

REPORT ON THE HARMONIZATION OF ITALIAN LAW WITH THE ENFORCEMENT OF THE EU GENERAL DATA PROTECTION REGULATION 2016/679



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I-INTRODUCTION

The right to privacy and the right to data protection do not find direct and explicit recognition in the Italian Constitution. These rights were originally the result of jurisprudential elaboration, mainly through reference to the principle of the development of human personality as enshrined in the Article 2 of the Italian Constitution. Those rights are then entered into the Italian legal system through their recognition at the European level in the European Convention on Human Rights (1950) and in the Charter of Fundamental Rights of the European Union (2000), known as the Charter of Nice, which has the same legal value as the European Union Treaties following the entry into force of the Treaty of Lisbon in 2009.

The Italian Data Protection Act n. 675 of 31.12.1996 (directed to the “protection of people and other subjects with regard to the processing of personal data”) was the first Italian legislation adopted in the field of privacy and data protection as a part of the process of transposing EU Data Protection Directive n. 95/46/EC (the Data Protection Directive). Other legal statutes were adopted within the framework established by the Data Protection Directive in addition to the Italian Data Protection Act. However, the Italian Data Protection Act of 1996 – which was necessary in order to comply with the requirement of Schengen Convention to protect personal data – did not actually amount to a full implementation of the Data Protection Directive. Indeed, it led some to comment that “The origin of this legislation, somehow ‘instrumental’ to the full achievement of the Internal Market, including the free movement of people, well explains because in some countries of the Union, among which unfortunately Italy, the protection of personal data, often simply referred to as the protection of privacy, has been, for quite a long time, hardly understood and shared”¹.

1 F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali. Dalla direttiva 95/46 al nuovo Regolamento europeo*, Giappi-

For this reason and following the digital evolution that occurred in the 1990s, this law was superseded by a more comprehensive Italian law in the field of privacy and data protection, namely the legislative decree n. 196 of 2003, that is, the Italian Personal Data Protection Code (also known as the Italian Code of Privacy), which fully implemented the Data Protection Directive on personal data processing, as well as the further EU directives issued in the field, in particular the e-privacy Directive (02/58/EC). The provisions of the Italian Personal Data Protection Code has ensured that personal data has been processed by respecting data subjects’ rights, fundamental freedoms and dignity with particular regard to confidentiality, personal identity and the right to personal data protection². The processing of personal data has been regulated in a very detailed and systematic way in the Italian legislation, by affording a high level of protection for the rights and freedoms of individuals, in line and compliance with the principles of simplification, harmonization and effectiveness of the protection granted to data subjects. Even if Italy was very late in the full implementation of the EU Data Protection Directive n. 95/46/EC, the Italian Personal Data Protection Code has been considered one of the most comprehensive and in-depth legislation on data protection in Europe.

However, the Italian regulation in the field of data protection has largely rested on an authorization scheme based on the paradigm of notice and consent and on the prior consultation of the Supervisory authority, which characterized the Italian Personal Data Protection Code. Moreover, the fulfillment of the obligations deriving from such a Code has mostly been conceived and carried out as a process of compliance with a checklist of formal requirements, based on a

chelli, Torino, 2016, p. 61.

2 P. Guarda, “Data Protection, Information Privacy, and Security Measures: An Essay on the European and the Italian Legal Frameworks”, in *Cyberspazio e diritto*, 2008, pp. 65-92. Available online at: <https://ssrn.com/abstract=1517449>.

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static view of the subjects involved (data subjects, data processors or data controllers). The Italian implementation of the privacy and data protection regulation must therefore adapt to the radical change in perspective determined by the risk-oriented approach and by the principle of accountability, on which the GDPR is based. This requires data processors and controllers as well as the supervisory authorities to keep up with the technological evolution in the processing of personal data, which the European regulator could not directly address in the GDPR (that is the reason why the GDPR does not even mention, for instance, Big Data, Cloud Computing, Intelligent Ambient, or the Internet of Things).

Against this backdrop, it is important that the current harmonization of the Italian law with the GDPR take into account the abovementioned constant technological evolution in the processing of personal data. It is exactly in this framework that national supervisory authorities are called upon to verify data controllers and processors' compliance with GDPR. This point has been stressed by Franco Pizzetti, a former Italian Supervisory Authority President, who remarked that: "[...] in view of the development of new technologies and of Artificial Intelligence, the resources given to the supervisory authority should be attributed, by taking into account that this authority needs to avail itself of adequate data scientists, technical and IT experts, who will support the Supervisory Authority in exercising its powers of control and supervision also in the abovementioned technological fields"³. In this regard, Article 14 of the current legislative decree of harmonization provides, with regard to Article 156, paragraph 5 of the Italian Data Protection Code, that: "In addition to permanent staff, the office [of the Supervisory Authority] can hire employees with a temporary contract or make use of consultants appointed pursuant to Article 7, paragraph 6, of the decree legislative n. 165 of 2001, in any case not exceeding twenty total units".

In the following sections, we have focused our attention on the main points established by the Italian current scheme of the legislative decree of harmonization

³ F. Pizzetti, "La protezione dei dati personali e la sfida dell'intelligenza artificiale", in F. Pizzetti (a cura di), *Intelligenza artificiale, protezione dei dati personali e regolazione*, Giappichelli, Torino, 2018, pp. 1-186, notably, par. 2.2. "La legislazione integrativa degli Stati e i vincoli posti dal Regolamento", cit. p. 12.

(henceforth the decree⁴) of the Italian law with the enforcement of the EU General Data Protection Regulation 2016/679, which provides, at the art 27, the partial abrogation of the legislative decree n. 196 of 2003, that is the Italian Personal Data Protection Code.

II-GENERAL PROVISIONS

A) The definition of "communication" and "dissemination"

The Italian legislature intervened, diverging partially from the EU Regulation 2016/679, introducing two specific definitions with reference to the notion of "communication" and "dissemination".

Article 4(1)(2) of the GDPR provides for the definition of "processing" as "*any operation or set of operations which is performed on personal data or on sets of personal data*", among which "disclosure" and "dissemination" are mentioned without any specific definition.

The Italian legislature defines communication as "*disclosing personal data to one or more identified entities other than the data subject, the data controller's or data processor's representative not established in the Union, the data processor and any persons who, under the direct authority of the controller or the processor, are authorised to process personal data, in any form whatsoever, including by making available or interrogating or interconnecting such data*".

It is a much broader definition than that of "disclosure by transmission" provided by the GDPR, as communication shall occur in any form.

Dissemination, instead, shall mean "*disclosing personal data to unidentified entities, in any form whatsoever, including by making available or interrogating such data*". It is a definition very close to "*dissemination or otherwise making available*" provided by the GDPR: we can even say that it is simply a specification of the meaning underlying the concept of dissemination.

The Italian legal system always kept these two processing operations separate from the others by reserving them with particular regulation for processing related to data concerning health or

⁴ Our report is based on two following versions of the (scheme of the) Italian legislative decree of harmonization of Italian law with the dispositions of the GDPR. At present (21 May 2018), the legislative decree has not yet been published and entered into force.

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criminal convictions and offences, as well as with reference to the household exemption, that, in Italy, did not apply in the case of systematic communication and dissemination.

Likewise, under the current legislative decree, communication and dissemination operations are regulated more strictly than others with reference to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, to processing related to genetic and biometric data and data concerning health (for which dissemination is prohibited) and with reference to a specific criminal offence.

III-PRINCIPLES

A) The lawful basis for the processing

Article 6 of the GDPR lists six lawful bases to process personal data.

Among these, Article 6(1) provides that processing shall be lawful if is: (c) necessary for compliance with a legal obligation to which the controller is subject, (e) necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller and (f) necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

According to Article 6(2) “*Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX*”.

Article 2-ter of the decree provides that the basis for the processing referred to Article 6(1) of the GDPR in point (c) and (e) shall be laid down by Italian law or regulation (i.e. sources of law of primary and secondary level).

Moreover, disclosure between data controllers that process data, other than special categories of personal

data and data relating to criminal convictions and offences, under the Article 6(1)(e) basis is lawful solely where a law or a regulation provides it. Failing this, disclosure is allowed only if it is necessary for the performance of tasks of public interest or in the exercise of official authority vested in the controller and commence 45 days after notification of the Italian Supervisory Authority (“Garante per la protezione dei dati personali”) and any measures have been imposed by the Supervisory Authority to protect data subjects.

Regarding the legitimate interest pursued by the controller as lawful basis [6(1)(f)] the Italian legislature introduced restrictions to the GDPR not provided by any open clauses.

The Italian 2018 Budget Law (Law no. 205 of 27 December 2017) provides that data controllers which process personal data through automated means or “new technologies” on the basis of legitimate interest shall send prior notification to the Italian Supervisory Authority, and wait 15 days for its approval (before commencing processing). During the 15 days, the Supervisory Authority shall investigate and decide whether to approve, suspend or even to stop the processing where the legitimate interests of the data controller are overridden by the interests or fundamental rights and freedoms of the data subjects.

This kind of provision does not seem to fall within the scope of discretionary power granted to Member States by the GDPR and, above all, the requirement for a prior check by the supervisory authority is at variance with the principle of accountability that characterizes the entire GDPR.

Article 22 of the decree states that from 25 May 2018, the above mentioned provisions shall apply exclusively to the processing related to children’ personal data collected online, within the limits and according to the procedures set out in Article 36 of the GDPR.

B) Conditions applicable to child’s consent in relation to information society services

Under GDPR, Article 8(1), where data subject’s consent is the lawful basis for the processing, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old.

The same Article prescribes that “*Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years*”.

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The Italian legislature in a first draft of the decree of harmonization established the age of 14 years. The final version of the decree, at Article 2-*quinquies*, provides that the processing of children' personal data shall be lawful where the child is at least 16 years old. It also provides that, where the child is below that age, the processing is lawful only if, and to the extent that, consent is given or authorised by the holder of parental responsibility over the child. Moreover, the data controller shall provide children with intelligible and easily accessible information and use clear and plain language.

C) Processing of particular categories of personal data necessary for reasons of significant public interest

Article 2-*sexies* of decree, which refers to Article 9, paragraph 1, of the GDPR, sets specific conditions for the legitimate processing of particular categories of personal data, which are processed for reasons of significant public interest. More specifically, Article 2-*sexies* of the decree provides that the processing of the particular categories of personal data referred to in Article 9(1) of the GDPR, necessary for reasons of significant public interest, pursuant to the letter g), paragraph 2, of the same Article, are allowed if they are provided for by law of the European Union or, in the internal legal system, by provisions of law or, in the cases provided by the law, of regulation specifying the types of data that can be processed, the operations that can be carried out and the reason of significant public interest. It is important to remark that, pursuant to Article 2-*sexies*, paragraph 1, of the current decree, the provisions allowing the processing of such particular categories of personal data may be established, in the internal legal system, by *primary* or *secondary* sources of law.

Article 2-*sexies*, paragraph 2, sets out a legal presumption, by providing that, without prejudice to what established by paragraph 1, the processing carried out in the following areas or in others expressly identified by the law are considered carried out for reasons of public interest (that is, areas where a provision of law or regulation that envisages a reason of public interest already exists):

a) access to administrative documents and civic access;

b) keeping of records and records of civil status, of the registry of the population residing in Italy and of Italian citizens residing abroad, and electoral lists, as well as

issuing identification or travelling documents or change of personal details;

c) keeping of the national registry of drivers and of national vehicle archives;

d) citizenship, immigration, asylum, condition of the foreigner and refugee, state of refugee;

e) active and passive electorate and exercise of other political rights, diplomatic and consular protection;

f) activities of public entities directed to the enforcement, also through their subsidiaries, of the provisions on taxation and customs;

g) control and inspection activities;

h) granting, winding up, modifying and revoking economic benefits, facilitations, donations, other emoluments and qualifications;

i) awarding of honors and rewards, recognition of the legal personhood of associations, foundations and institutions, including of worship, of ascertainment of the requisites of honorability and professionalism for the appointment, as for the profiles of competence of the public bodies, also for offices of cult and directives of legal persons, business and non-state education, as well as for the issuing and revoking of authorizations or qualifications, the granting of patronage and representation awards, membership of honorary committees and admission to ceremonies and institutional meetings;

l) relations between public entities and third sector entities;

m) conscientious objection;

n) sanctions and protection activities in administrative or judicial fora;

o) institutional relations with religious institutions, religious confessions and religious communities;

p) social-welfare activities for the protection of minors and persons in need, not self-sufficient and incapable individuals;

q) administrative activities related to activities of diagnosis, assistance or health or social therapy;

r) tasks of the national health service and of bodies operating in the health sector, as well as tasks of hygiene and safety in the workplace and health and

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safety of the population, civil protection, safeguarding of life and physical safety;

s) social protection of motherhood and voluntary interruption of pregnancy, addictions, assistance, social integration and rights of the disabled;

t) education and training in professional, university or higher education;

u) data processing carried out for archiving purposes in the public interest or for historical research, concerning the conservation, organization and communication of documents held in the State archives, in the historical archives of public bodies, or in private archives declared of significant historical interest, for the purposes of scientific research, as well as for statistical purposes by subjects that are part of the national statistical system (Sistan);

v) establishment, management and extinction, by subjects who perform tasks of public interest or related to the exercise of public authority, of work relations of any kind, also unpaid or honorary, and other forms of employment, trade union matters, employment and compulsory placement, retirement planning and assistance, protection of minorities and equal opportunities in the context of employment relationships, fulfillment of the remuneration, tax and accounting obligations, hygiene and safety at work or safety or health of the population, ascertainment of the civil liability, disciplinary and accounting, inspection activity.

Article 2-*sexies*, paragraph 3, of the decree, finally provides that the processing of genetic, biometric or health-related data take place in compliance with the provisions of Article 2-*septies* of the decree.

D) Safeguards measure for the processing of genetic data, biometric data or data concerning health

Article 2-*septies* of the decree, which refers to Article 9, paragraph 4, of the GDPR, sets specific conditions for the lawful processing of genetic data, biometric data or data concerning health. Notably, it calls for the adoption of *safeguard measures* by the Italian Supervisory Authority. Pursuant to Article 9, paragraph 4, of the GDPR, “*Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health*”, Article 2-*septies*, paragraph 1, of the decree provides that the processing of genetic data, biometric data or data concerning health is legitimate when:

- a) one of the conditions set out in Article 9, paragraph 2, of the GDPR applies;
- b) the processing of such particular categories of data is compliant with the safeguard measures adopted by the Supervisory Authority.

Article 2-*septies*, paragraph 2, of the decree provides that the provisions that establishes the safeguard measures referred to in paragraph 1 shall be adopted at least every two years and take into account:

- a) the guidelines, recommendations and best practices published by the European Committee for the Protection of Data and the best practices in the field of processing of personal data;
- b) the scientific and technological evolution in the sector covered by the measures;
- c) the interest in the free movement of personal data in the territory of the Union European.

Let us focus our attention on the paragraphs 3-6 of Article 2-*septies*, of the decree, detailing the safeguard measures adopted by the Supervisory Authority:

- Article 2-*septies*, paragraph 3, provides that the provision scheme – through which the Supervisory Authority adopts the safeguard measures – shall be subject to public consultation for no less than sixty days.
- Article 2-*septies*, paragraph 4, redundantly provides that safeguard measures shall be adopted in compliance with Article 9, paragraph 2, of the GDPR, and also concern the safeguard measures to be taken regarding:
 - a) markings on vehicles and access to restricted traffic areas;
 - b) organizational and management profiles in the health sector;
 - c) modalities for the direct communication to the interested party of the diagnoses and data related to own health;
 - d) prescription of medicines.
- Article 2-*septies*, paragraph 5, provides that the safeguard measures shall be adopted in relation to each category of personal data referred to in paragraph 1, having regard to the specific purposes of the processing and

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may identify, in compliance with paragraph 2, further conditions on the basis of which the processing of such data is permitted.

- Article 2-septies, paragraph 6, provides that safeguard measures related to genetic data and those referred to in paragraph 4, letters b, c, and d, shall be adopted after consulting the Minister of Health who, for this purpose, acquires the opinion of the Health Care Superior Council. For genetic data, the safeguard measures can identify, in case of particular and high level of risk, consent as an additional measure to protect the rights of the data subject, pursuant to Article 9 (4) of the GDPR, or other specific safeguards. In case of a particular and high level of risk, this paragraph refers to, and may also require, the data subject's consent, according to the well-established model of authorization, as the legal basis for the legitimate processing of personal data.

Finally, Article 2-septies, paragraph 7, provides that personal data referred to in paragraph 1 shall not be disseminated. This means that dissemination of such data is presumed to be a risky activity per se, which needs to be prohibited.

IV-RIGHTS OF THE DATA SUBJECT

Under Article 23 of GDPR, Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard a well-specified list of public interest.

The Italian legislature has established a list of restrictions to the rights provided for in Article 15 to 22 where, asserting them, detriment may occur to:

- a) interests protected by money laundry laws;
- b) interests protected by provisions on support for victims of extortion;
- c) activities carried out by Inquiry Parliamentary Committees;

d) activities carried out by Public Authorities, except for profit-seeking Public Authorities, for monetary and financial purposes;

e) investigations carried out by defence counsels or establishing or defending a legal claim.

Restrictions to the rights provided for in Article 12 to 22 and 34 have been introduced in order to safeguard the protection of judicial independence and judicial proceedings.

V-DATA CONTROLLER AND DATA PROCESSOR

A) Attribution of roles and tasks to designed subjects

Article 2-terdecies, paragraph 1, of the decree, which refers to Article 4, paragraph 1, num. 10, and Article 29, of the GDPR, establishes that the controller or processor may provide, in the context of their own organizational structure, which specific tasks and functions related to the processing of personal data are attributed to specifically designated natural persons operating under their authority.

Article 2-terdecies, paragraph 2, of the decree, provides that the controller or processor shall identify the most appropriate methods for to authorize the processing of personal data by persons who operate under their own direct authority.

The former national law (the Italian Personal Data Protection Code) used to define, under the Article 4, paragraph 1, letter h, this figure as the “designed person for the data processing” (“incaricato del trattamento dei dati”), i.e., the natural person authorized by the controller or processor to perform specific processing of personal data under the direct authority of the controller or processor. Pursuant to Article 30, paragraph 2, of the Italian Personal Data Protection Code, their designation was necessarily written and it identified the scope of the authorized processing, whereas, pursuant to Article 2-terdecies, paragraph 2, of the decree, it is left to the controller or processor to identify “the most appropriate methods” for to authorize the processing of personal data by persons operating under the controller's or processor's direct authority.

B) Processing presenting specific risks for the performance of a task carried out in the public interest.

Article 2-quaterdecies, of the current decree, which refers to Article 35 and Article 36, paragraph 5, of the

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GDPR, provides that with regard to the processing of personal data carried out for the performance of a task of public interest that may present particularly high risks pursuant to Article 35 of the Regulation, the Supervisory Authority can, on the basis of the provisions of Article 36, paragraph 5, of the same Regulation and with general measures adopted ex officio, prescribe measures and actions to guarantee the data subject, that the data controller is required to adopt.

This provision tends to require, in this particular context (i.e. the processing of personal data carried out for the performance of a task of public interest that may present particularly high risks) – more than a prior consultation or authorization (as provided by Article 36, paragraph 5, of the GDPR) – an *ex ante* power of intervention of the Supervisory Authority through the adoption of general measures ex officio and the injunction of specific measures and actions to be adopted by the data controller.

VI-REMEDIES, LIABILITY AND PENALTIES

Article 141 of the Italian Personal Data Protection Code provided three kinds of administrative remedies: complaints, reports and claims. The first remedy (*complaint*) consisted in a procedure set out in order to point out an infringement of the most relevant provisions of Data Protection Code. The second remedy (*report*) allowed the data subject to lodge a report, if no circumstantial complaint might be lodged, in order to call upon the Italian Supervisory Authority to check up on the aforementioned provisions of Data Protection Code. The third one (*claim*) was a non-judicial remedy set out, in order to ask for the enforcement of the data subject's rights, by lodging a claim before the Supervisory Authority, which prevented the data subject to bring an action for the same matter before the judicial authority.

Under the GDPR, the only remedy is the right to lodge a complaint before the Supervisory Authority. The decree allows the data subject to lodge a complaint before the Italian Supervisory Authority, by means of the same procedure that was referred to in terms of "claim" under the previous Italian Data Protection Code.

Moreover, the decree re-establishes reports, providing that whoever may lodge a report before the Italian Supervisory Authority, who is called upon to assess it for the purpose of the corrective powers referred to in Article 58 of the GDPR.

With regard to penalties, Article 84 of the GDPR

provides that Member States shall regulate the other penalties applicable to the infringements of the Regulation, and in particular, for infringements, which are not subject to administrative fines pursuant to Article 83. Furthermore, Member States shall take all measures necessary to ensure that penalties apply. Such penalties shall be effective, proportionate and dissuasive.

Under the Italian Personal Data Protection Code, there were regulated four criminal offences:

1. unlawful data processing;
2. untrue declarations and notifications submitted to the Italian Supervisory Authority;
3. failure to comply with security measures;
4. failure to comply with provisions issued by the Italian Supervisory Authority.

In order not to impinge on the fundamental "*ne bis in idem*" principle (i.e. the right not to be subject to trial or punishment twice), as the European Court of Human Rights applied it in the *A and B v. Norway Judgment*⁵, the Italian legislature, in the first version of the legislative decree of harmonization, chose to provide only one criminal offence (instead of the four above mentioned ones).

The final version of the decree, on the contrary, provides several criminal offences. The previous crimes, provided by Article 167 of the Italian Personal Data Protection Code, titled "*Unlawful data processing*", have been replaced by three new ones, which are partially different.

Under the new Article 167, paragraph 1, "*any person who, with a view to gain for himself or another, causes harm to the data subject by processing personal data in breach of Articles 123, 126 e 130 or of the provision made further to Article 129 of the Italian Data Protection Code shall be punished by imprisonment for between six and eighteen months, unless the offence is more serious*".

Articles 123, 126, 129 and 130 of the Italian Personal Data Protection Code are provisions related to electronic communication services, which remain in force until the e-privacy Regulation will be approved.

Under the new Article 167, paragraph 2, "*any person*

⁵ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-168972%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-168972%22]})

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who, with a view to gain for himself or another, causes harm to the data subject by processing special categories of personal data or personal data relating to criminal convictions and offences in breach of Articles 2-sexies, 2-octies and 2-quaterdecies of the Italian Data Protection Code shall be punished by imprisonment for between one and three years, unless the offence is more serious”.

Article 2-sexies of the Italian Personal Data Protection Code, as seen above (see Section 3.3), is an Italian special provision related to the processing of particular categories of personal data necessary for reasons of significant public interest. Article 2-octies is an Italian special provision related to the processing of personal data relating to criminal convictions and offences. Articles 2-quaterdecies is an Italian special provision that provides general application orders of the Supervisory Authority with regard to types of data processing that are likely to result in a high risk according to Article 36 of the GDPR (see Section 5.2).

Under the new Article 167, paragraph 3, *“any person who, with a view to gain for himself or another, causes harm to the data subject by transferring personal data to a third country or an international organization in breach of Articles 45, 46 or 49 of the GDPR shall be punished by imprisonment for between one and three years, unless the offence is more serious”.*

Two other new criminal offences are now provided by Article 167-bis of the Italian Personal Data Protection Code, titled *“Unlawful communication and dissemination of personal data related to a large number of people”.*

Under the new Article 167-bis, paragraph 1, *“the controller, the processor or the designated natural persons operating under their authority who, with a view to gain for himself or another, communicate or disseminate personal data related to a large number of people, in breach of Articles 2-sexies, 2-octies and 2-quaterdecies of the Italian Personal Data Protection Code shall be punished by imprisonment for between one and six years, unless the offence is more serious”.*

Under the new Article 167-bis, paragraph 2, *“the controller, the processor or the designated natural persons operating under their authority who, with a view to gain for himself or another, communicate or disseminate, without consent, personal data related to a large number of people shall be punished by imprisonment for between one and six years, if the consent is the legal basis for communication and*

dissemination, unless the offence is more serious”.

Article 167-ter of the Italian Personal Data Protection Code provides a new criminal offence titled *“Fraudulent acquisition of personal data”.*

Under that Article, *“any person who, with a view to gain for himself or another, acquire with fraud personal data related to a significant number of people shall be punished by imprisonment for between one and four, unless the offence is more serious”.*

Lastly, the new Article 168 provides two criminal offences titled *“Untrue declarations to the Italian Supervisory Authority and interruption of the execution of the tasks or the exercise of the powers of the Italian Supervisory Authority”.*

Under the new Article 168, paragraph 1, *“any person who declares or attests to untrue information or circumstances, or else submits forged records or documents, in connection with communications, records, documents or statements that are submitted or made, as the case may be, in a proceeding before the Italian Supervisory Authority and/or in the course of inquiries, shall be punished by imprisonment for between six months and three years, unless the offence is more serious”.*

Under the new Article 168, paragraph 2, *“any person who, outside the cases above referred, intentionally interrupts or disturbs the regularity of a proceeding before to the Italian Supervisory Authority or of an investigation carried out by the Italian Supervisory Authority shall be punished by imprisonment up to one year”.*

VII-OPENING CLAUSES: A GENERAL OVERVIEW

In the present and last paragraph, we briefly expound to the so-called “opening clauses”, which are strictly considered as the clauses that allow the Member States to fill in some provisions of the GDPR, by establishing some derogations to those provisions.

We found out fifteen opening-clauses of this kind: notably, Article 6(2); Article 8(1); Article 9(4); Article 23(1); Article 35(10); Article 36(5); Article 49(5); Article 80(2); Article 83(7); Article 84(1); Article 85(2); Article 87(12); Article 88(1); Article 89(2); Article 90(1).

As seen above, the Italian legislature introduced some more specific provisions, in order to implement Article 6(2) (see Section 3.1), Article 8(1) (see Section 3.2), Article 9(4) (see Section 3.4), Article 23(1) (see Section

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4), Article 36(5) (see Section 5.2), and Article 84(1) (see Section 6).

According to Article 85(2), the Italian legislature saved, with few changes, exemptions and derogations related to the processing of personal data for journalistic purposes as well as for academic, artistic or literary purposes as provided by the Italian Personal Data Protection Code.

According to Article 88(1), the Italian legislature saved, with few changes, exemptions and derogations related to the processing of personal data in the context of employment as provided by the Italian Personal Data Protection Code.

According to Article 89(2), the Italian legislature saved, with some changes, exemptions and derogations related to the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes as provided by the Italian Personal Data Protection Code.

VIII-APPENDIX: SUMMARY REPORT OF THE SPECIAL PARLIAMENTARY COMMITTEE

Legislature 18th - Special Commission for the examination of urgent acts presented by the Government - Summary Report n. 13 of 17/05/2018.

Scheme of legislative decree laying down provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679, concerning the protection of individuals with regard to the processing of personal data, as well as the free movement of such data and repealing the Directive 95/46/EC (General Data Protection Regulation) (No. 22)

(Opinion of the Minister for relations with Parliament, pursuant to Article 13 of the Law of 25 October 2017, No. 163. Examination and postponement)⁶.

The rapporteur PERILLI illustrates the legislative decree under consideration, prepared on the basis of the mandate contained in Article 13 of the 2016-2017 European delegation law. This is a particularly complex provision from the technical point of view, which is of considerable importance as it is aimed at adapting the national legislation to the provisions of European Regulation no. 2016/679, aimed at strengthening

the level of protection of individuals with regard to the processing of personal data, improving the free movement of such data and the opportunities of businesses in the digital single market.

The Regulation, which will enter into force on 25 May, is based on the principle of accountability, that is, the empowerment of the data controller in relation both to the adoption of appropriate and effective measures for data protection, and to the need to demonstrate, upon request, that these measures have been adopted. Together with the Data Protection Directive in the area of law enforcement (Directive 2016/680/EU), it is therefore the new regulatory framework for data protection legislation defined at European level. It is a regulatory framework of great impact for a wide range of companies and users and it is therefore essential that a lacking legislation does not produce interpretative problems and additional costs, especially in the age of the digital economy.

In order to better understand the context in which the Special Committee operates as an advisory body, it might be useful to recall the timing of the obligations that concerned and will concern the legislation in question.

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data repeals Directive 95/46/EC (General Data Protection Regulation). Drafted after a long process, the Regulation establishes an immediately enforceable regulation in the legal systems of the Member States and, by its express provisions, replaces the previous regulatory framework of the Directive starting from May 2018 (recital 171 and Article 99 of Regulation 2016/679/EU). The Member States have therefore had two years to update the internal regulation, a period deemed appropriate to verify which internal discipline continue to be effective and which shall be amended, as well as to clarify the new rules also with regard to the processing of particular categories of data.

From a legislative point of view, Italy has chosen to adapt its personal data regulation to the non-immediately applicable part of regulation 679/2016 only with law no. 163 of 25 October 2017, in force since 21 November 2017. In December 2017, the commission of experts charged to draft the text was appointed to the Ministry of Justice. The Commission started work in January 2018 and effectively concluded them in mid-March 2018. The staff of the Supervisory Authority

⁶ Original text in Italian: http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=18&id=01067334&part=doc_dc-sedetit_iscsadg&parse=no

E-conférence, National Adaptations of the GDPR

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for the protection of personal data participated in the work of the technical commission. On March 21, 2018, the Council of Ministers approved, in preliminary examination, a legislative decree implementing Article 13 of the European delegation law. On this draft, considerable controversies have arisen, with regard to the adopted legislative technique and possible issues of constitutionality, with particular reference to the hypothesis of full repeal of the current Data Protection Code. Only on 10 May 2018 the scheme was sent to the Chambers and on 14 May it was assigned to the Special Commission, established on 4 April.

The corpus of rules under examination is very complex. It consists of 28 Articles grouped into six Chapters, which intervene with abrogation and modifications on almost all of the 186 Articles of the current Data Protection Code, with over 100 pages of attached reports, and proves to be unequal compared to the draft approved on March 21 by the Council of Ministers. This circumstance should be emphasized only because of the fact that in some parts the report, notably the technical report, still erroneously refer to the old preliminary text and the complete repeal of the code is no longer proceeding. Instead, the text limits itself to the general replacement of penal sanctions with administrative sanctions and maintains the criminal relevance of Article 167 of the code on the unlawful processing of data. On the contrary, there are two autonomous criminal offences: the unlawful communication and dissemination of personal data referring to a large number of people, under Article 167-bis, and the fraudulent acquisition of personal data, referred to in Article 167-ter. In addition, there is a stabilization of the increase in the Supervisory Authority's staff at 162 units, as already gradually provided for by recent regulations, and there is an equalization of the relative salaries to those of the *Autorità per le Garanzie nelle Comunicazioni* (Communications Supervisory Authority), with charges that shall be properly evaluated. It also provides the possibility for children under 16 years to use social networks with the consent given by the person exercising parental authority.

It is therefore observed that the delegation conferred by the Chambers to the Government expires on 21 May 2018: the deadline is extended by three months, pursuant to Article 31 of Law no. 234 of 2012, even if on 25 May 2018 the EU Regulation enters into force.

Therefore, it points out that two sources of law on privacy issues will coexist in the immediate future: the

Code, as amended, and the EU Regulation. Considering the instrument chosen by the European legislature, a Regulation and not a Directive, it would probably not have been necessary for the legislature to intervene from a strictly technical-legal standpoint. However, it was deemed useful to adapt the national legislation to the Regulation, also in consideration of the issues referred to the internal regulation, similar to what happened in other countries, where, however, the work for the recognition of the legislation to adapt started in advance.

As a whole, the legislative decree scheme carries out an extensive intervention on the code regarding the protection of personal data, i.e. the legislative decree n. 196 of 2003. The most substantial part of the amendments concerns the repeal of the provisions of the code incompatible or overlapping with those of the European regulation, which by their nature are directly applicable in the national States and which therefore constitute the primary data protection regime in the future. Other interventions, on the other hand, are aimed at adapting, through legislative innovations, the provisions of the Code to the provisions of the European Regulation that are not directly applicable, which leave room for intervention to national legislatures. As a result of the proposed intervention, therefore, the code is intended to perform, in the regulation of personal data protection, a function complementary to the European Regulation.

The accompanying report highlights certain choices made during the preparation of the scheme. Notably, it is remarked that, in order to assure continuity, the provisions of the Supervisory Authority and the authorizations, which will be the subject of a subsequent reorganization, as well as the deontological codes in force, have been safeguarded for a transitional period. For small and medium-sized enterprises, the Supervisory Authority is expected to promote simplified procedures for the fulfillment of the obligations of the controller of personal data processing. Lastly, the provisions concerning electronic communications have not been modified, pending the issuance of the specific European Regulation.

More specifically, in Chapter I, Article 1 modifies the title and premises of the Data Protection Code, while Chapter II, constituted by Article 2, first introduces modifications to the general provisions of the Code, referred to in Title I of Part I. It is specified that the processing of personal data takes place according to the rules of Regulation (EU) 2016/679 and of the code

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as amended and that the public Supervisory Authority remains identified in the “Garante per la Protezione dei Dati Personali”.

The new Titles I-bis, I-ter and I-quarter have been added. In the first title, concerning the principles, it is specified - in Articles 2-ter to 2-novies - that the legal basis for the processing of personal data carried out for the performance of a task of public interest or connected to the exercise of public authority consists exclusively of a legal provision or, in the cases provided by law, of regulation. Rules are laid down for the adoption of the deontological rules; some rules are defined for the consent of the minor in relation to the services of the information society, setting at the age of sixteen the minimum age for the provision of consent. Provisions are introduced for the processing of particular categories of personal data necessary for reasons of significant public interest, measures for the processing of genetic, biometric and health data and those relating to criminal convictions and offenses. The principle of the non-usability of the data processed in breach of the discipline on the processing of personal data is established.

The new Title I-ter, Articles 2-decies to 2-duodecies, concerns the rights of data subjects and the grounds for their limitation. In particular, limitations of their rights are set out if a prejudice may stem from their exercise to the interests protected under the provisions on money laundering and support for victims of extortion requests, to the activity of the parliamentary committees of inquiry, to the activities of supervision on financial and monetary markets, to the judicial exercise of rights or to the carrying out of defensive investigations. With reference to the rights concerning deceased persons, it is then introduced an extension of their possible exercise by those who have a personal interest or act to protect the interested party or for family reasons deserving protection.

The new Title I-quater, Articles 2-terdecies to 2-quinquiesdecies, contains provisions aimed at specifying the powers and obligations of the data controller and processor, including the possibility of delegating tasks and functions to natural persons operating under their authority. Article 27 provides for the repeal of the current Titles II, III, IV, V, VI and VII.

Chapter III of the scheme introduces amendments to Part II of the Code, containing provisions relating to specific sectors, which is now referred to specific provisions for the processing necessary to fulfill a legal obligation or to perform a task of public or connected

interest to the exercise of public authority.

In Title I of Part II of the Code, concerning judicial processing, are added Articles 50 and 52, relating, respectively, to news and images concerning minors and to the processing of identification data contained in judicial authorities' orders.

In the report accompanying the scheme, it should be noted that Title II of Part II of the Code, concerning processing by police forces, is repealed by the legislative decree implementing Directive 2016/680/EU, which is currently being adopted. For the purposes of coordination with this legislative decree, the amendments introduced by Article 4 of the scheme under examination to Title III of Part II of the Code, in particular Article 58, concerning the provisions on the processing of personal data for security purposes, are also addressed. national or defense.

Article 5 of the scheme intervenes with certain additions on the first two Chapters of Title IV of Part II of the Code, with reference to the discipline on data protection in relation to access to administrative documents and public registers and professional registers. Chapter III, IV and V of Title IV are repealed by Article 27 of the scheme.

Article 6 of the scheme affects Title V of Part II of the Code, which concerns the processing of personal data in the health sector. In the report accompanying the provision, it is emphasized that the new Articles actually reproduce substantially the current Articles of the Code: the changes are dictated by the need to update certain normative references and to expunge every reference to the consent that, according to the regulation, no longer constitutes the only requirement of lawfulness (legal basis) of data processing. In relation to this part of the Code, Article 27 lists the numerous repealed Articles.

Article 7 of the scheme affects Title VI of Part II of the Code, relating to the education sector. In particular, the scope of the discipline on the processing of student data is also extended to the field of public and private universities and other institutions in the field of training and education. In the report it is pointed out that this means overcoming the asymmetry of protection between educational institutions and universities.

Article 8 of the scheme introduces non-substantial amendments to Title VII of Part II of the Code, now referred to data processing for archiving purposes in the public interest, scientific or historical research or

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for statistical purposes.

Article 9 of the scheme introduces amendments to Title VIII of Part II of the Code, concerning processing in the context of the employment relationship. It is expected that the Supervisory Authority will promote the adoption of deontological rules for public and private subjects interested in the processing of personal data and it excludes the need for consent in cases of receipt of curricula spontaneously sent for the purpose of the possible establishment of a working relationship. The rules on data collection and remote controls remain unchanged, with the only introduction of the reference to Article 10 of Legislative Decree no. 276 of 2003, which extended the prohibition of investigations on opinions also to employment agencies and other authorized or accredited public or private subjects.

Article 10 of the scheme affects Title IX of Part II of the Code, which in its current form contained rules concerning the banking, financial and insurance sectors and which, with the intervention carried out by the provision in question, refers only to the insurance sector, with the reproduction of the provisions contained in Article 120, relating to claims.

Article 11 of the scheme reproduces almost entirely the provisions contained in Title X of Part II of the Code, relating to electronic communications. Pending the new European legislation on the matter, it was decided to limit the interventions on the Articles included in this Title - which also constitute the transposition of the current European legislation - to coordination changes, also in relation to the legislative provisions approved in the last months of the last legislature. In line with the provisions of the regulation, however, Articles 132-ter and 132-quater are introduced, which require publicly accessible electronic communications service providers to adopt organizational and safeguard technical measures appropriate to the existing risk and to inform subscribers and users, where possible, about the existence of a risk of network security breaches, indicating the possible remedies and related presumable costs.

Again on the basis of Article 27 of the scheme, Title XI of Part II of the Code, relating to the liberal professions and private investigation, is repealed.

Article 12 of the scheme intervenes with some additions to Title XII of Part II of the Code, containing rules on journalism, freedom of information and processing, with reference to the promotion of the adoption of deontological rules on data processing.

Chapter IV of the scheme in question introduces amendments to Part III of the Code, dedicated to the protection of data subjects and to penalties, as well as to the annexes. In particular, with Article 13 of the scheme, a new Chapter I is inserted in Title I, which establishes the principle of the alternativeness of forms of protection. The new Article 140-bis, in fact, provides that the data subject, if he believes that the rights he entitles on the basis of personal data protection legislation have been violated, can lodge a complaint with the Supervisory Authority or appeal before the Judicial Authority. The claim to the Supervisory Authority cannot be proposed if, for the same object and between the same parties, the judicial authority has already been appealed.

The additional changes introduced by Article 13 concern the Articles relating to the filing of complaints to the Supervisory Authority, the procedures for the decision by that Authority and the possibility, recognized to anyone, to address a report on the possible violation of the data protection regulations. The jurisdiction over all disputes regarding the protection of personal data subject to judicial remedies and the right to compensation for damages is still reserved to the ordinary judicial authorities.

Following the new provisions, Article 27 provides for the repeal of the Articles of the current Code on the alternative protection to the jurisdiction.

Article 14 of the scheme then intervenes on Title II of Part III, renewing its provisions in order to adapt the discipline of the Independent Supervisory Authority to the provisions of the regulation. The rules contained in this Title specify the organization chart, the remuneration and the organizational structure of the Supervisory Authority for the protection of personal data, identify its tasks and powers, including that of acting in court, and regulate the requests for information and the procedures for conducting investigations.

Article 15 of the scheme intervenes on Title III of Part III of the Code, concerning penalties. With reference to Chapter I of the Title, related to administrative infringements, only Article 166 remains (with respect to the repeal set out in Article 27 of the scheme), which is amended to define the criteria for applying administrative fines and the procedure for the adoption of corrective and sanctioning measures. It is indicated in detail to which infringement of the rules introduced the different penalties provided for in the Regulation will apply, and the Supervisory Authority

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is identified as the body delegated to the adoption of the corrective measures provided for in the Regulation and to the imposition of administrative fines. The sanctioning procedure is regulated, establishing that it may be filed against both private parties, public authorities and public bodies, following a claim or an initiative by the Supervisory Authority, in the exercise of the investigative powers, as well as in relation to accesses, inspections and checks carried out on the basis of independent assessment powers, or delegated by the Supervisory Authority.

With regard to the criminal offenses, regulated in Chapter II of Title III of the Code, in the report accompanying the scheme it is highlighted that some of the existing criminal provisions, pursuant to Articles 167 and following of the Data Protection Code, punish behaviors that are punished with administrative fines to the European Regulation. The Government considered it appropriate to proceed to a partial decriminalization, partly following the direction drawn up by the technical Commission to avoid the danger of undermining the ne bis in idem principle between criminal penalties and administrative fines stated in the jurisprudence of the European Court of Justice, which, moreover, is very widespread in the report, notwithstanding the fact that in national law and internal jurisprudence it has had limited relevance. The wording of Article 167 of the Code, as amended by the scheme in question, still continues to contain criminal penalties in relation to the infringement of certain provisions of the Code concerning the unlawful processing of personal data.

With the new Article s 167-bis and 167-ter, criminal penalties are introduced, respectively, for cases of unlawful communication or dissemination and fraudulent acquisition of personal data, if such data are referable to a large number of people. Article 168 is also renewed, which provides for criminal penalties for those who declare or attests untrue information in proceedings before the Supervisory Authority or interrupt or disturb the execution of the activities of the Supervisory Authority. Article 171 is reformulated and provides for criminal penalties for the infringement of the provisions on remote controls and investigations on workers' opinions. Finally, Articles 169 and 170 have been repealed, with which the non-adoption of security measures for data protection and non-compliance with the provisions of the Supervisory Authority were penalized.

Title IV of the Code, related to the transitory and final provisions, is almost entirely repealed by Article 27 of the scheme and the annexes B and C to the Code are

also repealed. With reference to Annex A, Article 16 of the scheme changes its name to "deontological rules". Chapter V of the draft decree contains only Article 17, which changes Article 10 of the legislative decree no. 150 of 2011 in relation to the procedure for settling disputes concerning the protection of personal data.

Finally, Chapter VI contains the transitional, final and financial provisions.

In particular, Article 18 regulates the facilitated conclusion of violations concerning the protection of personal data, providing for a reduced payment for proceedings that, as of March 21, 2018, are still not defined with the adoption of the ordinance-injunction.

Article 19 introduces a specific rule for handling the previous affairs. Article 20 provides the legal effectiveness of codes of ethics and conduct in force at the date of entry into force of the decree under examination. Article 21 sets out the transitional rules on the general authorizations of the Supervisory Authority. Article 22 intervenes with transitional rules on a heterogeneous series of issues. Article 23 contains rules for coordination with the decree adopted in implementation of the delegation contained in Article 11 of Law no. 163 of 2017 for the transposition of the 2016/680/EU directive.

Article 24 regulates the applicability of administrative fines to infringements committed before the date of entry into force of the decree in question. Article 25 concerns, consequently, the transmission of documents by the judicial authority to the administrative authority.

Article 26 contains the financial provisions, while Article 27 lists the provisions of the repealed code. Finally, Article 28 regulates the entry into force of the decree, setting it as 25 May 2018.

The rapporteur clarifies that the Special Committee, in the consultative stage, could only express itself on the correspondence of the scheme to the delegation conferred by Parliament in 2017 and therefore, indirectly, to Regulation 2016/679, also with very limited available time, due to the timing and drafting modalities of the Articles adopted by the Government, which transmitted the text to the Parliament close to its hypothetical entry into force.

Therefore, some critical considerations are done, observing that the ratio underlying some provisions is not always explained in the draft decree. References to the parts of the regulation that led the drafters to repeal or renew certain Articles of the Data Protection

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Code are sometimes lacking. The rapporteur believes that this drafting technique, together with the lack of a text showing the changes made to the complex body of law subject to the intervention, does not allow a reasoned examination of the provisions introduced, especially considering the tight schedule envisaged. Moreover, the opinion of the Supervisory Authority has not been acquired.

In his opinion, it is needed to evaluate the introduction of a mechanism for the facilitated definition of disputes, the penalties system, which does not always appear to be harmonious with the internal legal system, the interventions on the structure and remuneration of the Supervisory Authority, but also the individual innovations in specific areas and sectors.

With reference to the penalties, he specifies that they are provided for by the European Regulation under Article 83. The decision on the imposition of the administrative fines is left to the Supervisory Authority for the protection of personal data, which takes into account the nature, gravity and duration of the infringement, its intentional or negligent character, the action taken by the controller or processor to mitigate the damage suffered by data subjects, any relevant previous infringements by the controller or processor, the degree of cooperation with the Supervisory Authority, as well as any other aggravating factors. There are financial penalties that, depending on the case, can reach up to 10 or 20 million euro or, for companies, up to 2% or 4% of the world annual turnover of the previous year.

*Article 84 provides that Member States shall lay down rules on other penalties for infringements of the Regulation, in particular for infringements which are not subject to administrative fines pursuant to Article 83 and shall take all measures necessary to ensure that they are implemented. These penalties must be effective, proportionate and dissuasive. The same Regulation, under Article 58, allows the Authority to limit or ban a data processing and recital 149 of the Regulation 679/2016 on data protection allows Member States to impose penalties in accordance with the principle of *ne bis in idem*. With regard to this framework in the Regulation, Article 166 of the Data Protection Code - amended by Article 15 of the decree - indicates the infringements subject to the administrative fines referred to in Article 83 (4) and (5) of the Regulations, that are, respectively administrative fines of up to 10 million euros or, for companies, up to 2 percent of the total annual turnover of the previous*

year, if higher, as well as administrative fines of up to 20 million euro or, for companies, up to 4 percent of the total annual worldwide turnover of the previous year, if higher. The proceeds of the sanctions are assigned half to the Treasury and half to the Supervisory Authority. The existing Articles 161, 162, 162-bis, 162-ter, 163, 164, 164-bis, 165, 169 and 170 are repealed, while the introduction of the cases referred to in Article 167-bis and Article 167-ter refers to specific hypotheses.

Overall, the repealing effect will affect numerous criminal conducts and their perpetrators. A more favorable regulation seems to be reserved for the facts committed before the new legislation. By way of derogation from the general regulations, a reduced payment, equal to two fifths of the minimum, is admitted for all the violations of the current Articles 33 and from 161 to 164-bis, not defined by order and injunction as of March 21, 2018. In this regard, he indicates that the rationale for identifying this deadline is not clear.

On the basis of Article 24, violations committed prior to the entry into force of the legislative decree in question are applied to the provisions which, by means of repeal, replace administrative and criminal penalties. If the proceedings have been irrevocably concluded, the Judge must revoke the sentence or the decree because the fact is no longer provided by the law as a crime. He points out, in any case, that an administrative fine for the maximum penalty originally envisaged may not be applied to the facts committed before the entry into force of the decree, taking into account Article 135 of the Criminal Code, in which the matching criterion with a custodial sentence is indicated in 250 euros per day. The reduced payment referred to in Article 16 of Law no. 689 of 1981, according to which the payment of a reduced amount equal to the third part of the maximum penalty envisaged for the committed infringement, is admitted, or, if more favorable and if the minimum of the legal penalty is established, equal to double of the relative amount in addition to the costs of the proceedings, within the term of sixty days from the immediate dispute or, if this has not occurred, from the notification of the violation. However, for future infringements, the possibility of an administrative obligation is not expressly envisaged for the lack – in the EU Regulation – of the parameter of the minimum amount of the fine.