# RSM PALEA LAURI GERLA

Associazione professionale di Studio Palea, Studio L4C, Studio Gerla Associati

# TAX NEWS

## 2016 – 10



RSM

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# FOCUS ON TAX AND ACCOUNTING TOPICS

## Non-deductibility of the remunerations paid to directors without powers

***(Italian Supreme Court, judgment no. 18448 of September 21st, 2016)***

The issue related to the remunerations paid to the directors is often the harbinger of tax disputes, for several reasons. The assessments carried out are typically those related to the size of the remunerations (non-deductibility of the fees regarded as "disproportionate" and uneconomic), as well as to the company formalities required during the resolution of the remuneration itself.

With Sentence of 21 September 2016, the Italian Supreme Court dealt with the issue from a new and different point of view: are those remunerations paid to directors – who substantially have no decision-making powers – deductible?

The Supreme Court has investigated the issue based on the fact that all costs are regarded as inherent.

Therefore, a preliminary overview of the (consolidated) principles ruling the tax deductibility of the expenses incurred is carried out, pointing out that:

- costs, to be deducted, shall be real, inherent, competent, certain and determined;
- for a cost, to be deducted, it is not only necessary that the related existence is assessed, but it is also important that such cost is proved to be inherent, i.e. whether it is an expense referring to activities resulting in revenues or income that are part of the business income;
- more in detail, the inherent character shall be understood as "a relationship between two concepts" – *the expense and the company* – so the cost is relevant for the quantification of the tax base, not mainly for its explicit and direct connection with a specific item of income, but for its relationship with an activity *potentially suitable for producing profits*.

Given the above, the Supreme Court has examined the case in which some directors were mere interposition with no real decision-making power. However, based on their role, they received a proper remuneration.

In accordance with the principles previously mentioned, the Supreme Court ruled that for the purposes of the deductibility of an expense, it is not sufficient to prove that it exists and, therefore, that an expense is documented, but it is also necessary to demonstrate that the goods or services purchased are inherent compared with the entrepreneurial activity, understood as the instrumentality of the goods or services themselves, as well as the economic consistency of the costs incurred within the business activity.

The Supreme Court stated that remuneration paid to directors "not acting as such" is clearly faulty; therefore, they are regarded as non-deductible.

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## Tax news related to the end-of-year Law Decrees

As part of a broader reorganization and simplification of the existing tax policies in Italy, aimed at strengthening the economic competitiveness of such a country, at relaxing the relationships between the State and the taxpayers and at countering tax evasion, the Italian Government has recently presented a new package of tax reforms that are added to the previous measures to support and strengthen the "*Italian system*"(see the Stability Law for the year 2015, the Internationalization Decree and Stability Law for 2016).

Some new features of the aforementioned package of reforms, which affect many taxpayers and that will, in many cases, be effective from the current year, will be analyzed in the following, with specific reference to:

- **Law Decree no. 193 of October, 22nd 2016**, published in the Official Journal no. 249 of October 24th, 2016 (except for any changes that may be carried out during the stage of conversion into Law);
- **Stability Law 2017** bill (now examined by the Parliament for discussion and final approval).

| **Law Decree no. 193/2016** | |
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| Abolition by Equitalia (i.e. the Italian state-owned Tax Collection Agency) | From July 1st, 2017, all companies belonging to Equitalia Group will be dissolved and replaced by a new public economic body called "Revenue Agency – Collection".<br><br>Such operation will result in the resolution of:<br>▪ interest on arrears (art. 30, paragraph 1, of the Italian Presidential Decree no. 602/1973), and<br>▪ penalties and additional amounts on debts (art. 27, paragraph 1 of the Law Decree no. 46/1999)<br>The procedure covers debts born between 2000 and 2015, provided that the taxpayers must pay the part of debts which refer to:<br>▪ capital and related interest,<br>▪ related commissions on capital and interest,<br>▪ expenses for enforcement proceedings, and<br>▪ expenses for the notification of the notice of payment.<br><br>The taxpayer carries out the procedure filling in and sending by January 23rd, 2017 the DA1 form, available on the website of Equitalia or in one of the offices of Equitalia.<br><br>It is possible to carry out a single payment or to pay up to a maximum of four instalments, paying the third one on September 15th, 2017 and the fourth one by March 3rd, 2018. It shall be pointed out that the amounts already paid are not relevant for the procedure and therefore will not be reimbursed.<br><br>Finally, it is possible to opt for the preferential treatment even though the taxpayer has already started to reimburse his debit. In this case, the taxpayer shall be up to date with the payment of instalments expiring between October and December 2016 in order to apply for the new procedure. |

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| | Based on the first activities of the Parliamentary, it shall be pointed out that:<br>▪ the write-off will also affect the notices of payment notified in 2016,<br>▪ the instalments will increase from four to five, and,<br>▪ the deadline for the payment of the last instalment will be postponed from March to September 2018.<br>It shall be pointed out that the procedure is still under discussion and could be subject to further changes. |
| Quarterly analytical Spesometro | From January 1st, 2017, the taxpayers subject to VAT obliged to submit the 2017 VAT quarterly communication shall send, every 3 months (by the last day of the second month following the reference quarter), all invoices issued and received and the data relating to the VAT receivable and VAT payable.<br>In the communication, the following will be included:<br>▪ the identification data of the parties involved;<br>▪ date and number of the invoice;<br>▪ tax base;<br>▪ rate applied;<br>▪ tax and transaction type. |
| Reopening of the terms to apply for the VD procedure | The terms to apply for the voluntary disclosure procedure, in order to regularize capital and investments held abroad in violation of the rules on tax monitoring, are reopened.<br>The procedure, that can be activated up to July 30th , 2017, applies to those subjects who want to regularize violations in terms of taxes on income and related additional taxes, substitute taxes, regional tax on productive activities and value added tax, as well as any related violations of the withholding agents' return, provided that the taxpayer has not already submitted (either directly or through intermediaries) the application for the regularization within the previous Voluntary Disclosure procedure (for violations committed up to September 30th, 2014).<br><br>The new procedure is characterized by the following:<br>▪ it can be activated for violations committed up to September 30, 2016 (date of submission of the tax return for the tax period 2015);<br>▪ for the only transactions subject to VD, fulfilments of "quadro RW" are temporary suspended till the conclusion of the procedure and are spontaneously paid in a single lump-sum by September 30, 2017, provided that the taxpayer has stated in detail, in the attached report, all information for the settlement of the income tax and the filling in of RW section;<br>▪ the terms of assessment in art. 43 of the Italian Presidential Decree no. 600/73 which expire as of January 1st, 2015 (the first deadline is related to the tax year 2009) are "automatically" extended to December 31, 2018;<br>▪ the regularization of the violations takes place with a single payment by September 30, 2017, i.e. with 3 consecutive quarterly instalments of the same amount, the first of which to be paid by September 30, 2017; |

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| | ▪ the payment of the amounts due, unlike the previous Voluntary Disclosure procedure, is carried out with a *self-assessment taxation* by the taxpayer. However, in case of insufficient payments, it will be necessary to pay a surcharge on penalties ranging from 3% to 10% (depending on the difference between the payments made and the payments due);<br>▪ in case the payment by September 30, 2017 is not carried out, the reduction of penalties (for violations in terms of tax monitoring) is reduced by 40% (instead of 50%, as in the previous Voluntary Disclosure procedure) if the assets are transferred to a EU State or EEA, or by 15% in all other cases;<br>▪ if, conversely, the payment of the sums due is carried out in an amount which is higher than the amount due, the surplus can be used to request as refund or can be used as offsetting. |

| **Stability Law 2017 bill** | |
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| Tax deductions for building restructuring, aseismic requalification, energy requalification e purchase of furniture and tax credit for accommodation facilities | ▪ the terms for benefitting from the 50% tax deduction on building restructuring expenses that do not provide energy savings are extended up to December 31st, 2017 up to a maximum limit of Euro 96.000,00 per residential unit. The favorable treatment applies to real-estate owners (as they are subject to the income tax of individuals, whether or not resident in the State) and to the holders of real or personal rights of enjoyment on the real estate restructured;<br>▪ the terms for benefitting from the 65% tax deduction on energy requalification expenses are extended up to December 31st, 2017. If the restructuring activities concern the common parts of the condo buildings, the procedure shall be extended up to December 31st, 2021 (by raising the tax deduction to 70% or to 75%, depending on the type of energy requalification activity);<br>▪ from January 1st, 2017 to December 31st 2021, in order to carry out aseismic requalification activities in high risk seismic zones (zones 1, 2 and 3) with a tax deduction of 50%, for a maximum limit of Euro 96.000,00 per residential unit. Even in this case, the deduction is raised to 70% or 80% if such activities involve the shifting of the real-estate unit to one or two of lower risk classes. For the common parts of condo buildings, the deduction goes from 75% to 85%, always with a limit of Euro 96.000,00;<br>▪ the terms to benefit from the 50% tax deduction of the costs incurred for the purchase of furniture and large appliances of high energy class are extended up to December 31st, 2017. |
| Super-amortization for new operating assets | ▪ the terms for the favorable tax treatment on investments in new operating assets with amortization increased by 40% are extended up to December 31st, 2017. The same measure applies to orders placed before December 31st, 2017 with a payment on account of 20% and with a settlement by June 30th, 2018;<br>▪ for operating assets, aimed at promoting technological and/or digital transformation ("Industry Model 4.0") of the company, the increase in the depreciation amount is increased by 50% (the |

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| | so-called Hyper-depreciation), while with reference to the intangible assets included in the same activity, the increase on the depreciation amount is raised by 40% |
| Tax credit for research and development activities | Updating in the field of credit for research and development activities (operational activities with Ministerial Decree no. 27/2015, published in Official Gazette no. 174/2015) are the following:<br>▪ the deadline for taking advantage of the benefit is extended and postponed until one year (December 31st, 2020);<br>▪ the scope of the benefit is increased from 25% to 50% of the surplus costs incurred compared the average for the investments made in research and development activities realized in the three-years tax period preceding the one in which such benefit was enjoyed<br>▪ the type of subjects potentially taking advantage of this favorable measure is broaden, even including the resident subjects (or the permanent establishments in Italy of non-resident subjects) that carry out research and development activities on the basis of commissioning works with other resident companies, located in EU / EEA or located in the States included in the list as per Ministerial Decree of September 4, 1996 |
| A simplified accounting regime founded on a cash basis (i.e. the opposite of the matching principle) | A simplified accounting regime is introduced for sole proprietorships and partnerships, founded on a "cash basis" instead of the "accrual basis", for the determination of the IRPEF taxes on income and for the calculation of IRAP due. |
| Introduction of VAT group | Starting from January 1st, 2018 the taxpayers located in the State and carrying out business activities, for whom there are joint financial, economic and organizational bonds (as per art. 70-ter of the Italian Presidential Decree 633/72), can become a single taxpayer, with a single VAT number, meaning:<br>▪ transactions between taxpayers included in the VAT group become irrelevant for VAT purposes;<br>▪ the VAT group acts as a single taxable entity in its relationships with third parties.<br><br>The application for the procedure occurs by electronic means, by mentioning the data of the companies involved and with specific information requests. If the application is carried out between January 1st, and September 30th, the procedure starts from the year following such a communication. Otherwise, it starts from the second year following such a communication.<br><br>The application is valid for three years. After such period, it is automatically renewed year by year. |
| Tax relief for direct farmers and professional entrepreneurial farmers | There is a tax relief for direct farmers and professional entrepreneurial farmers younger than 40 years old, who from January 1st, 2017 to December 31st, 2017 will apply, for the first time, to social security |

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| | duties.<br><br>The benefit consists in a tax exemption for the first 5 years of activity, to the extent of:<br>▪ 100% for the first 36 months<br>▪ 66% for the following 12 months<br>▪ 50% for the following 12 months |
| Option for the substitute tax on foreign-source income realized by individuals who transfers their tax residence to Italy | An optional system is introduced to attract in Italy non-residents (High Net Worth) wishing to transfer their residence.<br>The option allows to:<br>▪ exclude, from the worldwide principle taxation, the foreign-source income (with exclusion of capital gains, taxed at ordinary individual income tax – Irpef, as general anti-avoidance rule);;<br>▪ subject the foreign-source income to an overall withholding tax amounted to € 100.000,00, decreased to € 25.000 for each family member who transfers his residence to Italy within the same procedure/option;<br>▪ subject to individual income tax (Irpef) all the domestic income.<br><br>The application to the regime is not provided in case the subject has been resident in Italy for at least 9 of the last 10 tax years.<br><br>It is not possible to apply for the option, which is always revocable, once 15 years has gone by from the first tax year in which the option begun. In any case, it is regarded as void in case of failure or partial payment of the substitute tax.<br><br>It shall be pointed out that the application to the regime requires the mandatory request for a ruling with the tax authorities, within the deadline for the submission of the return relating to the tax period in which the residence is transferred to Italy. |
| Postponement of the re-determination of the purchase value of land and of investments as well as postponement of the revaluation of company assets | The deadline for the re-determination of the cost or purchase value of the investments that are not traded on regulated markets and of the land (building or agricultural land) provided in the original provision of the Lax Decree no. 282/2002 has been extended.<br>▪ Deadline for the expertise and the payment of the substitute tax: June 30th, 2017<br>▪ unique rate: 8%<br>▪ Beneficiaries: natural persons, simple partnerships, non-profit organizations and non-residents without a permanent establishment in Italy<br>▪ Subject: investments and land held outside the business activity on January 1st, 2017<br><br>The terms for the revaluation of company (operating or non-operating) assets, other than those whose production or exchange is aimed at business activity, resulting from the financial statements as at December 31st, 2015 (and again presentment in the following financial statements). |

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| | Main aspects:<br>▪ the revaluation shall be carried out in the financial statements as at December 31st, 2016, on all goods falling within a given category;<br>▪ the tax recognition of the higher values takes place with the payment of a substitute tax equal to 16% for depreciable assets and 12% on other goods;<br>▪ the revaluation surplus balance can be shaken off with substitute tax of 10%. |
| IRI (i.e. Tax on business income) | (New) optional tax regime for individual businesses and business partnerships in the ordinary account.<br>Advantages:<br><br>▪ the business income is subject to separate taxation with a single rate of 24% (equal to the one that will be the new IRES from January 1st, 2017)<br>▪ to facilitate the recapitalization of companies, it is determined that the profits made and not distributed to shareholders will maintain a tax suspension regime (they will not create the tax base for shareholders' irpef purposes in the year thy are realized but when they are distributed)<br>▪ to avoid double taxation (first IRI and then Irpef) there is a mechanism of proportional deduction of the taxes already paid<br><br>Subjects carrying out business activities in an individual and associated form are excluded from the regime. |

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# FOCUS ON EMPLOYMENT
## (IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

### DID YOU KNOW THAT...

***Failure to specify the tasks invalidates the probation period?***

The probation period associated with an employment agreement must not only be laid out in written form but must also contain specific instructions on the tasks that will be assigned to the employee during the probation period (specificity requirement), or it would be null and void. This is because the right of the employer to enforce the unquestionable assessment on the outcome of the probation applies to specifically identified and instructed tasks. The consequence if the probation period is found to be invalid is the subjection of any employer termination to the rules for unlawful dismissals.

### JUDGMENT OF THE MONTH

**Lawful dismissal only at the presence of violent intentional acts**

The Court of Cassation, with judgement No. 20211 published on 7 October 2016, issued its ruling on the matter of dismissal for just cause notified to an employee for having participated in a "violent altercation with a colleague then followed by bodily harm". In this case, the Court of Cassation confirmed the decision of the Court of Appeal of Milan, which deemed unlawful the dismissal and consequently ordered the reinstatement of the employee because the employer failed to prove that the fact that took place was attributed to the employee both in terms of materiality and intentionality of the conduct. In fact, according to the findings of the Court of Appeal, witnesses confirmed that a brawl between the two workers indeed took place, but they issued conflicting statements on how it happened, so conclusive proof on the dynamics of the events could not be obtained. The company criticized the judgement through an appeal arguing that the Court at the time of the counterclaim incorrectly assessed the proof acquired and, given the fact that it was ascertained in the deeds that the altercation indeed occurred, it was the employee's responsibility to demonstrate the existence of discrimination and that his conduct was in response to an aggression suffered by the hands of another employee. The Court of Cassation, however, rejected the plaintiff's argument. Indeed, in the opinion of the judges, in the matter of dismissal for just cause, it is the responsibility of the employer to prove the fact attributed to the employee, proving it both in material and intentional terms. The justificatory evidence linked to the employee is then the element that emerges only where previous **demonstration** of the **fault** associated to the employee occurred, fault whose proof could not be obtained in this case.

### REGULATION

**The 2017 Budget bill has been approved**

The Council of Ministers approved the State budget bill for the fiscal year 2017 and for the three-year period 2017-2019. A variety of changes have been introduced in terms of labour law. In particular, it was announced that the taxation limit for the **productivity bonus** with a 10% tax flat rate will increase in 2017 from the current 2,000 Euros to 3,000 Euros and in case of equal involvement of employees in the organisation of work, the current limit of 2,500 Euros will increase to 4,000 Euros. Workers, clerks, executives and non-senior managers will benefit from it with an increase in the gross income limit that

will allow them to take advantage of a reduced tax rate from the current 50,000 Euros to 80,000 Euros per year. In respect to pensions, among others, **three types of early retirement programs** (the so called APE) were established: (i) social APE addressed to certain categories of employees, and charged to the State; (ii) voluntary APE addressed to employees who decide to retire up to 3 years and 7 months before the legal pension requirements and (iii) corporate APE called for by businesses committed to a restructuring plan whose costs are charged to the businesses. The **contribution exemption** for young and unemployed people was reintroduced into this Budget bill.

## CASE LAW

### A post featuring a gun is not just cause for dismissal

The Court of Bergamo, with judgement No. 684 dated 14 September 2016, ruled unlawful to dismiss an employee for having published a **photograph** on **Facebook** depicting the employee bracing a firearm. According to the Court, in this case, the employee's conduct, even if reprehensible, **was not serious enough to** ***"debase (...) the fiduciary relationship with the employer"***, since the photograph was published on a social network accessible to everyone and, therefore, it would be equivalent to make public statements without specific reference to individuals or groups. It follows that the conduct may not be significant enough to affect work performance. Essentially, in the opinion of the Court, if the **purpose** of the photograph is not of a threatening nature or such to generate collective apprehension, dismissal cannot be ordered. At most, after a practical analysis aimed at achieving a balance of interests between freedom of expression and repercussions on the company image, a **disciplinary measure** may be implemented.

### Dismissal for poor performance to be linked to subjective and objective parameters

The Court of Cassation, with judgement No. 18317 dated 19 September 2016, intervened on the topic of dismissal for justified subjective reasons based on poor performance. According to the Supreme Court of Cassation, failure to achieve a specific result is not sufficient evidence for dismissal, but it is also necessary to demonstrate a culpable and negligent violation of the contractual obligations by the employee in the fulfilment of his/her normal job performance. In the case examined, the Court refused the claim of an employer that was therefore sentenced to reinstate and pay compensations owed to an employee from the date of dismissal up to the date of reinstatement. In the judgment reasons, the Court stated that the **burden of proof** borne by the employer cannot leave out an assessment under different points of view: (i) a **subjective point of view**, which is based on the examination of the **objectives agreed** with the employee at his hiring and the evaluation of his **guilty and negligent** conduct; and (ii) an **objective point of view**, according to which it is always necessary to **compare** the **performance** of the employee with the **average** performance of other workers. The Court of Cassation, with this decision, clarified the types of elements that must be proven in order for this type of dismissal to be considered lawful.

### Generalized and arranged ex-ante remote supervision: inadmissible evidence

The Court of Cassation, with judgement No. 19922 dated 5 October 2016, confirmed unlawful the dismissal for just cause of an employee in charge of private supervisory activity, who failed to make all the inspections he was entrusted. The disciplinary offence was ascertained by the employer on the basis of data collected through the GPS satellite system installed in the vehicle used by the employee and equipped with the Patrol Manager System. As sustained by the Territorial Court, the Supreme Court of Cassation affirmed the **inadmissibility of the evidence** provided by the employer given that according to the union agreements signed – since the two systems represented a form of **remote**

**supervision**, and therefore fell within the scope of Article 4 of the Workers' Statute – expressly established that tools for the remote supervision of workers could not be used. Nor, in the opinion of the Court, it can be assumed, as argued by the employer, that it represented a form of defensive supervision since "*it is not possible to consider 'defensive' **generalized supervision** mechanisms and controls arranged even before the occurrence of any suspicion*", that is **ex-ante** with respect to the rise of suspicion on the commission of the disciplinary offence. The aforementioned law principle was used by the Supreme Court of Cassation on the basis of the provisions contained in Article 4 of the Workers' Statute in the version preceding the new implemented version contained in the Jobs Act. According to the new formulation of the rule, in fact, it would be possible to use as sources of **evidence** also **generalized supervision** systems arranged **ex-ante** within the limits referred to in paragraphs 1 and 2 and in compliance with the conditions referred to in paragraph 3 of Article 4 of the Workers' Statute.

**Collective dismissal: compensatory indemnity for failure to clarify selection criteria**

The Court of Cassation with judgement No. 19320 published on 29 September 2016, stated that concerning a collective dismissal the violation of Article 4, paragraph 9 of Law 223/1991, on failure to clarify the factual assumptions on the basis of which the employees to be dismissed were selected, was merely a matter of form. It follows that, according to the Supreme Court of Cassation, pursuant to paragraph 3 of Article 5 of Law 223/1991, in such a case, an employee is entitled to receive only the all-inclusive compensatory indemnity ranging between a minimum of 12 and a maximum of 24 monthly payments from the actual final remuneration received, and not the reintegration in the workplace as well. The latter, in the opinion of the Supreme Court of Cassation, is due only in the event of selection criteria violation. The law principle affirmed by the Supreme Court of Cassation represents the proper application of the provisions contained in Article 5, paragraph 3 of Law 223/1991 considering the wording of the provision that grants compensatory indemnity in the case of violation of the procedures mentioned in Article 4, paragraph 12 of Law 223/1991 and, therefore, in case of violation of the information referred to in Article 4, paragraph 9 of Law 223/1991.

**Disciplinary dismissal: inspections even in the absence of serious suspicions of illness are allowed**

The Supreme Court of Cassation with judgement No. 18507 filed on 21 September 2016, intervened again on the sensitive issue of denial of acceptance of the medical certificate attesting to an employee's illness. In this case, an employee, unable to work for a declared pathology of acute sciatica, was caught by an investigative agency hired by the employer, to carry out work on the roof and in the courtyard of his own home. According to the judgement under review, the **truthfulness** of an **illness** alleged by an employee **can be disregarded** by the employer "*even just by **verifying any factual situation** – even if not resulting from an health-related investigation – **that can demonstrate the absence** of illness **or its lack of effect in causing inability to work***". The aforementioned judgement also confirms the right of the employer to perform the inspection, even if in secret through an investigator, even in absence of serious suspicions. Therefore, the investigative results, if legitimately acquired, are such as to make the medical certificate issued by affiliated professionals null and void and even if, in general, a medical certificate represents valid evidence until a claim of fraud is brought forth.

## PRACTICE

**Privacy Authority approval of time-stamping Apps**

After approval issued by the Privacy Authority, businesses may install an "app" on the smartphones of their staff to record the start and end of the work shift. What are the regulatory principles of such remote supervisory tools which, while practical for corporate efficiency, may affect the right to

employee's privacy? The monitoring app may store only data related to the location of work as well as the date and time of "virtual stamping", but they cannot store the exact location of the employee. For the protection of the employees, in addition, the time-stamping app must be configured in such a way to prevent the processing, even if accidental, of other personal data contained in the device owned by the employee. In addition, employees must be adequately and fully informed about the type of data, purpose and methods of the processing, storage times, optional nature of the provision, and the persons responsible or in charge of the processing. The companies shall also ensure implementation of the security measures necessary to preserve data integrity and to prevent access to unauthorized persons. The judgment of the Privacy Authority contributes to develop the concept of "privacy by design", balancing the interests of corporate efficiency and the protection of workers' privacy.

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