RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

2018 – 04

RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

E-invoicing guidelines

(Italian Revenue Agency, Italian Decree of April 30th, 2018, and Circular no. 8 of April 30th, 2018)

The countdown for the launch of electronic invoicing has now begun: unless extended, from July 1st the purchase of fuel by VAT taxable persons will be subject to the new rules, while from January 1st, 2019 all B2B transactions will be carried out exclusively in this way.

With the provision dated April 30th, the Italian Revenue Agency has issued the *technical regulations* to define:

- the procedures for the correct preparation of the electronic invoice and the debit/credit notes,
- the ways for sending and receiving electronic invoices,
- the checks that the system will carry out in relation to the compulsory information to be provided in the invoice,
- the role that intermediaries can play in the e-invoicing process,
- the services that the Italian Revenue Agency will make available to commercial operators to support them in managing the process.

At the same time, the first clarifications on electronic invoicing for fuel purchases were provided in Circular no. 8.

According to the technical specifications, the process of issuing and receiving electronic invoices must be carried out using the XML format and the Interchange System (SdI). For electronic invoices to be sent to Public Administrations, the technical rules provided by the Italian Ministerial Decree no. 55/2013 remain effective.

The *transmission* of electronic invoicing files to the SdI can be carried out through PEC (i.e. certified email address), web and mobile services made available by the Italian Revenue Agency, or through "web service" application cooperation systems or data transmission between remote terminals based on FTP protocol.

The functionality of the electronic invoicing system in terms of *delivery to the counterparty* takes place through the indication of the "Recipient Code" and the seller's/principal's PEC address.

Once the invoice has been sent to the SdI, this latter carries out a series of *checks* regarding the presence, in the file, of the compulsory information required and, for some of them, the *validity* (the existence in the Tax Registry of the VAT number of the seller and of the purchaser or of the fiscal code if the latter is a final consumer) and *consistency* (consistency between the values of the taxable amount, the VAT rate and the tax indicated on the invoice).

In case all pieces of information are correct, the SdI returns to the transmitting party a *receipt* in which the successful outcome of the process relating to the check and the delivery or the availability of the file is specified: in case the file is not accepted, a receipt of rejection is produced.

The seller can also send the electronic invoices to the SdI through an *intermediary* and the purchaser can receive the electronic invoices from the SdI through an intermediary, communicating to the seller the "telematic address" (recipient code or PEC) of the intermediary itself.

The Decree also regulates the procedures for issuing *debit/credit notes* pursuant to art. 26 of the Italian Presidential Decree no. 633/72, as well as *self-invoicing* and allows the use of *electronic storage* services for the invoices made available by the Italian Tax Authorities.

With regard to the invoices issued to *final consumers*, the SdI system makes available to the seller a *computer copy* of the invoice: in any case, the seller is required to deliver directly to the client – final consumer a computer or analogical copy of the electronic invoice, at the same time notifying that the invoice is made available to him in a special reserved area of the website of the Italian Revenue Agency.

With regard to *cross-border transactions*, resident taxable persons liable to VAT shall submit the following information:

- the identification data of the seller,
- the identification data of the purchaser,
- the date of the document proving the transaction, the date of registration (only for the documents received and the related debit/credit notes), the document number, the taxable amount, the VAT rate applied and the tax or, if the transaction does not involve the recording of the tax in the document, the type of transaction.

This communication is optional for all the transactions for which a *customs bill* has been issued and those for which electronic invoices have been issued or received according to the rules established by the decree itself.

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Does the absence of any indication of a tax relief in the return preclude its use?

(Court of Cassation, sentence no. 10029 of April 4th, 2018)

In a regulatory framework, such as the Italian one, where there are many rules for tax reliefs, the question often arises whether the request or the achievement of a tax bonus by a company necessarily requires a specific indication in the tax return.

On this point, it should be pointed out that many rules for tax reliefs require the "under penalty of forfeiture" indication, but at the same time the question was raised of how such indications should be linked to a principle (repeatedly upheld by the Court of Cassation), on the basis of which tax returns are always amendable, in order to assert the taxpayer's real ability to pay and thus overcome any mistakes made within the filling-in.

In the present case, a company was denied the tax credit for incentives for scientific research precisely because of the failure to fill in the RU section of the Unico tax return form, with the consequent request for taxes, penalties and interest.

After alternating results in the first two levels of judgement, the Court of Cassation has adopted a rigorous approach, endorsing the position of the Italian Tax Authorities.
It was thus highlighted that:

- the legislation on the bonus, which has not been acknowledged by the Italian Tax Authorities, expressly provides for the penalty due to lapsing if in the income tax return there is no indication relating to the period during which the benefit is granted. The provision of a term established under penalty of forfeiture is, for the Court of Cassation appointed, is grounded on the need of defining, within a specific time, the financial burden deriving from the recognition of tax credits, otherwise susceptible to remaining suspended indefinitely;

- the above-mentioned provision for forfeiture implies the peremptory nature of the term covered by this sanction, with consequent extinction of the right on the basis of *the failure to exercise the right* within the established time frame, independently of any consideration regarding the subjective situations of the subject incurred in the forfeiture, as can be inferred from the Italian civil law rule according to which forfeiture can be prevented only by the performance of the act provided for by law (art. 2966 of the Italian Civil Code);

- if it is true that, due to case law, in the event of mistakes or omissions in the return, the taxpayer can always oppose, within the dispute, the greater tax claim of the Italian Tax Authorities, this principle still needs to be specified: the general and unlimited amenableness of the tax return meets the limit of the return destined to remain untraceable due to the *occurrence of forfeitures*;

- in the opinion of the judges, the indication of the tax bonus in the income tax return also includes a "negotiation act", as it is intended to express the will to avail of the benefit based on the correspondence between the activity carried out and the purposes pursued by the legislator, so that the taxpayer who has omitted such an indication cannot invoke the principle of general amenableness of the tax return, which operates only in the case of mere externalization of science.

The conclusions reached with judgment no. 10029 are opposite to the previous judgments expressed by the same Court. With judgment no. 26550 of 2016, for example, another Section of the Court of Cassation established (with reference to the same tax relief) that a tax credit not shown in the tax

return, or amended tax return, submitted by the expiration date, can be opposed by the taxpayer in a judicial proceeding. However, the taxpayer must prove the existence of tax bonus formal requirements, that the same requirements are not challenged by the Italian Tax Authorities, as it is a formal decadence that only affects the administrative level.

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Italian Transfer Pricing Guidelines

The Italian regulation on intragroup transactions ("Transfer Pricing") has always been characterized by being extremely brief at a regulatory level (only the seventh paragraph of art. 110 of the TUIR – i.e. Italian consolidated law on income tax – deals with this issue), referring to the guidelines drawn up at OECD level, as well as to (old) documents of the Italian Revenue Agency (in particular, Circular no. 32 of 1980, still taken into consideration) the processing of the operational effects.

On May 14th, the Italian Ministry of Economy and Finance (hereinafter "MEF"), issued the Measure officially setting out, at a "regulatory level", the guidelines for the application of the provisions on transfer pricing. The issuing of the aforementioned Measure derives from the amendments made to art. 110 of the Decree Law no. 50 dated April 24th, 2017: on the basis of this provision, it was established that, by means of a special ministerial decree, the guidelines for the application of the TP could be determined on the basis of international best practices.

Please find below the text of art. 110, paragraph 7, of the TUIR and a first examination of the measure:

Income items arising from transactions with companies not residing in the territory of the State, which directly or indirectly control the business, are controlled by it or are controlled by the same the company controlling the business, are determined with reference to the conditions and prices which would be agreed between independent subjects operating under conditions of free competition and in circumstances comparable, if this results in an increase in income.

The same provision shall apply even if a reduction in income results from it, according to the terms and conditions referred to in article 31-quater of the Italian Presidential Decree no. 600 of September 29th, 1973.

By means of Decree issued by the MEF, the guidelines for the application of this paragraph can be determined based on the international best practice

Scope and definitions

The first two articles of the Measure define the scope of the same ones, making express reference to the "best practices" within TP developed at international level and provide definitions of the terms present in the Decree, and in particular of "associated companies", "independent companies", "controlled transactions" and "uncontrolled transactions".

Concept of comparability

The decree defines the criteria by which the transactions to be analyzed can be considered "comparable".

More specifically, a "non-controlled" transaction is comparable to a "subsidiary" if there are no significant differences that could have a significant impact on the financial indicator that can be used in accordance with the method deemed as most appropriate. If, on the other hand, there are differences, the transactions may be comparable if it is possible to make accurate "comparability adjustments"" in order to eliminate (or significantly reduce) the effects of these differences.

Economically relevant characteristics or factors that make it possible to assess the *effective comparability* of transactions are also identified;

- the contractual terms of the transactions;
- the *functions* performed by each of the parties involved in the transaction, taking into account the *operating assets* used and the *risks* assumed, the *circumstances* that characterize the transaction and the *habitual practices* of the sector;
- the *characteristics* of the products sold and services supplied;
- the *economic circumstances* of the parties and the market conditions in which they operate;
- the *corporate strategies* implemented by the parties.

Transfer pricing determination methods

The principle, now established at international level, according to which *there is no*t an *a priori* method better than others, is introduced. Therefore, it is necessary to identify the" most appropriate" method to the circumstances of the case:
In principle, the method should be identified as one of the commonly recognized ones, meaning

1. method of price comparison (i.e. Cup);
2. resale price method (i.e. Resale Minus);
3. cost-plus method;
4. transaction net margin method (known as TNMM);
5. transactional profit-splitting method (i.e. Profit Split).

The choice of the most appropriate method must consider various criteria:

- the strengths and weaknesses of each method according to the circumstances of the case;
- the adequacy of the method in consideration of the characteristics of the transaction;
- the availability of reliable information (also in relation to uncontrolled transactions to be compared);
- the degree of comparability between the controlled transaction and the uncontrolled transaction (also taking into account the reliability of the adjustments made).

It is also specified that, if the analysis carried out identifies several methods which are applicable with "the same degree of reliability", then the "traditional" methods (1-3) are preferable to the others (4-6); moreover, if one of the two methods identified as equally reliable were the one of price comparison (1), this method would prevail over the others.

On a residual and exceptional basis, if the company proves that none of the six methods provided is reliable, it is theoretically possible to use a different and additional method, provided that it can be shown that the same one produces a result consistent with the one which independent companies would obtain in carrying out comparable uncontrolled transactions.

Aggregation of transactions

The principle of free competition is applied on a "transaction-by-transaction" basis: however, when an associated enterprise carried out two or more controlled transactions that are "closely related" to each other or that form a "unitary whole" (such that they cannot be reliably assessed separately), the transactions may be aggregated for comparability purposes and in order to choose the appropriate method.

Range of values

The Decree also addresses a thorny issue relating to TP, defining the notion of a range of values "in compliance" with the principle of free competition: in this way, the range of values resulting from the financial indicator selected by applying the most appropriate method is in compliance with the principle of free competition.

A controlled transaction is therefore considered to have been carried out in accordance with the principle of free competition if the financial indicator falls within the *range of values* resulting from the comparability analysis.

If, on the contrary, the financial indicator does not fall within the above range, the Italian Tax Authorities makes an adjustment to the transfer prices so that the same indicator falls within the range, without prejudice to the possibility of the company proving that the controlled transaction complies with the principle of free competition.

Arm's length price of low value-added intra-group services

The principle – on the basis of which intra-group services characterized by "low added value", meaning that:

- have a supportive nature;
- are not part of the core business of the multinational group;
- do not require the use of unique, valuable intangible assets or contribute to their creation;
- do not involve the assumption or control of a significant risk by the service provider or give rise to such a risk for the service provider –

is codified. Such services can be valued in an adequate way, by adding a *profit margin* equal to 5% to the aggregation of *direct and indirect costs* associated with their provision.

Services that the multinational group should also provide to independent entities are not considered to have low added value.

TP documentation

With regard to the documentation supporting TP policies, the provisions currently in force are *updated* (by means of a decree issued by the Italian Revenue Agency) to consider, in this case as well, the international best practices.
In order to avoid unnecessary disputes, it is also specified that:

- the documentation is to be considered suitable in all cases in which it provides the data and information necessary to carry out an analysis of the transfer prices charged, regardless of the fact that the chosen method of comparison or the choice of comparables are different from those identified by the Italian Tax Authorities;

- the presence in the documentation of "partial" omissions and/or inaccuracies (i.e. omissions and/or inaccuracies that do not jeopardize the analysis by the control bodies) cannot lead to an assessment of the unsuitability of the documentation itself.

The Decree of May 14th (art. 9) provides that one or more decrees containing additional "application provisions" may be issued, in order to take into account the periodic updating of the guidelines drawn up by the OECD.

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DEADLINES – MAY 2018

- this list is not comprehensive of all tax deadlines; the most recurrent administrative deadlines have been omitted

- From January 1st, 2014, the compensation limit has increased from Euro 516.456 to Euro 700.000.
  Please remind the following limitations applicable to compensations:

  - ☐ in terms of VAT
  - ☐ in terms of taxes on income and IRAP
  - ☐ in the presence of tax debts entered on the tax roll and expired for amounts exceeding Euro 1,500

Thursday 31st

VAT Communications

By this date, the taxpayers concerned are obliged to submit electronically the accounting data summarizing the *periodic VAT liquidations* as well as the *invoices issued and received*, made in the first quarter of 2018.

FACTA Communication

By this date (extended deadline) the financial intermediaries involved must transmit electronically to the Italian Tax Authorities the data (referred to 2017) relating to the so-called "FACTA" ("Foreign Account Tax Compliance Act"), an agreement undersigned between Italy and the United States, on the basis of which the financial information of US citizens and residents who hold accounts in Italy is exchanged, as well as the opposite cases (Italian residents with current accounts in the United States).

FOCUS ON EMPLOYMENT

(IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

DID YOU KNOW THAT...

.....project collaboration and self-employment relationships may be stabilized without penalties?

Pursuant to article 54, Legislative Decree no. 81/2015, employers are entitled to hire individuals already parties to project collaboration contracts and individuals registered for VAT purposes with whom self-employment relationships occurred provided that: (i) the individuals sign a settlement agreement in front of unions or labour authorities; (ii) in the twelve months following the hiring, employers do not terminate the employment relationship, except for disciplinary reasons. The open-ended employment involves the extinguishing of administrative, social security contributions and tax penalties related to the erroneous qualification of the relationship, without prejudice to the infringements ascertained as a result of inspections carried out before the hiring date.

JUDGEMENT OF THE MONTH

Carrying out a working activity during one's leave may be a cause of dismissal (LPO)

The Court of Cassation, with its judgement No. 6893 of 20 March 2018, declared the dismissal for cause notified to an employee to be lawful, as a result of having carried out another working activity during the days of leave for serious family reasons. In the case at issue, following the investigation ordered by the employer, it emerged that the employee – "precisely complying with the timetable" – went to a real estate company's office, of which the employee was manager and technical director, during the days in which the employee benefitted from the above-mentioned leave. Above all and by making cross-reference to one of its own stances, the Court considered that the investigative controls ordered by the employer had been lawful, since justified by the suspicion of the "perpetration of breaches of the law" by the employee, which cannot be traced back to the mere breach of the employment obligation and carried out outside working times. The Court then laid stress on the objective seriousness of the behaviour, since the employee had used the leave (granted "for serious and documented family reasons") for purposes unrelated thereto and, moreover, forbidden (pursuant to the provisions under article 4 of Law No. 53/2000 "During such period the employee kept the respective job (...) and cannot carry out any type of working activity"). In this respect the Court, apart from anything else, made cross-reference to one of its stances based on which "the use of one's leave to carry out a different working activity amounts to abuse due to diversion of the distinctive purpose of the right, fit to amount to just cause for dismissal". In the Court's opinion, it must be added that any such behaviour is detrimental to the employer's good faith, which sees itself unfairly deprived of the employee's work. Finally, the Court highlighted that it is not necessary to post up the disciplinary code beforehand upon any breach (as in the case at issue) of law provisions and, in any event, of fundamental duties of the employee, which may be recognised as such without it being necessary to foresee them specifically.

CASE LAW

Unlawful dismissal for not having objected a criminal offence to a subordinate

With its judgement No. 8407 lodged on 5 April 2018, the Court of Cassation declared the disciplinary dismissal notified to a female employee unlawful. On two occasions, she failed to stop another employee, who was a subordinate, from stealing pellet bags from the employer's outlet, just limiting herself to warn her managers on both occasions. In the case at issue and during the first episode, the employee had warned her own head of sector – who, however, did not give her any instructions whatsoever as to the measures to be taken – and, on the occasion of the second episode, she had warned the branch's assistant. According to the company, instead of reporting the facts to her own managers, the employee should have verbally objected the perpetration of the criminal offence to her own subordinate, in compliance with the obligations of fairness, good faith and loyalty towards the employer. By upholding the decision of the Court of Appeal having territorial jurisdiction, the Court of Cassation stated the following principle of law: "in so far as dismissal for disciplinary reasons is concerned, even if the rules and regulations under the collective bargaining agreements foresee a certain behaviour as just cause or justified subjective grounds for withdrawal, the judge vested with the right to challenge the lawfulness of the dismissal must in any event check the actual seriousness of the behaviour with which the employee has been charged" (Cass. No. 16095/2013; Cass. No. 21633/2013). The Court of Cassation also clarified that "(...) the infliction of the highest disciplinary penalty is solely justified upon a considerable breach of the contractual obligations, or even such as not to allow the continuation, even temporary, of the employment". By abiding by these principles, the Court of Cassation deemed that the employee had acted correctly, therefore declaring the employer's withdrawal from the employment to be unlawful. Consequently, prior to expediting any dismissal, it is always necessary to check whether the seriousness of the behaviour – even if sanctioned by the collective bargaining agreement – is such as to justify the withdrawal.

Incompleteness of the notice of commencement of the collective dismissal procedure: unlawful dismissal

With its judgement No. 6792 of 21 March 2018, the Court of Cassation dealt with the completeness of the notice of commencement of the collective dismissal procedure under article 4 of Law No. 223/1991. In particular the Court, in compliance with the stance of the judges ruling on the merits of the case, stressed that said notice amounts to fundamental compliance for the profitable participation of the trade unions in the co-management of the crisis and for the transparency of the employer's decision-making process. The foregoing entails that the employee may lawfully assert the incompleteness of the notice as a flaw of the dismissal notified thereto and that the subsequent reaching of a trade union agreement will not cure in itself the lack of information. In the Court's opinion, the duties of information must accompany the beginning of the procedure by communicating the entire reasons leading to the surplus situation, as well as the number, the position within the company and the professional profiles of the staff deemed to be in excess. It will only be like this, according to the Court, that it may be possible to check the connection between the company's needs and the identification of the staff to be dismissed. And, in the case at issue, the real reasons for the reorganisation were to be found not only in the vague drop in turnover, as shown in the notice, but also in the merger project resolved upon. In this respect, even if it is true that, pursuant to section 2112 of the Civil Code, the employer transferor is however entitled to notify the dismissals deemed necessary, this does not exclude the obligation, after having taken the decision to reduce the staff, to fulfil the communication obligations by acting in a transparent way, such as to allow the trade unions to fulfil a guarantee purpose as requested by law.

The right to have access to the records throughout the disciplinary procedure

With its judgement No. 7581 of 27 March 2018, the Court of Cassation has once again dealt with the delicate subject of the so-called right to have access to the records within a disciplinary procedure. In the case at issue, the judges ruling on the merits of the case held the dismissal notified to an employee to be unlawful. The employee had attended hearings for legal traineeship purposes, on days on which the employee proved to be absent for illness or present at work. In order to ground his own complaint, the employee claimed the employer's refusal to make the documentation grounding the charge available, which was necessary in order to be able to correctly exercise the respective right of defence, since the facts dated back to the past and concerned occasional behaviours such as to prevent him from remembering the specific episodes. In upholding the ruling on the merits of the case, the Court stressed that, even if article 7 of Law No. 300/1970 did not weigh an obligation upon the employer to make the documentation available to the employee, against whom a disciplinary formal notice had been brought and on which the latter is based, the employer "must offer the consultation of the company documents to the person charged, where the examination of any such documents is necessary for the purpose of allowing the opposite party to have an appropriate defence, based on the principles of fairness and good faith in the performance of the contract". The stance put forward fully complies with the principle pursuant to which the employee's right of defence must not be limited within the scope of a disciplinary procedure, subject to the unlawfulness of the notified dismissal, if any.

PRACTICE

The Welfare of Telecommunications

Since last 9 April, the employees of the telecommunications sector have also been the recipients of welfare measures. Indeed, through a specific trade union memorandum of agreement, the signatories of the National Collective Bargaining Agreement have implemented the provisions under the Plan Agreement for the Renewal of the aforesaid collective bargaining agreement of 23 November 2017. In particular, it is foreseen that, effective as from 1 July 2018 and until the following 31 December, the companies within the sector must implement specific welfare measures in terms of goods and services, due up to an amount of Euro 120. Such measures will be acknowledged to the employees, who are not under a probation period, hired as at 1 July with indefinite and fixed term employment agreements, having accrued at least 3 months of seniority in 2018. Any employee under unpaid or non-indemnified leave within the period running from 1 July 2018 until 31 December 2018 will be excluded. The agreement foresees that the new welfare measures will be added to any possible offer of goods and services already foreseen within the company either individually or collectively. As regards the basket of goods and services falling within the welfare, it is foreseen that the companies, together with the company's trade unions, must identify the relevant types in view of improving the quality of the personal and family life of employees belonging to the company's staff, consistently with their features, favouring those aimed at education, training, recreation and social assistance and healthcare. Without prejudice, in any event, to the possibility that the employees entitled thereto have, to allocate the amount of Euro 120 to funding the so-called Telemaco Fund, that is the sector supplementary pension fund.

The guidelines of the INL on the supply of labour

Through its circulars No. 6 and No. 7 of 2018, the Ispettorato nazionale del lavoro (namely, the national labour inspectorate or "INL") has fixed the guidelines on the supply of labour, starting from the content of judgement No. 254/2017 with which the Constitutional Court ruled on the scope of application of article 29 of Legislative Decree No. 276/2003, by also extending it to sub-supply agreements. In

particular the INL, with its circular No. 6/2018, has given operational instructions to the investigators, by mentioning that all those situations in which there is a "dissociation" between the employer and the user of the work, including the cases of relations between consortium and consortium companies, are worth being inspected. With its circular No. 7/2018 the INL, instead, has faced the issue of the network agreements, mentioning the formal elements to be checked in case of any inspection, such as: (i) the existence of an agreement; (ii) the filing of the agreement with the Companies' Register; (iii) reference in the agreement as to any possible co-employment of the employment relationship. The INL has then clarified that any possible omissions pertaining to the salary or to the contributions expose to liability on the side of all co-employers, effective as from the "pooling" of the employees concerned, given the fact that the general principle of joint and several liability under article 29, paragraph 2, of Legislative Decree No. 276/2003 applies to the case at issue.

The operational instructions of the INL on audiovisual aids and other control instruments

The National Labour Inspectorate ("INL"), with its circular No. 5/2018, has given operational instructions on the problems concerning the installation and use of audiovisual aids and other control instruments. According to the INL, should any employees be filmed, the latter should take place as a rule accidentally and occasionally, but nothing prevents the direct shot of the employee, provided that there are reasons grounding the control, without introducing any conditions such as the 'shot angle' of the video camera or 'the obscuring of the employee's face'. Furthermore, according to the INL, it is not fundamental to specify the predetermined locating and the exact number of video cameras to be installed, without prejudice to the fact that the shots must be consistent and strictly connected with the reasons entitling the control and declared in the relevant request. The circular also dwells upon the justifying reason under article 4 of the Workers' Statute as to the "protection of the company's assets", by stressing that the principles of lawfulness and exactness of the pursued aim, as well as of the respective proportionality, fairness and non-incidence, call for gradualness – as stated by the Italian Data Protection Authority – as to the extent and type of monitoring, which makes more invasive controls residual. Always according to the INL, any remote access to the images 'in real time' must only be authorised in exceptional cases duly grounded. Last, but by no means least, the INL dwells upon the biometric recognition installed on the machines in order to prevent unauthorised parties from using it. This is considered a fundamental tool to "... do the job ..." and, therefore, its installation may take place regardless, pursuant to paragraph 2 of article 4 of the Workers' Statute, of both the agreement with the trade unions and of the authorisation administrative procedure foreseen by law.

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