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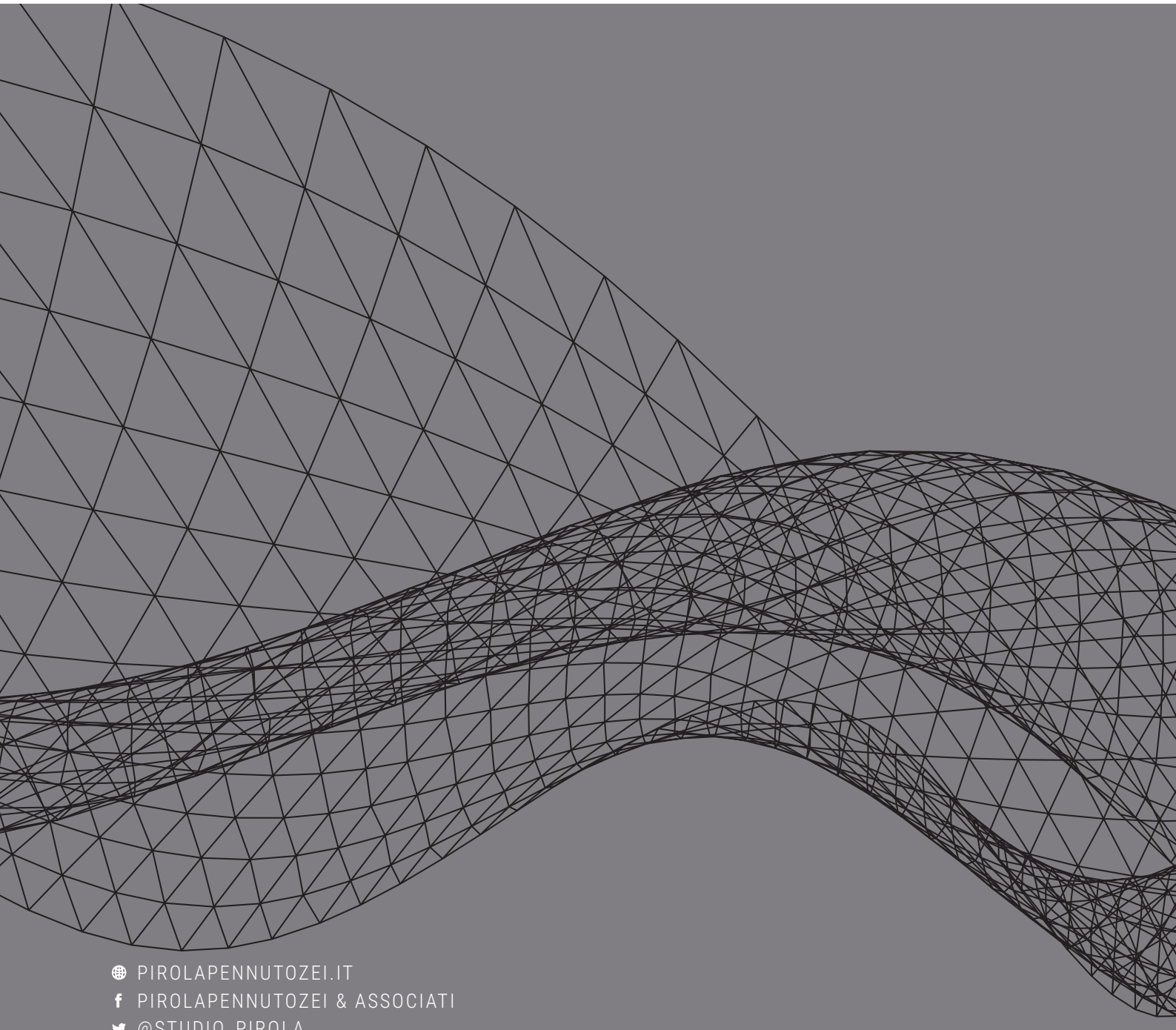
studio di consulenza
tributaria e legale

COMPLIANCE

NEWSLETTER / JULY 2018



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LEGISLATION

1.1

The Regulation on the exercise of A.N.A.C.'s powers to file an appeal has been published

The Regulation on the exercise by A.N.A.C. (Italian national anti-bribery agency) of the powers, set out by article 211, par. 1-*bis* and 1-*ter* of Legislative Decree no. 50/2016, to file an appeal against invitations to tender, general deeds and enactments related to public contracts (through a direct procedure or following a favourable reasoned opinion) has been published in the Italian Official Journal (*GU Serie Generale no. 164 of 17 July 2018*).

An appeal may be filed through a direct procedure when contracts have a significant impact, i.e. refer to major works or to works involving Euro 15 million or more or to services and/or supplies in an amount of Euro 25 million or more, involve several players, affect major events and refer to criminal cases or cases indicative of misconducts.

A.N.A.C. may issue a reasoned opinion and, should it be negative, may file an appeal with the administrative court, when there is suspicion of serious violations of the regulations on public contracts, such as, for instance, an award without prior publication of the invitation to tender, the tacit renewal of public contracts for works, services, supplies or a substantial amendment of the contract which would have required the implementation of a new call for tenders procedure.

The Regulation entered into force on 1 August 2018.

1.2

EU-Japan Agreement on the free movement of personal data

Japan and the European Union have signed the Free Trade Agreement and reached an understanding on the mutual acknowledgement of adequate levels of personal data protection.

Japan and the EU have agreed to recognise each other's data protection systems as 'equivalent'. Japan

will raise its security standards to European levels: among other things, the definition of sensitive data will be widened, it will be easier to exercise the right of access and to have data rectified, and protection will be strengthened in the event of transfer of European data from Japan to a third-party State. A system for the management and resolution of complaints will be created under the supervision of the European Commission in order to protect Japanese personal data and to reply to European citizens' requests on data access.

1.3

The European Parliament has requested suspension of the Privacy Shield

The European Parliament has proposed that the European Commission suspend the Privacy Shield, for the protection of personal data transferred from the European Union to the United States.

The European Commission claims that there have been cases of non-compliance by the U.S. authorities in implementing the Privacy Shield. First of all, the European Union maintains that in the U.S. there is no court or other venue before which cases of data breaches concerning European citizens' personal data can be brought. And it is a fact that two years after the entry into force of the Privacy Shield, the U.S. authorities have not yet appointed the entity in charge of managing the reports of privacy abuse and the Privacy and Civil Liberties Oversight Board (PCLOB).

The European Commission's main concerns are on the one hand that the U.S. authorities will give a too wide interpretation to the concept of "*national security*" and, on the other hand, the lack of clarity and transparency by the National Security Agency (NSA) as to the procedures adopted for the massive collection of data from the Internet for security reasons.

The European Commission has set the mandatory deadline for the U.S. to give full implementation to the Privacy Shield at 1 September 2018.

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GUIDANCE

2.1

The Italian Data Protection Authority has issued its 2018 Annual Report

The Data Protection Authority has provided the Italian Chamber of Deputies with its Report on the activities performed in 2017, which describes the main actions taken and enactments issued by the Authority, explains the progress of the implementation of personal data protection regulations, *inter alia* in the light of the new European GDPR, and states the future actions which the Authority is planning to take.

The most significant issues include personal data protection in employment relationships, the geo-localisation of employees, the consent to the processing of health data, data breaches, the delivery of promotional communications by mail and the transfer of data abroad.

The Report also states that the Authority has taken action in respect of about 6,000 notifications and, through the Revenue Police Special Units (*Unità Speciali della Guardia di Finanza - Nucleo speciale privacy*), carried out 275 inspections in both the public and private sector.

In 2017, the Data Protection Authority issued 589 fines concerning data processing without consent, the failure to provide information or the provision of insufficient information to users on the processing of their personal data, the failure to adopt security measures and to produce documents to the Authority.

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COURT DECISIONS

3.1

Data Protection: No advertising newsletter can be sent if no informed consent has been given

The Supreme Court pronounced on the increasingly widespread practice by several websites to send news, usually free of charge, after requesting the consumers' general consent to receive "*promotional information*", and issued decision no. 17278 dated 2 July 2018, by which it upheld the appeal filed by the Data Protection Authority and established that this practice violates the privacy of consumers, since they are unable to know clearly and in advance what they have given consent to.

The case dates back to 2014 when the Authority fined an online advertising company which had processed personal data for promotional purposes in the absence of "*free and specific*" consent by the data subjects. The company offered on its website a finance, tax, law and labor newsletters service for which users had to provide their email address and give their consent to personal data processing; in order to learn more about the offer, however, they had to click on a link which transferred them to a different web page which specified that data were also used "*for the sending of promotional notifications and commercial information by third parties*". If consent was denied, the newsletter service was not rendered.

By the above-mentioned decision, the Italian Supreme Court declared that such practice was inappropriate and provided new rules for online advertising, since, with regard to personal data processing, the notion of "*informed consent*" cannot be restricted or tainted by ruses, subterfuge, unfairness, duplicity or malice. In cases similar to that at issue, regarding a service which is neither non-fungible nor essential, the website operator can refuse to provide the service to those who have declined to receive promotional notifications, but cannot utilize personal data in order to provide or have someone else provide advertising information to anyone who does not want to receive it. Users must always be put in a position to understand unequivocally the effects of their consent to data processing.

Finally, the decision clarified that article 23 of the Privacy Code – in stating that consent is validly given solely if it is expressed freely and specifically with reference to a clearly identified processing - enables a website operator - which provides a fungible service that users can forgo without great harm to them (in the case at issue, the sending of finance, tax, law and labour newsletters) - to condition the supply of the

service to data processing for advertising purposes, provided that the consent is given individually and unequivocally with reference to such purpose, which also entails the need at least to specify the product or service sectors which the advertising notifications will refer to.

3.2
Autoriciclaggio and reservation of punishment

By decision no. 30399/2018 the Supreme Court pronounced on the correct interpretation of the reservation of punishment clause (*riserva di punibilità*) prescribed for the offence of *Autoriciclaggio* (i.e., the 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), which is a predicate offence pursuant to article 25-*octies* of Legislative Decree no. 231/2001.

Specifically, the reservation of punishment prescribed by article 648-*ter* (1) (4) of the Criminal Code entails that outside the scope of the cases listed in the previous paragraphs thereof, conducts in which money, assets or other valuable interests are intended for personal utilisation or benefit cannot be punished.

In the case at issue, the appellant claimed application of the reservation of punishment clause (and accordingly that he was not to be punished) since the money deriving from the predicate offence – bankruptcy – had been used to pay off his personal loan (i.e. to meet a person obligation).

The Supreme Court thoroughly examined the case and explained the reasons why the appeal had been rejected: according to the clause prescribed by article 648*ter*(1) par. 4 of the Criminal Code, a person is not held criminally liable if and only if he/she utilizes or benefits from the assets deriving from the predicate offence in a direct manner and does not take any action in respect of such assets aimed at actually hampering the identification of their criminal origin.

The Court specified that since it was obvious that the money deriving from the bankruptcy had undergone several and complex operations aimed at actually hiding its criminal origin, the appellant had been rightly investigated for *autoriciclaggio*, it being totally immaterial that, at the end of the laundering process, the money had been used to pay off the appellant's personal loan.

In conclusion, the Court of Cassation declared that the reservation of punishment clause did not apply since the appellant used the money indirectly and only following deceptive actions aimed at actually hiding its criminal origin.

3.3

Companies utilising pirated software

By decision no. 30047/2018, the Supreme Court pronounced with regard to copyright violation, regulated by article 25-*novies* of Legislative Decree no. 231/2001 (on corporate administrative liability).

In the case at issue, a company utilised: i) an unlicensed operating system on 6 of its 13 computers and ii) an unlicensed graphic software on all 13 computers.

During the investigations, the hard disks containing the illegally owned and duplicated software were seized.

The appellant filed an appeal before the Supreme Court arguing that the alleged crime (article 171*bis* of Law no. 633/41) did not exist since there was no evidence that the software had been duplicated and that it was used for commercial purposes, because the appellant was neither engaged in the sale of software, nor did it utilize the software for the benefit of clients, with the purpose of deriving a gain or an advantage.

The Supreme Court however confirmed the seizure and argued that the actual duplication of software could be verified solely by seizing the hard disks. Secondarily, the commercial purpose of the software could be inferred from the fact that the company carried out a business activity (mechanical and electronic design in the automotive industry). The Supreme Court concluded that the holding and utilization of software in the trade and industry sector gives rise to the offence at issue and that the hard disk could be seized in order to verify software duplication.

The significance of the above decision lies in the possibility to seize computers, thus preventing the perpetrator from further committing the offence.

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COMPLIANCE NEWSLETTER | JULY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JULY 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