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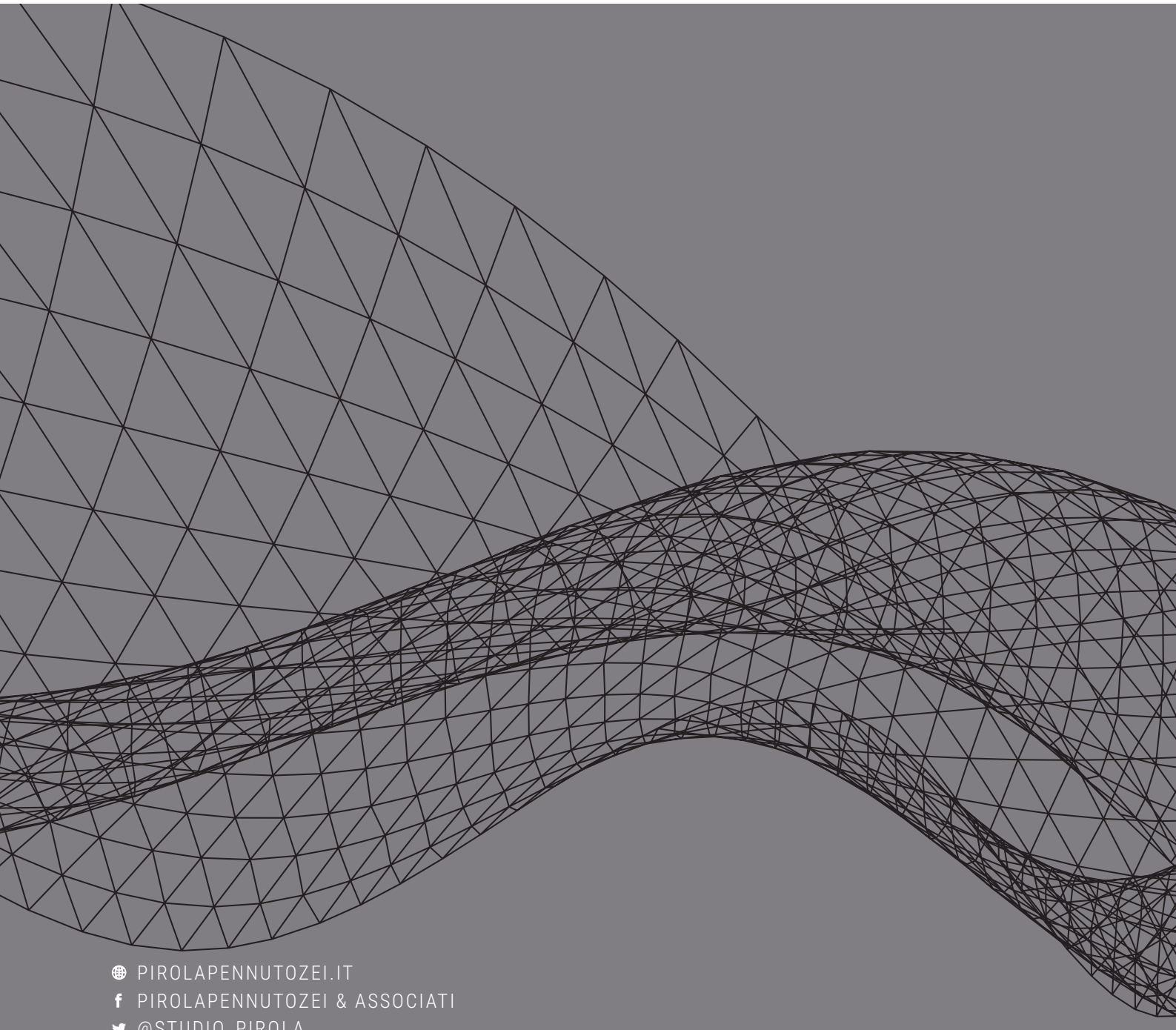
COMPLIANCE

NEWSLETTER / SEPTEMBER 2018



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LEGISLATION

1.1

The bill on the obligatory adoption of Forms 231 has been submitted to the Italian Senate

Bill No 726/2018 amended article 1 of legislative decree 231/2001 on corporate administrative liability, by introducing an obligation for "*all joint-stock and cooperative companies which do not meet the size and income limits provided by article 2435-bis*" to adopt an organizational, management and control model ("*the 231 Model*") and appoint a supervisory body.

This provision is addressed to all joint-stock companies, consortium and/or cooperative companies and/or all parent companies who, in any of the last three fiscal years, reported total balance sheet assets of no less than 4,400,000 euro or revenue from sales and services of no less than 8,800,000 euro.

The resolution to adopt a 231 Model and appoint a supervisory body will have to be filed with the Chamber of Commerce within ten days of being passed.

Failure to meet this obligation will involve pecuniary penalties in an amount of Euro 200,000 for each year of non-compliance.

1.2

Market abuse: predicate offence legislation has been amended

Legislative Decree No 107/2018, implementing Enabling Law No 163/2017 (published in Italian Official Journal No 214 of 14 September 2018 and entered into force on 29 September 2018) introduced a number of changes to the Consolidated Law on Financial Intermediation in order to adjust domestic legislation to the provisions of Regulation EU No 596/2014.

Such changes affects the rules on corporate administrative liability since the cases referred to in articles 184 -187 of the Consolidated Law on Financial Intermediation constitute predicate offenses pursuant to article 25 *sexies* of Legislative Decree No 231/2001.

One of the key changes introduced by the new article 187-*quinquies* of the Consolidated Law on Financial Intermediation consists in the payment of a pecuniary penalty ranging between Euro 20,000 and Euro 15,000,000, or of up to 15% of turnover, for market manipulation and insider dealing.

1.3

Reduced penalty charge for violations of data protection legislation

Legislative decree 101/2018 (published in the Official Journal No 205 on 4 September 2018 and entered into force on 19 September 2018) gives the possibility to settle administrative violations under the "*old*" Privacy Code by paying a reduced penalty (corresponding to two fifths of the minimum), unless a court order has already been issued in connection with the violation. Therefore, only offenders who received notification of the violation and relevant payment demand by 25 May 2018 are eligible for the beneficial treatment.

The deadline for taking advantage of the reduced penalty procedure is 18 December 2018. If the person concerned decides not to do so, he may either pay the full amount claimed in the payment demand or file a defense brief by 16 February 2019. In the latter case, the Data Protection Authority, after examining the brief, will either dismiss the case or issue a specific payment demand specifying the amount due.

GUIDANCE

2.1

Whistleblowing: online consultation on the Anti-bribery Authority's penalty regulation

The online consultation promoted by the Italian National Anti-bribery Authority in respect of the draft Regulation on the exercise of the power to charge penalties in connection with the protection of whistleblowers who became aware of wrongdoings in the course of their work relationship pursuant to article 54-*bis* of legislative decree 165/2001, was concluded on 30 September 2018.

Purpose of the Regulation is to establish the procedure for inflicting the pecuniary administrative penalties referred to in article 54-*bis*(6) of legislative decree No 165/2001.

Under the draft Regulation, the Authority may exercise its penalty-inflicting powers *ex-officio* (including in the form of inspections), following a report by the person concerned or by the trade unions, or in the event of failure to adopt the procedures for the submission and handling of whistleblowers' reports.

As a result of the online consultation, the Authority obtained helpful observations and elements from the parties concerned for the drawing up of the final version of the Regulation.

2.2

Transparency International's twelfth Report on the implementation of the 1997 OECD Convention on the fight against corruption: Italy has passed the test

On 12 September 2018, Transparency International published the twelfth edition of the Report on "*Exporting Corruption – Assessing Enforcement of the OECD Anti-Bribery Convention*", which evaluates the application of the OECD convention by the member states in the period ranging from 2014 to 2017.

The evaluation was made on the basis of the number of investigations started, ongoing trials and trials which resulted in the application of penalties. Contracting states were classified into four categories depending on their level of application of the Convention.

As a result of the survey, Italy was placed among virtuous countries - together with Germany, Israel, Norway, Switzerland, United Kingdom, United States – although it received specific recommendation, including *inter alia:* increasing whistleblowing protection, improving the management of and access to investigations and actions regarding foreign corruption cases and improving the efficiency of the judicial system and of the criminal trial process in particular.

2.3

The Data Protection Authority has published the FAQs in the record of processing activities

By press release dated 8 October 2018, the Data Protection Authority published the instructions for keeping and completing the record of processing activities.

The record shall be in writing, including in electronic form, and contain all of the information related to the processing carried out by enterprises, freelance professionals and associations in their capacity as Controller and/or Processor. It must show the purpose of processing, the categories of personal data and the transfer thereof, if any, as well as the technical and organizational procedures adopted by the Controller and/or the Processor.

The record shall be continuously updated since the contents must always reflect the processing actually carried out by the Controller or the Processor. Any changes in the procedures, purposes, categories of data and categories of data subjects must be immediately recorded and explained.

Finally, the Form including the "*simplified record*" of processing activities carried out by the controller of small- and medium sized enterprises and the Form including the "*simplified record*" of processing activities carried out by the processor of small- and medium-sized enterprises are available on the Data Protection Authority's website.

CASE LAW

3.1

The DPO's requirements

By decision no. 287/2018, the Friuli Venezia Giulia Administrative Regional Court (*TAR – Tribunale Amministrativo Regionale*) nullified the procedure for the appointment of the Data Protection Officer, since it deemed that the ISO/IEC/27001 certification held by the candidate was not legitimate basis for his eligibility to the position; the essential requirements necessary to be appointed DPO are in-depth knowledge of and the application of the industry regulations, regardless of whether the candidate holds the above mentioned certification, which does not reflect (or does not fully reflect) the DPO's specific function as guarantor.

3.2

Possible liability according to Legislative decree no. 231/2001 in connection with the Morandi bridge collapse

The Genoa Prosecutor's office has initiated an investigation on the collapse of the Morandi bridge.

For the purposes of interest here, according to the declarations made by the Genoa Prosecutor, also Autostrade per l'Italia S.p.A. seems to have been recorded in the register of persons under investigation (*registro degli indagati*), as it might have committed a violation under Legislative Decree no. 231/2001.

It appears that the company has been charged with the predicate offence of involuntary manslaughter with violation of safety at work regulations. If confirmed, this approach would be consistent with that followed by the Court of *Lucca* in the *Viareggio* railway accident. This interpretation would entail the extension of corporate administrative liability also to cases where the victims of involuntary manslaughter with violation of safety at work regulations are not employees of the company.

3.3

According to the Italian supreme court, holding a considerable amount of money is not sufficient to be charged with money laundering

By decision no. 39006 of 27 August 2018, the Court of Cassation established that for the purposes of claiming that money laundering has been committed, it is not sufficient that the alleged perpetrator hold considerable amounts of cash (in the case at issue, Euro 160,000). Unless there are grounds for demonstrating that a predicate offence has been committed and resulted in the sum seized being generate, holding such amount cannot per se constitute basis for claiming that money laundering has been committed.

The Court of Cassation specified that, although - when sums of money generally connected with a crime are seized - it is not necessary to provide evidence that such sums pertain to the crime, it must be proved that there was an actual possibility that such money was related to the crime.

Money laundering is one of the predicate offences established by Legislative Decree no. 231/2001.

3.4

Antitrust compliance guidelines

On 4 October 2018 the Italian Antitrust authority (*Autorità Garante della Concorrenza e del Mercato* - AGCM) published the final version of the antitrust compliance guidelines.

Based on prior experience, on domestic and European court decisions and on the best practices of foreign antitrust authorities, AGCM drafted its guidelines to give companies support with:

(i) the content of the compliance program to avoid and/or combat antitrust violations (risk management) and encourage a competition culture, and

(ii) the application for an evaluation of the antitrust compliance program at the AGCM's full discretion with a view to receiving the benefit of mitigating circumstances (possible reduction of the antitrust penalty of up to 15% before the start of an investigation or 5% after the start of an investigation).

To obtain the benefit of the mitigating circumstances, it is not sufficient that companies merely adopt an antitrust compliance program (including as part of the ethical code and/or code of conduct) on paper, but must actually commit to implementing it company-wide, including at management level.

In particular, the program should be designed to prevent antitrust offences (e.g., anti-competition covenants or abuse of dominant position) and customized to the company's requirements (and if necessary updated and improved) in the light of its market context and the level of antitrust risk it is exposed to.

To this effect, (periodical) staff training is of the essence. It is possible to appoint an autonomous and independent antitrust compliance officer, providing him/her with adequate instruments and resources, for the implementation of the program and the verification of the prevention procedures in place, reporting to the company's administrative bodies.

Antitrust compliance programs implemented before notification of the start of the antitrust proceedings and considered to be adequate and effective (i.e., that enable the prompt discovery of an antitrust offence) may be rewarded with an up to 15% penalty reduction.

Antitrust compliance programs implemented after notification of the start of the proceedings and within six months from its commencements may benefit from up to a 5% penalty reduction.

Antitrust compliance programs implemented before notification of the start of the antitrust proceeding but considered to be not adequate or inadequate (i.e., that enable the prompt discovery of an antitrust offence) may benefit from an up to 10 or 5% penalty reduction respectively, provided that considerable changes are made and implemented within the first six months of the start of the investigation.

It is up to the company to demonstrate to AGCM that it actually implemented the program, by means of internal documentation, periodical audits, corrective measures etc.

The evaluation of the program with a view to penalty reduction may be requested for all investigations started after 4 October 2018.

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COMPLIANCE NEWSLETTER | SEPTEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 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