data, no further tasks and duties shall be assigned to the DPO.

2.3

INAIL incentives to enterprises for the adoption of the Models pursuant to legislative decree 231

INAIL (the Italian workers' compensation authority) has approved the general criteria for the implementation of the procedure for the granting of financial incentives to companies investing in safety features at the workplace (*Bandi ISI*) thus contributing to the documented improvement of working conditions.

The incentives will fund investment projects for the implementation of organizational and social responsibility models, for the reduction of risk resulting from the manual handling of loads and the cleanup of asbestos-containing materials, by micro and small enterprises engaged in specific business segments and for micro and small enterprises engaged in the farming business.

Applications will have to cover a single project and will be submitted through the INAIL website from 19 April to 31 May 2018 by enterprises, including sole proprietors, registered with the Chamber of Commerce.

The funds available for projects regarding the adoption of organizational and social responsibility models amount to Euro 100 million in the aggregate and to between Euro 5,000 and 130,000 per applicant.

COURT DECISIONS

3.1
Health and safety in the workplace: levels of liability within the company's organisation

By decision no. 52536/2017, the Italian Supreme Court has pronounced on a case of bodily harm to a female worker resulting from an accident at work caused by the malfunction of an industrial machine, and stated once again the various levels of liability within the company's organization.

The judges' reconstruction is supported by the guidance provided in decision no. 38343/2014 (Joint sitting of the Court of Cassation Chambers), stating that liability lies first and foremost with the employer, i.e. "*the person who is in charge of the organization of the company or production unit as it exercises decision-making and spending powers*".

At the intermediate level in the line of responsibility we find the manager/executive (dirigente) who "*carries out the employer's instructions, organizing and monitoring the working activity thanks to his/her professional skills and hierarchical and functional powers adequate to the nature of his/her role. He/she is required to cooperate with the employer to ensure compliance with the law and fulfil the obligations imposed on the employer by the law*".

Finally, the person in charge (*preposto*) supervises the activities, carries out the instructions received and ensures that they are implemented, on the basis and within the limits of hierarchical and functional powers adequate to the nature of his/her role.

The above persons have specific management and control powers as well as responsibilities, based on the company's business segment, legal form, organisation and size. *"In organizations of a certain complexity several persons, with different skills, may be appointed to the above roles. Within the same organization therefore there may be several guarantors. Because of such complexity, the criminally liable person is often identified through an accurate analysis of the various management and organizational areas within each entity*".

In that context, the Court of Cassation continued, the analysis of the powers, where granted, is a decisive factor: the delegation of powers must be made in writing and carry a "*certified date*" (date for official purposes), must have a definite, non-generic content and a clear and recognizable scope, and concern a person with professional skills and experience and vested with the relevant organizational, management, control and spending powers.

If the delegation of powers does not meet the legally-prescribed requirements, and since the principle of actual guarantor – "*according to which the guarantor is the person who actually takes on and exercises the powers of the employer, the executive or the person in charge*" - does not apply, the liable person shall be the "imperfect" delegating entity to whom the prevention functions and duties continue to be assigned.

3.2

Inducement to corruption: the offence is considered to be committed based on actual activities

By decision No. 57228/2017, the Italian Supreme Court sentenced a private limited company in the building industry for inducement to corruption pursuant to legislative decree 231/2001 per.

The facts are as follows: the legal representative of the company had solicited a city councilor (member of a local "*civic list*" – a party list presented at an Italian local election which has no official connection with a national political party) to act in breach of her professional duties by giving her support to the approval of a variation to the zoning regulation benefiting the company, in exchange for a 20,000 Euro bribe, which the councilor refused.

Although the company appealing against the lower court decision claimed that the person to whom the bribe had been offered was not a public officer but merely a member of a local civic list, the Supreme Court stated that the title of public officer depended on the activity actually carried out, regardless of whether or not the person concerned is an employee of a public body or agency.

In the Supreme Court's opinion, a city council decision to the advantage of the private individual who made the solicitation and to which the member of the civic list approached may have contributed by her vote in favor, constituted a form of inducement.

3.3

Liability pursuant to legislative decree "*231*": the notion of "*interest*" is not merely subjective

By decision No 295/2018 filed on 9 January, the Italian Supreme Court analyzed once again the criteria for the objective recognition of corporate liability, based on prior Supreme Court decisions.

Article 5 of legislative decree 231/2001 provides that the company is involved if an offence is committed "in its interest or to it advantage". The Supreme Court has often analyzed these criteria, considering them to be mutually exclusive.

The notion of "*interest*" is based on a "*teleological evaluation of the offence, which can be made ex ante at the time of committing the crime by a subjective judgment based on the psychological element of that specific perpetrator*", whereas the "*advantage*" has "*basically objective connotations, which may be evaluated ex post, on the basis of the effects which actually resulted from the commission of the offence and regardless of its original purpose*".

However, in the Supreme Court Judges' opinion, there has been a shift to an increasingly more objective notion of both advantage and interest, so much so that, in order for corporate liability to arise "*it is enough to prove that the company derived an advantage although it was not possible to identify its interest before the offence was committed*" and provided it was not determined that "*the offence was committed in the sole interest of the perpetrator, a natural person, or any third parties*". For this reason, "*the notion of interest contained in article 5(1) may not be strictly or solely a subjective definition, which would require a psychological evaluation of the case, not justified by the wording of the law*".

Thus, in the Supreme Court's opinion, "*just like the law does not necessarily require that for corporate liability to arise the perpetrator must have been seeking to attain the company's interest, it does not require either that the perpetrator must have been aware that it was achieving* [the company's] *interest through its conduct*".

3.4

Labor contracting: the contract is null and void if personnel is not externally managed

In order for labor contracting to be lawfully implemented, the key condition to be met is that the contractor be in charge of labor organization (other conditions being that the contractor assumes the relevant business risk and puts in place adequate means). Lacking this key condition, the arrangement shall be regarded as an agreement for the provision of staff, which is subject to significant limitations imposed by the law.

This is a decision made by the Italian Supreme Court in decree No 938 of 17 January 2018, which acceded to the appeal submitted by the Revenue Agency to declare a contract to be null and void, and resulting in non-deductibility of VAT and income taxes.

The agreement for the provision of staff (*somministrazione di lavoro*) is regulated by strict provisions (articles 20 ff of legislative decree 276/2003). Outside the cases provided by the decree, company may use third-party manpower by means of labor contracting, which however cannot provide for the mere provision of work services but requires the contractor to put in place an organization of means in connection with the work and the service.

In other words, providing the principal with manpower, on whom such principal exercises organizational authority, constitutes an unlawful provision of personnel. For this reason, the Italian Supreme Court in order No 938 stipulated that the contract is null and void if personnel is not externally managed.

Furthermore, where in the context of a case of unlawful provision of personnel one or more situations of exploitation referred to in the new article 603-*bis* of the Italian Penal Code are identified, in addition to the administrative fine charged to the principal pursuant to article 18(5-*bis*) of Legislative Decree 276/2003, both the principal and the contractor may be accused of operating a gangmaster scheme (a form of illicit mediation to labor contracting, called "*caporalato*") pursuant to article 25-quinquies of Legislative Decree 231/2001.

3.5

Video-surveillance and workers' rights: the right to respect for private life is paramount

In decision *López Ribalda* v. Spain (Application 1874/13) dated 9 January 2018, the European Court of Human Rights stated that a violation of the right to privacy stipulated by article 8 of the ECHR had been committed by a Spanish supermarket chain which had put in place covert surveillance of employees to investigate suspected cases of thefts, which were subsequently confirmed.

The supermarket manager had been noting for some time irregularities between daily cash receipts and stock levels which had roused his suspicions. In order to shed light on the circumstances, he had installed surveillance cameras, both visible (recording customers) and hidden (directed at the employees' areas and meant to record and control employees). Employees were given prior notice of the installation of the visible cameras but not the hidden cameras.

The Court stated that "*although the purpose of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves*".

Therefore, in the Court's view, pursuant to Spanish personal data protection legislation, the applicants should have been informed of the fact that they were being the subject of video surveillance, at least on general terms. Instead, they were totally unaware of the existence of some of the surveillance cameras.

Therefore, if the employer suspects his employees of theft, he has an obligation to warn them and provide them with general information on video-surveillance so as not to violate their right to privacy.

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 | JANUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JANUARY 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