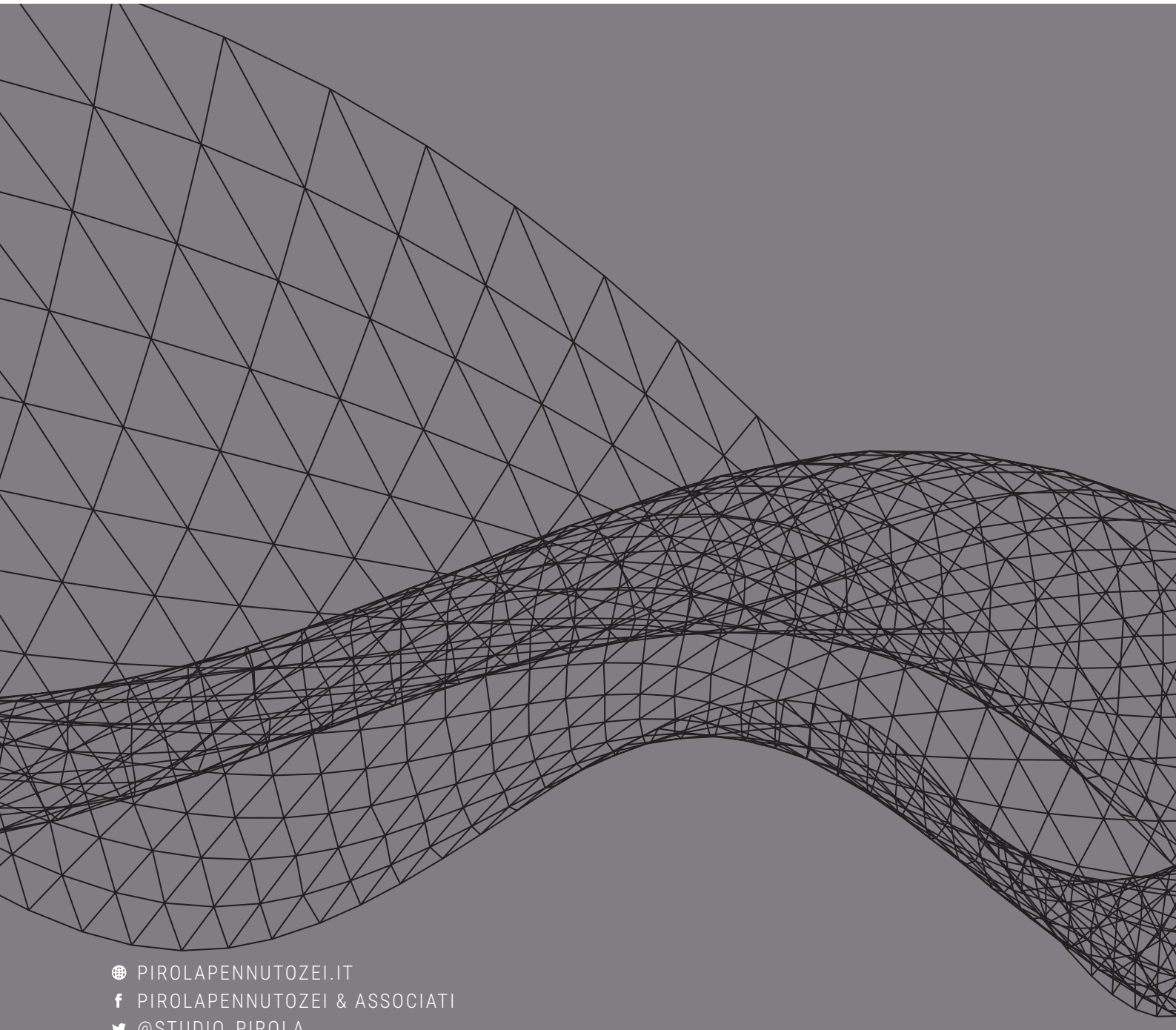
Pirola
Pennuto
Zei
& Associati

studio di consulenza
tributaria e legale

# COMPLIANCE

## NEWSLETTER / AUGUST 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

The New Privacy Code (Legislative Decree no. 101/2018) has been published in the Italian Official Journal

The new Privacy Code, which aligns Italian data protection legislation to the EU General Data Protection Regulation no. 2016/679, was published in the Official Journal on 4 September 2018 and has entered into force on 19 September 2018.

According to the above Decree, during the transitional period the Data Protection Authority's general measures and authorisations and the current codes of ethics will continue to be in full force and effect. Moreover, new criminally relevant offences have been introduced and the Authority will have to issue specific rules for the application of fines and to promote simplified compliance procedures for small- and medium-sized enterprises.

## 1.2

**Brazil has approved the new privacy law based on GDPR principles**

On 14 August 2018 Brazil approved Law no. 13709 on personal data protection governing the processing of data in the public and private sector, according to which public and private entities may only process the personal data that are strictly necessary for the provision of their services. The persons concerned by the law will be subject to control by the newly-established National Data Protection Authority and to fines of up to 50 million Brazilian reals.

With reference to the entry into force of the above regulation, companies and public entities will benefit from a period of 18 months in order to adjust to the new regulations. The new regulation incorporates the principles set out in the GDPR and specifically lawfulness, fairness, accountability, non-discrimination, purpose limitation and transparency on the use of personal data.

## 1.3

### Legislative Decree no. 65/2018: Security of network and information systems

Legislative Decree no. 65/2018 on the security of network and information systems implementing European Directive no. 1148/2016 of the European Parliament and Council (the NIS Directive) entered into force on last 24 June.

In particular, purpose of the decree is to ensure that the most serious incidents are reported, to promote a culture of risk management among the main economic players, above all operators of essential services for the maintenance of economic and social activities and digital service providers, to improve domestic cybersecurity skills and enhance cooperation between Italy and the EU.

Moreover, the decree has identified the authorities in charge of network and information security by sectors and the relevant tasks, as well as the computer security incident response teams ('CSIRTs') which perform the functions of Italian computer emergency response teams ('CERTs'), establishing the procedures for preventing and managing IT incidents.

# GUIDANCE

## 2.1

**Data Protection Authority: inspection activity for the period July-December 2018**

By resolution dated 26 July 2018, the Data Protection Authority approved the plan for the inspection activities to be carried out by the Authority, with the support of the Tax police, in the period July-December 2018. According to the resolution, inspections will be conducted at entities which carry out particularly significant data processing, such as companies and entities managing big databases, banks and telemarketing companies. Inspections will cover compliance with reporting obligations, proper acquisition of the consent of the data subjects and the data storage period. Inspections will be carried out, on the one hand, in respect of entities identified based on complaints or reports and, on the other hand, at the initiative of the Authority, having regard to the most significant processing in terms of risk and size.

## 2.2

**The Data Protection Authority has pronounced on GPS and company car fleets**

By enactment no. 396/2018, the Data Protection Authority has pronounced on the case reported by an employee concerning the implementation by his company of a GPS device installed on company vehicles without providing any information and/or policy explaining the characteristics of such GPS device to the employees using the company cars.

Since cars were used for mixed personal and business purposes, the geopositioning system enabled the employer to process also the data regarding the employee's position outside working hours and to monitor the employee's activity on a continuous basis, about every 120 seconds.

At the end of the Authority's inspection, it emerged that the processing of personal data made by the company - the data controller - was not compliant with the regulations on personal data processing since the GPS was contrary to the principles of necessity, relevance and minimisation of the data established by Legislative Decree no. 196/2003 (Privacy Code) and European Regulation no. 679/2016.

Accordingly, the Authority has prohibited the company from further processing the above mentioned

personal data and has ordered the geopositioning service suppliers to inform their customers in advance of the possibility to amend the standard settings of the device and to design the device in such a way as to comply with the data subjects' right to confidentiality, with specific reference to the frequency of the geopositioning of the data subjects.

# CASE LAW

## 3.1

**Legislative decree 231/2001: it is acceptable to enter into a plea bargain if reparation actions are taken**

The Judge for Preliminary Hearing at the Court of Rome sanctioned a company charged with bribery (pursuant to article 25 of Legislative Decree no. 231/2001) only to a fine under the terms of the plea bargain reached between the parties. The judge issued this decision on 20 March 2018 on conclusion of investigations showing that the company had not prepared the Organizational, management and control model preventing the commission of bribery offenses.

Since the Company reimbursed the gains derived from the commission of the offence, paid compensation for damage and removed the organizational deficiencies by adopting a "*reparation*" Model, a reduced penalty was inflicted.

We note that pursuant to Article 63 of Legislative Decree no. 231/2001, plea bargains may be reached, *inter alia,* in the following cases: (i) when the offence only entails the infliction of a fine and (ii) when the judgement issued against the accused in respect of a predicate offence may become final by reaching a plea bargain.

In the case at issue, the Judge had ascertained that the relevant conditions were met.

The judgment under examination is not significantly innovative; however, it further contributes to the consolidation of the court decisions aimed at enhancing aspects additional aspects besides those expressly prescribed by the law and, as a consequence, to allow companies to reach a plea bargain and avoid going to trial.

## 3.2

**Whistleblowers' protection is not available to employees who commit a crime in the process of gathering information**

By decision no. 35792/2018, the Supreme Court has established that an employee who gains unlawful

access to an IT system in order to gather evidence of offences allegedly committed at work, is liable for the offence provided by article 615-*ter* of the Criminal Code (unlawful access to an IT system) and cannot invoke whistleblowers' protection. The Court clarified that the new whistleblowing legislation (Law no. 179/2017) is not designed to encourage the investigation skills of public-sector employees, who may solely report facts discovered in the course of their work.

In the case at issue, in order to demonstrate the vulnerability of the IT system adopted by the employer, the employee had utilized a colleague's account and password in order to access the system and create a false document for the termination of the employment of an inexistent employee.

The appellant, who had been charged with the offence set out by article 615-*ter* of the Criminal Code, claimed in his defence that his conduct was triggered by the wish to do his duty, based on the loyalty binding civil servants to their employer under articles 54 and 54-*bis* of Legislative Decree no. 165/2001.

The Supreme Court has however rejected the defence arguments and declared that whistleblower legislation is aimed at preventing unfavourable consequences, solely with regard to the employment relationship, for a whistleblower who discovered illegal activity within the scope of his/her work. However, it does not establish an obligation to actively acquire information, nor does it authorize improper investigation activities, in breach of the limits set out by the law. It ensues that the employee's conduct could not be justified and had to be considered a prosecutable offence.

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 | AUGUST 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 AUGUST 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