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THE LONG ROADMAP OF THE ITALIAN **LEGISLATOR** TOWARDS THE EUROPEAN REGULATION ON PRIVACY

One year after the European Regulation on Privacy was passed by the Community Legislator – and one year after the deadline that this Legislator had given to Member States to adapt to this regulation – it seems interesting to point out the situation in Italy after the "Jobs Act".

The European Legislator was insightful in 2016 when it decided to regulate the matter on Privacy by choosing the instrument of regulation, perhaps aware of the general "ruthlessness" of Member States in transposing the rules of Community Law. In fact, the regulation is directly applicable at all Member States, while the former Privacy Directive required each State to produce their own regulations, even though these States had to comply with the principles contained in the Directive itself.

This choice made by the European Legislator aimed at pointing out that the community acquis sanctioned by the various treaties and by the European Constitution "still exists" and "needs to be protected", even more so at a time when the stability of the Union has been put to the test by economic and political events that have repeatedly highlighted the total absence of common guidelines that will inspire Member States to make decisions on issues of major national and international interest.

From 28 March 2018, the current 28 EU Member States will have to permanently apply the provisions contained in the aforesaid European Regulation. This does not mean that most of the legislation in question (including the Italian one) will not or should not be linked to or coordinated with the new rules introduced in Europe and, in the same view, it is also the Privacy Guarantor who has cautiously limited the temporal effectiveness of general authorisations for sensitive data until this "fateful" date.

The new regulatory system has introduced important changes in the privacy scene that, at least in our country, has been subject to regulations that in most cases are very generic and difficult to apply, so much so that the Guarantor has had to intervene to settle disputes and controversies (as well as interpretative doubts) in order to ensure the correct application – or at least prevent violation – of the rules safeguarding the right of the so-called "data subject".

The Community Legislator has primarily sought to "shift" the control of the respect of privacy rights, also constitutionally guaranteed, from third parties (in Italy, the Guarantor or judicial authority) to subjects such as trade associations that can equip themselves with "self-regulatory codes" aimed at certifying the reliability of the control system and use of sensitive data.

Certainly, compared to the past, a more active role is being played by those who apply the current Privacy provisions daily and to test the effects (in some cases, despite them) deriving also – and above all – within the employment relationship.

In line with this approach, there is also the introduction of a new figure (at least in the Italian legislation): the "Data Protection Officer" (DPO) who, among other things, will have the task of:
- monitoring and controlling compliance with the Regulation;
- assessing the impacts on data protection, raising awareness and training of personnel involved in the processing and related control activities;
- consulting directly with the Guarantor.

Another important new feature, which lies within the self-regulatory apparatus and accountability of those involved in data processing is the impact assessment on data protection, the so-called "Privacy Impact Assessment" (PIA).
In other words, the Data Controller, Data Processor and DPO must first assess whether certain processing activities can present a high risk to the rights and freedoms of natural persons and at the same time provide appropriate measures aimed at eliminating these risks and guaranteeing the protection of personal data.

EU REGULATION NO. 2016/679: MAIN INNOVATIONS

THE NEW FIGURE OF THE DPO
Responsibilities and role within the company

PRIVATE IMPACT ASSESSMENT
Obligations for the employer

TOUGHENING OF SANCTIONS
up to
2%
of the company's turnover

Needless to say, the simple adoption of the self-regulation mechanism and systematic analysis of the impacts that certain activities may have on personal data will produce, as an initial effect, the immediate consequence of having or seeking within the company people (even external) who have in-depth knowledge of the subject and who have the regulatory requisites to manage the relationship with natural persons whose data will be processed for the purposes provided by the regulations.

Apart from the obvious considerations on the difficulty to achieve "independence" of the DPO, who as collaborator of a company (even manager) should have an evident conflict of interest while performing his duties, such as that of checking the work, it remains to be seen how (and if) the Italian Legislator intends to intervene in order to adapt the current regulatory system born with the Workers' Statute and modified by the recent Jobs Act to the European legislation.

If, in 2015, our Legislator felt that a regulatory intervention relating to controls during the performance of the working activities could no longer be postponed, especially since the most recent law on this matter dates back to 1970, it is equally true that he neglected – perhaps not accidentally – to make a connection between the changes introduced in 2015 on controls at a distance and the legislation on privacy, an issue that the Guarantor has spoken about on several occasions with respect to filling the gaps in the legislation relating to:
- the types of instruments used to perform the work,
- how to use these instruments and the contents of the notice to be given to employees to legitimise these controls,
- the disciplinary consequences that could have come from the performance of the employment relationship.

Another aspect just as important is the management of the litigation in case of violations to the privacy legislation, given that the sanctions have become much tougher (up to 2% of the company's turnover).

In fact, the Regulation stipulates that the legislation applies to companies located outside the European Union that offer services or products to people located within the EU.

The Regulation indicates the data protection Authority of the country where the main establishment is located as the body responsible to settle disputes on its application and compliance, but this principle does not appear sufficient (and is not always compatible with that of the place of jurisdiction), especially in the case of multinational companies where it is not always easy to find out where the main establishment is located.

In fact, the Regulation has sought to analyse the various assumptions in the case of companies with multiple locations or controlled by a parent company, but it is interesting (and perhaps indicative) to point out that the same Legislator uses the conditional when identifying the main establishment or parent company in the case of groups of companies, almost as if to point out that these cases are so complex that it would not be easy to determine and clearly define the competences (and jurisdiction) of each Member State.

In 2003, Leg. Decree no. 196 undoubtedly represented the first legislative act on privacy throughout the EU: will the Italian Legislator succeed in maintaining its leading role in Europe?