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studio di consulenza
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COMPLIANCE

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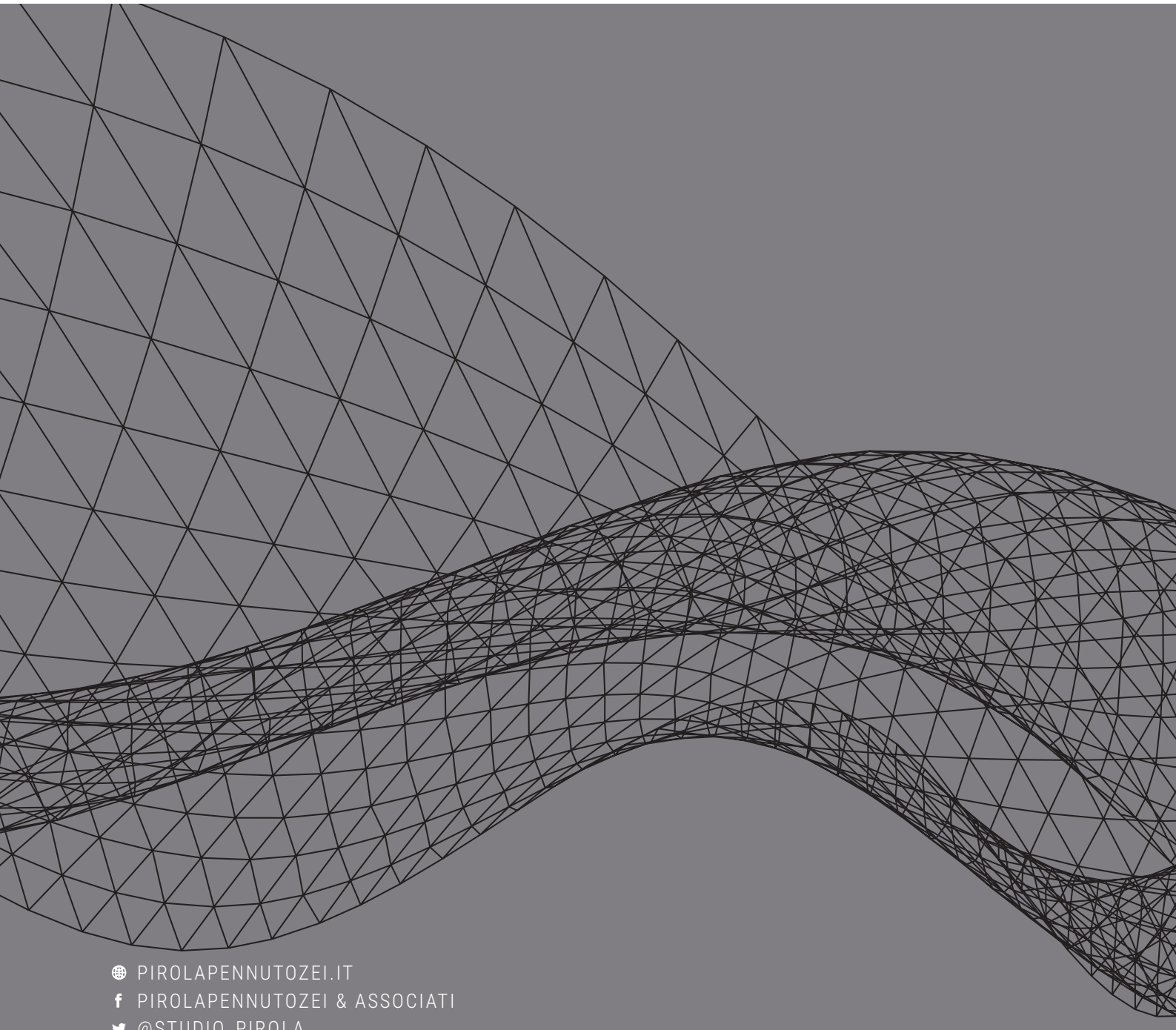

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LEGISLATION

1.1
GDPR: the Parliamentary Committees have completed the examination of the adjusting draft legislative decree

On 20 June last, the special-purpose Committee approved, with some observations and conditions, the draft legislative decree regarding the adjustment of Italian legislation to Regulation (EU) no. 679/2016 (GDPR), on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

Despite the amendments made to the original wording of the legislative decree, its original structure has been confirmed: the Italian Privacy Code has been widely reviewed and supplemented and only partly abrogated.

The main suggested changes include the following: the age for giving consent to the processing of data in relation to the offer of information society services has been lowered to 14 years and the definition of "*public interest*" as legal basis for the processing of the specific categories of data pursuant to article 9 of the Regulation has been widened.

As regards biometric and health data, the committee has requested that a specific list of data security measures be prepared and issued with the Data Protection Authority's annual enactment, to ensure the lawful processing of such data.

The special-purpose committee has also suggested that the Government amend the wording of the decree to clarify the obligation to appoint a Data Protection Officer and keep records of processing activities for small-sized firms and for controllers carrying out a "*large-scale*" processing operations.

The committee has also requested that the decree include the possibility for the Data Protection Authority to adopt guidelines regarding organisational procedures and measures for the implementation of the Regulation, taking into consideration the personal data processing simplification requirements for micro-, small- and medium-sized companies.

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With reference to the applicable fines, the special-purpose committee has suggested introducing a prior notice of the penalties due, to be sent to the person concerned for reasons of administrative certainty. With reference to criminal aspects, the committee has requested that the offences designated as "*unlawful data processing*", "*unlawful disclosure of data regarding a significant number of people*" and "*fraudulent collection of personal data*" (articles 167, 167-*bis* and 167-*ter* of the Privacy code) also involve wilful damage to the data subject (in addition to the obtaining of a gain for the perpetrator itself or others).

It has also been suggested extending the list of the entities which might commit an offence included in article 167-*bis* and to change the expression "*significant number of people*" with a more accurate and specific definition.

The Parliament has also requested bringing back into force article 170 of Legislative Decree no. 196/2003 concerning the offence of non-compliance with the Data Protection Authority's provisions.

Finally, the committee suggested that, during a provisional phase of not less than 8 months after the entry into force of the adjusting legislative decree, the Data Protection Authority may be given the possibility not to inflict fines to firms, but solely to give warnings or instructions on how to adjust to the new regulations, thereby postponing the application of fines in connection with the failure to comply with the Regulation.

According to the standard approval procedure, the Government will have to prepare the final text of the adjusting decree by 23 August 2018.

1.2

Data protection: the Protocol updating Convention 108 has been approved

After a long procedure started in 2011, the Council of Europe's Committee of Ministers has completed the modernisation of the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (EST 108) ("*Convention 108*") of 1981.

The Protocol updating Convention 108 was opened for signature on 25 June 2018, at the Council of Europe's meeting.

The modernisation of Convention 108, which to date is the only binding instrument for data protection worldwide, responds to the several challenges occurred over the years due to the technology development and ensures the compliance with the Convention principles and strengthens the mechanisms adopted to actually implement it.

The Protocol guarantees high standards within the frame of regulations facilitating their adoption by several States, including those that are not members of the Council of Europe. Moreover, it provides a connection between the different approaches, including Regulation (EU) No 2016/679, according to which the accession to Convention 108 by third parties is among the criteria to be taken into consideration in order to evaluate their adequacy in the circulation of data.

The Protocol includes several changes in respect of the original wording, with particular regard to the following: strengthening of the transparency obligations to be complied with by the controllers; widening of the rights of the persons involved, now including the right not to be subject to merely automatic decisions and to know the processing logic; greater guarantees for date safety, including the obligation to notify data breaches and to ensure a privacy-by-design approach. The Protocol also strengthens the tasks of the Data protection authorities and the Committee of the Convention, called upon to play a role in the assessment of the effective respect of the principles of the Convention that must be ensured by the countries that will be part of it.

GUIDANCE

2.1

Whistleblowing: New Assonime circular

On 28 June last, *Assonime* (the Association of Italian Joint Stock Companies) published circular no. 16/2018 on whistleblowing.

The Association has thoroughly analysed all provisions of Law no. 179/2017, with regard to public and private sectors and has focused its attention on the most frequent interpretation issues, such as their applicability to publicly-controlled listed companies.

With reference to the private sector, the circular has analysed the special regulations already in force in the several sectors and stated that "*the regulations are connected with the more complex matter of the management of information within the entity, and must coordinate with the other internal control instruments*".

For this purpose, companies will have to set up a procedure enabling whistleblowers to report breaches without fear for their safety and preventing retaliation by the employer.

2.2

Geolocalisation of employees: the Data Protection Authority requests specific protection

By a recent enactment, the Data Protection Authority has allowed the geolocalisation through smartphones and tablets of the staff of a company providing services in the field of private security and transportation of valuables, while introducing measures protecting the employees' confidentiality.

The Authority has considered that the processing is lawful, necessary and proportionate, taking into consideration the specific regulations prescribing the adoption of technical control measures including geolocalisation for cash transportation.

However, for the employees' increased protection, the Authority has requested that an icon be placed on

the device showing that the localization mode is active, and that the system be configured in such a way that the geographical position of the employees disappears from the central unit's monitor after a certain period of the inactivity of its employee.

The data collected by the system may be consulted solely by the central unit operators and the top IT staff using specific credentials and authorizations. For the additional protection of employees, data cannot be utilized to control employees or for disciplinary purposes.

The company will have to provide the employees involved with adequate information enabling them to exercise their rights.

2.3

Marketing: the Data Protection Authority has prohibited the consent pop-up

The Data Protection Authority has prohibited a company providing website comparison services (in respect of loans, insurance policies, electricity, gas and telephone bills) from processing the data collected through a popup for the purposes of marketing and sale to other firms without the users' consent. The Authority's intervention was triggered by reports of unsolicited promotional notifications received from the company by telephone or email or unsolicited promotional phone calls made on landline and mobile numbers on behalf of energy and telecommunications companies.

The Authority's inspection ascertained that the popup did not allow access to the services offered if the user did not give his/her consent to the processing of his/her personal data for various purposes (including marketing and disclosure of data to third parties). If the user filled in the fields but did not check consent off, the website did not acquire the data and allow the user to continue with his/her request. Accordingly, even though the privacy notice referred to the different purposes of data processing, users were not allowed to give their specific and differentiated consent, as prescribed by the law.

The Authority has stated once again that the collection and/or storage of personal data made in breach of the informed consent obligation constitute unlawful processing of data regardless of their further utilization and that data collected through popups may be utilized solely to execute users' requests.

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The Authority has prohibited the processing of data taken from lists obtained from other firms and in respect of which the company receiving the list was unable to demonstrate that it had received the data subject's specific consent to marketing activities or to the notification of his/her data to other entities for promotional purposes.

The Authority has also ordered the company to notify all entities to which it had provided the personal data lists that such data cannot be utilized without obtaining the data subject's prior consent for the relevant activities.

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3.1

Safety at work, liability for failure to carry out inspections in contract works

With regard to the prevention of accidents at work, the principal has a position "*of guarantor*", meaning that its liability for accidents at work arises in the event that it has failed to ensure that the sub-contractor adopted the general work health and safety protection measures and, in any case, when a situation arises that presents an immediately perceivable and non-occasional danger.

This was the statement made in Italian Supreme Court decision no. 22013/2018, regarding the proceedings against the managing director of a company for negligent personal injuries suffered by the worker of a sub-contractor firm.

The defendant, in his capacity as Managing director and site manager, had hired this firm to carry out building services without first checking that it had the required technical skills and satisfied the safety at work obligations as prescribed by legislative decree no. 81/2008.

Workers had been provided inadequate tools lacking the safety devices specified in the relevant user manuals.

Both lower courts had ruled that the managing director was criminally liable and their decision was confirmed by the Supreme Court.

The principal company, represented by its legal representative, was sentenced to the payment of a Euro 1,000 fine and declared liable pursuant to articles 5 and 25*septies* of Legislative Decree no. 231/2001, since it did not have an organizational model ensuring control over the procedures for the choice of sub-contractors and the verification of the safety measures at the construction sites.

The Court ruled that the company had committed the offences solely in the interest of saving costs by hiring inexpensive firms which had failed to adopt the required safety measures.

3.2
Commutation of sentence (*indulto*) is not applicable to the penalties prescribed by legislative decree no. 231/2001

By decision no. 21724/2018, the Supreme Court has confirmed that the commutation of sentence (*indulto*), which refers to detention and fines, does not apply to the penalties prescribed by article 9 of legislative decree no. 231/2001 which are connected to administrative rather than criminal liability.

For this reason, the Court has declared the appeal filed by a company sentenced to pay a Euro 10,000 fine, for aggravated fraud at a public call for tenders referred to in article 24 of legislative decree no. 231/2001, to be inadmissible.

3.3
Failure to pay workers' salary and *Autoriciclaggio*

On 7 June last the Supreme Court of Cassation filed its decision no. 25979 which referred to the case of an employer charged with extortion for forcing his staff to accept salaries lower than those shown in their pay-slip and threatening them with dismissal or non-hiring.

In the decision it was stated that the money falsely claimed to have been paid to the employees had in fact been used to make underhand payments to the company's sellers, a conduct which resulted in the introduction of illegal funds in the company's finances in such a way as to avoid the identification of the criminal origin of the money. The company has therefore been charged with 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 realisation of such proceeds) prescribed by article 25-*octies* of legislative decree no. 231/2001, since it had utilized extortion money in its business activity and had prevented the identification of its origin.

Article 648-*ter* 1) of the Criminal Code punishes the utilisation, substitution or transfer of assets or other valuable interests by the person committing the predicate offence in order to "*concretely*" prevent the identification of their illicit origin.

This offence is considered as having been committed when the perpetrator engages in a specially dissimulating conduct, i.e. a conduct demonstrating that the offender actually intended to hide the unlawful origin of the money and assets. Accordingly, the re-introduction into the company's financial system of the money and assets of an unlawful origin will be criminally relevant. The Court has therefore underlined that what matters is not so much the fact that the offender could derive a personal benefit from such conduct, which of itself is not subject to penalty, but rather the fact that it may obtain an advantage from the concealment of the unlawful gains and their re-employment in the form of payments to sellers.

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COMPLIANCE NEWSLETTER | JUNE 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 JUNE 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