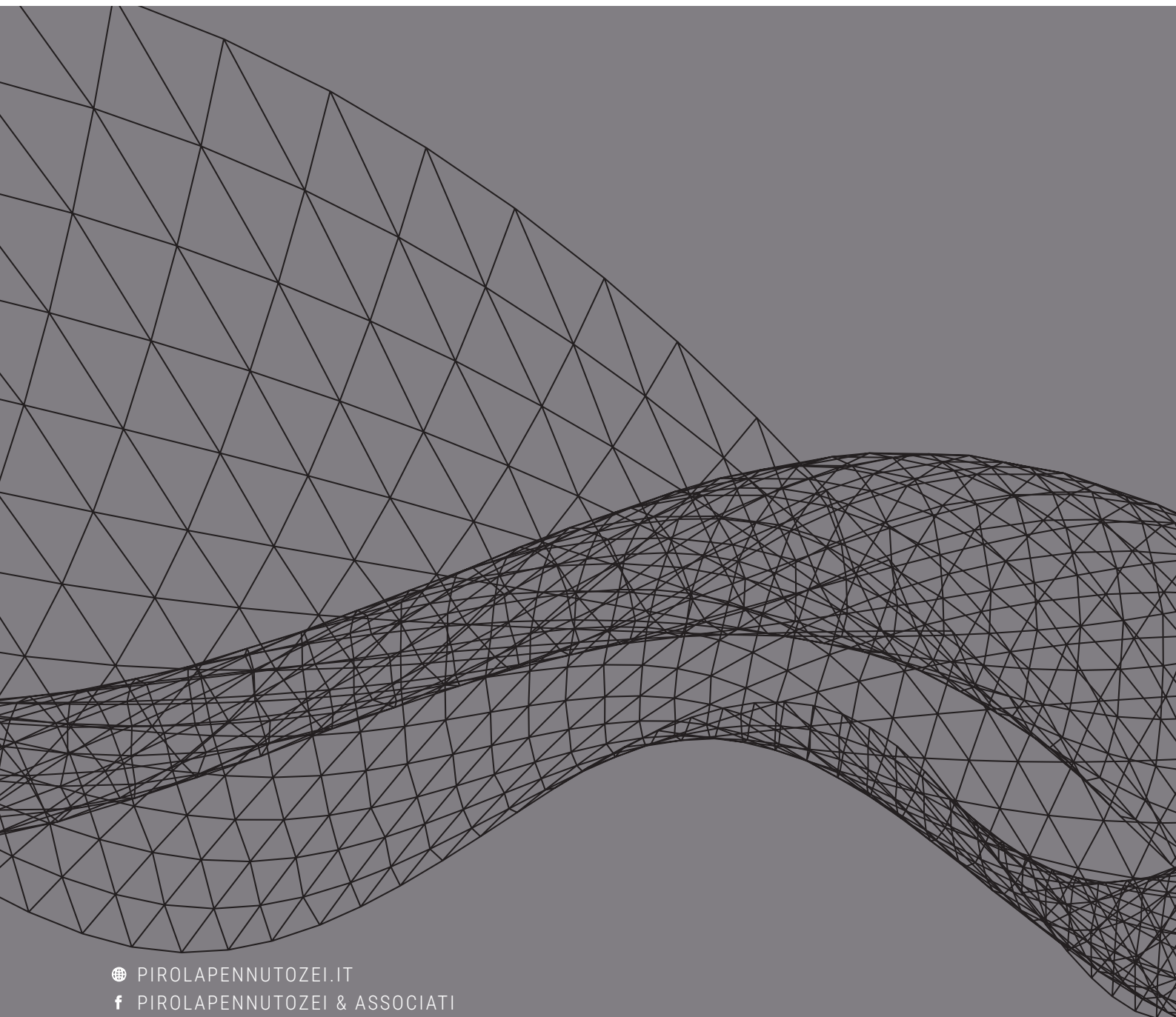


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COMPLIANCE

NEWSLETTER / OCTOBER 2018



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LEGISLATION

1.1

The opinion of the Italian Data Protection Authority on *DDL concretezza*

On 11 October 2018, the Italian Data Protection Authority pronounced on the bill designed to ensure the efficiency of public authorities and the prevention of absenteeism through the introduction of biometric identification and video-surveillance systems.

The Data Protection Authority stated that the mandatory and simultaneous use of these instruments to check observance of working hours exceeded the purposes to be achieved. Therefore, he recommended first of all that the bill be amended to reflect the choice of a single instrument and its use in accordance with the principle of gradual character of the measures restricting the rights of people and, secondly, that the use of such systems take into account the existence of specific risk factors and particular conditions (including the size of the company, the number of employees involved etc.).

Subject to the above, in order to ensure the correct processing of the personal data of public officials, it has been established that the decree setting out the practical steps to combat absenteeism would be adopted in concert with the Data Protection Authority.

1.2

The Chamber of Deputies has approved the bill on crimes against cultural heritage

On 18 October 2018, the Chamber of Deputies approved the bill on crimes against cultural heritage, to implement a consistent set of penalties to protect cultural heritage and overcome the division between the Penal Code and the Cultural Heritage Code, introducing new offences and enhancing inadequate penalties.

The bill provides for the inclusion in the list of predicate offences provided by decree 231/2001 of article 25-*quaterdecies* ("*Crime against cultural heritage*") and article 25-*quinquiesdecies* ("*Holding of illicitly-acquired, destruction and looting of cultural assets and illegal trafficking of assets of cultural interest*").

1.3

The corrupt practices prevention decree has been submitted to the Italian Chamber of Deputies

The corrupt practices prevention decree ("*SpazzaCorrotti*") – introducing new measures to combat crimes against the Public Authorities – was submitted to the Council of Ministries on 24 September 2018. The decree significantly amends several provisions of the Italian Penal Code, Code of Criminal Proceedings and legislative decree 231/2001.

In particular, the decree revisits the disqualification measures against companies in the event of conviction for offences against the public authorities, with a minimum 5-year (instead of 1-year) and a maximum 10-year (instead of 2-year) sentence.

Other changes to legislative decree 231/2001 include:

- the enhancement of the principal penalties for bribery regarding the exercise of a public officer's duties (article 318 of the Italian penal code);
- the rewording of the offence of influence peddling (article 346-*bis* of the Italian penal code) to include the fraudulent claim to influence with public officials, with a view to obtaining a bribe (article 346 of the Italian penal code) and the enhancement of the relevant penalties;
- the extended scope of application of the offences related to the bribery of foreign public officials (article 322-*bis* of the Italian penal code);
- the introduction of prosecution *ex-officio* for the offences of private-to-private bribery and incitement to private-to-private bribery (articles 2635 and 2635-*bis* of the Italian civil code).

The bill is currently being examined by the joint committees I Constitutional Affairs and II Justice.

1.4

The EU has adopted the new AML Directive

On 11 October 2018, the Council of the European Union adopted a new anti-money laundering Directive. The measure, which will enter into force after publication in the Official Journal of the European Union,

LEGISLATION

introduced new provisions to combat the use of financial resources for illegal purposes, including resources used for terrorist financing.

The new provisions establish minimum rules for the identification of AML offences and relevant penalties. The Directive provides for maximum 4-year imprisonment and the possibility for judicial bodies to charge additional measures and penalties (such as for instance the temporary or permanent exclusion from access to public funding and pecuniary penalties).

It is worth noting that bodies corporate may be considered liable for AML activities and consequently bear the relevant penalties, such as for instance the exclusion from public aid, judicial surveillance and judicial dissolution measures.

The Directive also contains provisions for the removal of obstacles to cross-border judicial and police cooperation. Common rules improving cross-border investigations have been introduced to identify the country with competent jurisdiction, the manner of cooperation between the countries concerned and the participation in Eurojust.

GUIDANCE

2.1

Municipality of Milan: obligation to report the beneficial owner

The Municipality of Milan has recently approved a motion according to which the Three-year Plan for the Prevention of Corruption and for Transparency will include a specific rule providing for the obligation for private entities to report details of their “*beneficial owner*” whenever they take part in a call for tender for the award of works, supplies and services or enter into a concession or a zoning agreement or receive a loan, a subsidy, an authorization or a concession.

The Municipality of Milan’s approach is designed on the one hand to identify the beneficial owner of a company even though this information is not publicly available and on the other hand, to prevent the illegal use of more or less complex corporate structures for money laundering purposes.

2.2

Data protection: limitations to telephone and direct mail advertising

The Counsel of Ministries meeting of 25 October 2018 approved the Regulation extending the “*Registro Pubblico delle Opposizioni*” (a register of users who no longer wish to receive marketing or sales phone calls) to hard copy mail advertising, thus introducing the possibility for users to object to advertising being sent to the mailing addresses listed in the telephone directories.

The Regulation thus extended the opt-out clause (revocation of consent and/or objection to processing) to direct mail advertising and establishes the manner in which subscribers are to be registered and the register consultation obligations by telemarketing operators.

As a result of the extension, the processing of mailing addresses for commercial purposes will be valid only if operators gathered the data subject’s consent, as established by Regulation (EU) 2016/679.

Once the service is available, users whose number is listed in telephone directories may object to receiving both telemarketing calls and direct mail advertising.

This measure will be added to the provisions of Law 5/2018 which prescribed the inclusion in the “*Registro delle Opposizioni*” of mobile phone numbers and unlisted landline numbers.

2.3

European Data Protection Board: the common criteria for the list of processing activities subject to data protection impact assessment have been established

On 26 September 2018, the European Data Protection Committee (the “*Committee*”) adopted a series of measures in relation to the proposals made by domestic authorities on the lists of processing activities subject to Data Protection Impact Assessment (“*DPIA*”), which are a tool designed to ensure consistent application of the provisions of Regulation 679/2016 throughout Europe.

In this regard, the Data Processing Authority has published a list of 12 personal data processing activities to be submitted to the DPIA.

2.4

Data protection: the Data Protection Authority establishes the content of the internal register of data breaches

The Data Protection authority, in enactment No 459 of 4 October 2018, dealt with the content of the internal register of data breaches.

After the issue of legislative decree 101/2018, the Authority supplemented its 22 May resolution to incorporate the cases of non-compliance with data protection rules which involve the infliction of penalties by the Data Protection Authority, with specific regard to the processing of personal data by the competent authorities to prevent, investigate, detect or prosecute crime or execute criminal penalties.

Pursuant to the new Data Protection authority resolution, the new register will include some measures of the Data Protection Authority, including measures issuing warnings to the data controller or processor or demands that data subjects be informed of a data breach or measures inflicting administrative penalties.

Furthermore, the register will have to report:

- the outcome of disputes arising in connection with the data protection authority's measures;
- breaches of the privacy code or industry regulations together with the subject of the breach and the amount of the relevant penalties;
- information on the payment of the pecuniary penalty charged (or registration of the unpaid penalty in the register of unpaid taxes and penalties).

Furthermore the resolution specifies a number of persons to be mentioned in the register if they were liable to some of the above measures (including data controllers, joint controllers, data processors, certifying bodies), which will be classified according to specific information, as follows:

- for natural persons: name, last name, place and date of birth, fiscal code number;
- for bodies corporate: name, VAT number/fiscal code.

2.5

The process for the creation of a network of corruption prevention agencies is underway

As announced by the representatives of ANAC (Italian anti-corruption authority) during the 9th session of the Working Group on Prevention of Corruption, seventeen national anti-corruption agencies signed the "*Declaration for the corruption prevention agencies' network*" in Šibenik, Croatia.

The signature of the declaration marks the start of a process toward the creation of a continental network of corruption-prevention agencies, an initiative promoted in 2017 when the "*Nicoletti report*" on corruption was submitted to the Council of Europe's Parliamentary Assembly.

The common goal is to exchange information and best practices between the Member States concerned and to establish common standards on significant issues, such as whistleblower protection legislation, codes of conduct, risk analyses and training on anti-corruption issues within schools and universities.

At the moment, only European countries are involved, except Benin, but several other European and non-European countries have stated their intention to join the project.

CASE LAW

3.1

Italian Supreme Court: handprint-activated biometric badges are not allowed

The Italian Supreme Court has recently confirmed the Euro 66,000 fine inflicted by the Data Protection Authority on a waste collection company due to violation of its general enactment of 23 November 2006, which provides that *"the use of biometric data may be justified only in particular cases, having regard to the purposes for which and the context in which they are processed and, as regards workplaces, to control access to sensitive areas based on the nature of the activities carried out therein"*.

The system implemented by the company consisted in gathering employee clocking information using biometric hand data stored in their smart badges.

Unlike the Court of Catania, the Italian Supreme Court considered the gathering of biometric hand data to check employee clocking information as a processing of personal data, on the basis that it is immaterial that the employee's handprint is stored in databases and that to be considered so it is sufficient that the employee's personal data are collected and temporarily processed.

In the same ruling, the Court stated that *"the transformation of the biometric hand data in a reference model, consisting of a code, would allow the identification of a person by comparing the numerical code obtained at each access and that originally gathered"*.

3.2

Italian Supreme Court: the double track system for market abuse penalties is allowed

In its decision No 45829, the Italian Supreme Court ruled on the controversial issue of the double track system of simultaneously inflicted criminal and administrative penalties, a sensitive issue which could appear to be in contrast with the prohibition of double jeopardy established by the Constitution.

The case consisted of protracted market abuse which had resulted in a significant alteration of a company's stock listing price. Three individuals had been convicted for the commission of the administrative offence

under the prior wording of article 187-*ter* of the Italian Consolidated Law on Finance. First, Consob inflicted administrative pecuniary and disqualification penalties; subsequently, criminal pecuniary and disqualification penalties were additionally imposed.

Consequently, the three individuals had brought an appeal to the Italian supreme court claiming, *inter alia*, double jeopardy.

The Supreme Court, however, confirmed the Milan Appeals Court's criminal conviction and stated that the double tax system for inflicting administrative and criminal penalties was acceptable provided that penalties were imposed according to an integrated procedure and that they complied with the principle of proportionality of the penalties with the severity of the offence.

The Supreme Court stated that it was up to the judge to ascertain that the aggregate penalties were proportional to the offence which the defendants were being charged with and that in the case in question all penalties imposed were close to the legal minimum. Therefore, the individual penalties did not effectively punish and deter and therefore the whole of the penalties inflicted was not overly burdensome for the individuals concerned.

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LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 OCTOBER 2018.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST,
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