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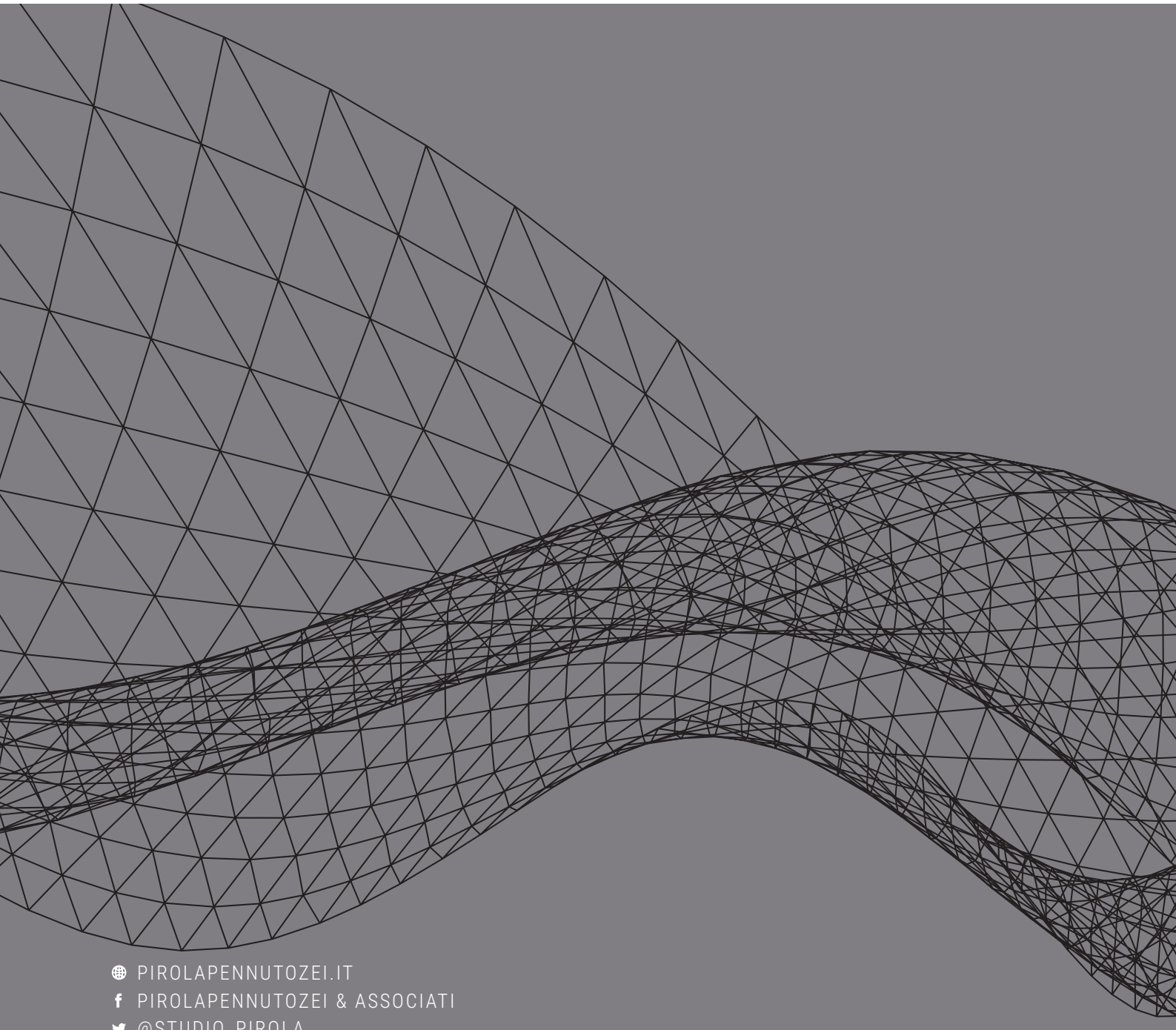
COMPLIANCE

NEWSLETTER /NOVEMBER 2018



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LEGISLATION

1.1

Legislative decree No 231/2001 as protection of the Union's financial interests

The Italian Senate is currently examining Bill No C. 1201, the European delegation law 2018, already approved by the Chamber of Deputies. The Bill incorporates up to 22 EU Directives, including Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (PFI - "*protection of financial interests*").

The Directive introduced an obligation for Member States to adopt measures to ensure the perpetrators' liability for offences adversely affecting the financial interests of the Union, with particular regard to serious offences against the common VAT system, i.e. intentional acts or omissions connected with the territory of two or more Member States of the Union involving a total damage of at least ten million Euro. Article 6 of the Directive extends such liability to legal persons for any criminal offences committed for their benefit. Therefore, legislative decree 231/2001 will have to be amended to include the above offences among predicate offences.

Article 3 of Bill C. 1201 provides that offences harming the Union's financial interest shall be subject not only to the penalties provided by legislative decree 231/2001 but also to those provided by article 9 of the Directive, such as the exclusion from entitlement to public benefits or aid, the temporary or permanent exclusion from public tender procedures and the temporary or permanent disqualification from the practice of commercial activities.

1.2

Amendments to legislative decree 231/2001 benefiting small-sized enterprises

On 29 October, the Italian Chamber of Deputies' Justice Committee was appointed to review Bill No 818 concerning "*Changes to legislative decree No 231 of 8 June 2001, to legislative decree No 231 of 21 November 2007 and other provisions concerning the supervisory bodies of companies and the corporate liability for criminal administrative offences of banks, financial intermediaries and insurance companies*", and to report back to the Chamber with their comments or proposed amendments (*sede referente*).

The bill puts forth a reform of corporate administrative liability which on the one hand protects small-sized companies and on the other hand enhances the obligations for large-sized companies where

"*offences having an impact on the health and savings of citizens and on market freedom (corruption) are committed*".

The bill covers several areas of legislative decree No 231:

- it rewords article 1 ("*Parties*"), excluding small-sized companies (i.e., companies with fewer than 15 employees) from the scope of the decree;
- it amends several aspects of article 6;
- it regulates the liability of corporate groups, with the addition of paragraph 5-*bis* to article 6 providing that the application of the provisions extends "*also to entities subject to direction and coordination*", with an exception to the size limit (15 employees) stated above ("*regardless of the number of employees*");
- it expressly states that the supervisory body must be "*independent*".

As part of these changes, paragraphs 4 and 4-*bis* of article 6 are going to be eliminated. These concern:

- the possibility for the governing body to carry out supervisory body tasks in small-sized companies;
- the possibility that in joint-stock companies (*società di capitali*), supervisory body tasks may be carried out by the board of statutory auditors (*collegio sindacale*), the supervisory board (*consiglio di sorveglianza*) and the management control committee (*comitato per il controllo della gestione*).

One last proposed change to article 6 is to extend the scope of the Supervisory Body's authority to include the possibility that the SB may inform the entrepreneur, the legal representative or his/her designated representative of any violations of article 41 of Decree 231/2007, in connection with suspicious transactions, whether they have been carried out or just attempted, regarding money laundering or terrorist financing.

Finally, the bill intends to eliminate the rule to the advantage of banks, financial intermediaries and insurance companies, prohibiting official receivership ("*commissariamento giudiziale*") and precautionary bans on holding offices or carrying out activities.

1.3

The European Parliament's Justice Committee has concluded its work on Whistleblowing

On 20 November 2018, the European Parliament's Justice Committee concluded its work on the draft whistleblowing directive submitted by the European Commission to the European Parliament on 23 April.

Trilateral negotiations will now begin between the European Parliament, the European Council and the European Commission, which will result in the final version of the directive.
In particular, the current draft provides that all public and private companies with at least 250 employees will be required to put in place whistleblowing procedures, extends whistleblowing protection to anonymous reports provided that they are well-detailed and allows reports on working conditions.
The current draft also extends protection to any co-workers of the whistleblower who provided his/her with some form of help, and to the facilitators who work for organizations providing support to whistleblowers.

1.4

The Anti-corruption decree has been submitted to the Italian Senate

The Italian Chamber of Deputies has approved the anticorruption decree ("*Decreto SpazzaCorrotti*"), which *inter alia* introduces a number of changes to Decree 231/2001, including the following:

- inclusion of "*influence peddling*" among the offences regulated by Decree 231;
- an extension of the length of the bans on holding offices or carrying out activities provided by article 25 of Decree 231 (from between 1 and 2 years to between 5 and 10 years);
- the addition of paragraph 5-*bis*, which reduces the length of the ban (between three months and 2 years) if, before the court of first instance ruling, the company had made its best endeavors to avoid further consequences of the offence, cooperated with the judicial authority to secure proof of the offence and identify the culprits, and implemented adequate organization models to prevent further offences and avoid the organization deficiencies which originally led to their commission.

The final version of the legislation was approved on 18 December 2018.

GUIDANCE

2.1

E-invoicing infringes the General Data Protection Regulation

On 15 November, the Italian Privacy Authority issued an Enactment against the Italian Revenue Agency on the e-invoicing obligation ("*Provvedimento nei confronti dell'Agenzia dell'entrate sull'obbligo di fatturazione elettronica*") [web doc. No 9069959], noting that the new e-invoicing procedure provides for the processing by the Revenue Agency of the particulars contained in the invoices, in breach of the GDPR.
The Privacy Authority therefore asked the Italian Revenue Agency to take appropriate measures to ensure compliance with the data protection legislation and to inform the Authority of the measures put in place to this effect.
The Enactment was also sent to the President of the Council of ministers and to the Minister of economy and finance for their evaluations.

2.2

Fourth plenary session of the European Data Protection Board

The fourth plenary session of the independent data protection authorities that form part of the European Data Protection Board was held on 16 November 2018.
Several topics were discussed. First of all, the Board discussed the draft Japan Adequacy Decision, i.e., a decision adopted by the European Commission which establishes that a non-EU country (or one or more territories within a non-EU country) or an international organization ensures an adequate level of protection of personal data, with the result that personal data can flow from all EU States in accordance with article 45 of the GDPR.
In the past, the Commission had adopted several Adequacy Decisions with regard to countries such as Switzerland, Australia, Argentina and the United States (the Privacy Shield)
With regard to Japan, the draft decision had been sent to EDPB by the European Commissioner for Justice, *Věra Jourová*, in September.
The EDPB stressed the importance of ensuring the continuity and high level of protection of data transfers outside the EU.
Secondly, the Board agreed to the European Commission's request to draw up a handbook on the

relationship between GDPR and Regulation 536/2014 on clinical trials on medicinal products for human use. The handbook will be drawn up in Q&A form. Finally, the Board discussed some details of the draft guidelines on the scope of application of the GDPR and announced its impending publication.

CASE LAW

3.1

Italian Supreme Court: the employer has the role of guarantor

On 6 November 2018, the Italian Supreme Court, 3rd penal section, filed decision No 50000/2018 concerning a case of injury at work resulting from the breach of workplace safety rules.
The Court stated that the employer must act as guarantor, meaning that not only does he have an obligation to put in place accident-prevention measures but must also constantly monitor its workers' compliance therewith.
This does not mean that the employer must create a "*risk-free*" working environment, but that he should take "*all measures which, with regard to the specific case and activity, are adequate to neutralize the associated technical risks*". Nor does the employee's actual conduct mitigate the employer's liability for non-compliance, unless the former was abnormal, exceptional or beyond the requirements of the work process.

3.2

Definition of environmental pollution

On 6 November 2018 the Italian supreme court, 3rd section, filed decision No 50018/2018 providing significant guidance on the interpretation of the offence of "*Environmental pollution*" referred to in article 452-*bis* of the penal code, which punishes "*anyone who unlawfully causes significant and measurable impairment or deterioration*".
The Court stated that according to the rule there is no need to give proof of contamination, since impairment or deterioration - meaning "*a significant and measurable alteration of the original environmental elements or ecosystem*" - are sufficient conditions: the damage offence provided by article 452-*bis* of the penal code (…) concerns environment *stricto sensu* and postulates the identification of actual harm caused to environment according to the scope of the new rule which does not require proof of site contamination.
Furthermore, the damage caused by pollution needs not be irreversible, since irreversible damage to the balance of an ecosystem would constitute environmental disaster, a more severe crime punished by article 452-*quater* of the penal code.

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COMPLIANCE NEWSLETTER | NOVEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 NOVEMBER 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