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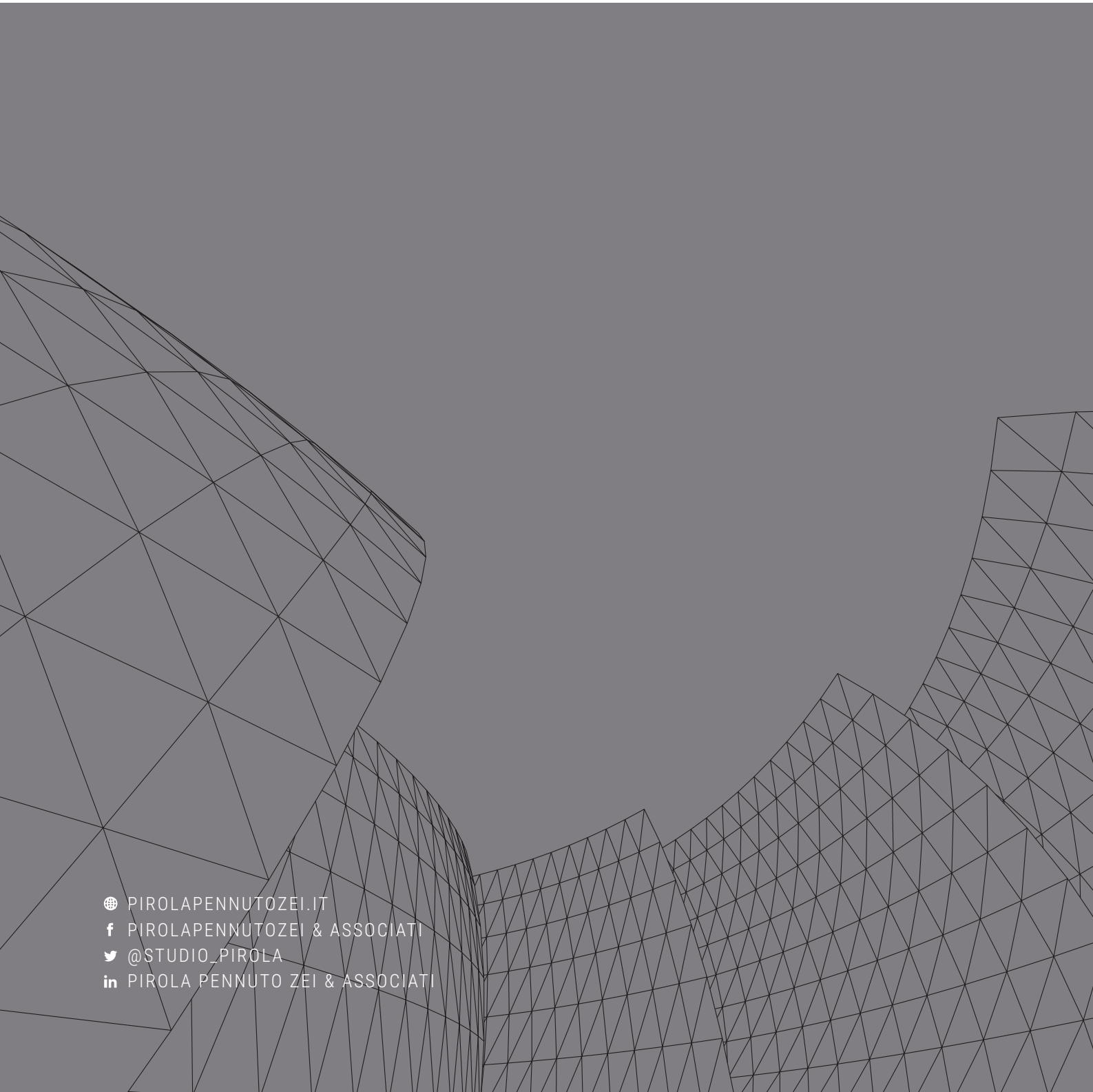
LEGAL

NEWSLETTER / SEPTEMBER 2018



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LEGISLATION

1.1

Legislative Decree 3 August 2018, no. 105 - "*Supplementary and corrective provisions to Legislative Decree 3 July 2017, no. 117, entitled: «Not-for-profit Sector Code, as per art. 1(2)(b) Law 6 June 2016, no. 106.»*" (Official Gazette 10-9-2018, No. 2010)

Legislative Decree 105/2018, containing amendments and additions to the Not-for-Profit Sector Code under Legislative Decree 117/2017, was published in the Official Gazette no. 2010 on 10 September 2018.

In general terms the amendment includes an extension to the deadline by which not-for-profit entities are to adapt their by-laws to the new rules, the introduction of provisions coordinating legal and tax obligations, and clarifications in relation to registrations both with the Register of Legal Entities and the Single National Register.

The main provisions of the Legislative Decree are the following:

Accounting records and financial statements

Art. 30 Legislative Decree 105/2018 contains changes to the obligations as to the preparation and keeping of accounting records of non-commercial not-for-profit entities which do not apply the flat-tax regime (as per art. 87 Not-for-Profit Sector Code).

It is provided that, in relation to the whole of the activities carried out by the entity, chronological and systematic accounting records must be prepared to reflect the operations carried out in each management period in a complete and analytical manner. Rather than being set out in a specific accounting document, the general interest activities are to be set out comprehensively and separately from the secondary activities in the financial statements for the year, such as to represent the entity's asset, economic and financial situations. This is to be drawn up within 6 months of the end of the financial year.

The maximum limit under which such entities can prepare a Cash Flow Statement rather than keeping accounting records has been increased from Euro 50,000 Euro to 220,000.

The deadline of 4 months from the end of the year for the preparation of the specific statement required for tax collection purposes, has been abrogated for all non-commercial not-for-profit entities.

Amending art. 13(6) of the Not-for-Profit Sector Code, art. 4 Legislative Decree 105/2018 changes the reporting procedures for any activities other than those of general interest, providing that the administrative body is to document those activities which have a secondary and instrumental nature with respect to the corporate purpose, either with an annotation at the end of the Cash Flow Statement, or in the Notes to the Financial Statements.

Entities with legal personality

Art. 6 contains a clarification regarding the simultaneous registration with the Register of Legal Entities and the Single National Register.

A new paragraph 1-*bis* is inserted into art. 22 Legislative Decree 117/2017. This provision states that "*in relation to not-for-profit associations and foundations which already have legal entity, and which register with in the Not-for-Profit Single National Register, the effectiveness of registration in the Register of Legal Entities is suspended while the entity is registered in the aforementioned Single National Register. During such period of suspension, these associations and foundations do not lose the legal personality acquired with the previous registration. Registration in the Single National Register and any subsequent cancellation, will be communicated by the appropriate office to the Prefecture or to the competent Autonomous Region or Province within 15 days*".

Audit

Art. 8 Legislative Decree 105/2018, amending the second sentence art. 30(6) Legislative Decree 117/2017, introduces the possibility that, if a legal audit is mandatory, that it be carried out by the internal control body, on the condition that all members of such body are legal auditors registered in the appropriate register.

1.2

Legislative Decree 10 August 2018, no. 107 - "*Rules to bring Italian legislation into line with the provisions of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC*" (Official Gazette 14-9-2018, no. 214)

Legislative Decree 10 August 2018, no. 107 entitled "*Rules to bring Italian legislation into line with the provisions of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC*" was published in the Official Gazette no. 214 on 14 September 2018.

This Decree adapts Italian legislation to the provisions of Regulation (EU) No 596/2014, which established a harmonized regulatory framework on market abuse and introduced measures for prevention of such abuse (the "*Market Abuse Regulation - MAR*"). Legislative Decree 107/2018, which took effect on 29 September 2018, is limited to adopting the measures expressly required of the Member States.

Arts. 1 to 4 of Legislative Decree 107/2018 amends the following sections of Legislative Decree 58/1998 Consolidated Finance Act (TUF): the common provisions (part I TUF), market regulation (part III TUF), regulation of issuers (part IV TUF), and penalties (part V TUF).

The following is of note:

- **take-over bids or public exchange offers:** it is provided that communication to the public of the following actions must be made promptly and in accordance with CONSOB regulatory procedures: approval to waive protective measures in the by-laws (art 104 TUF); and shareholder authorization to implement measures to counter take-over bids made by entities not subject to the same obligations (reciprocity clause pursuant to art. 104-*ter* TUF);

- **public disclosure obligations of listed issuers:** issuers must disclose inside information to the public pursuant to art. 17 of the MAR Regulation. CONSOB's powers concerning methods and terms of disclosure of inside information (including reference to publication in print) has been eliminated

as this is not compatible with the MAR Regulation. Listed companies must continue to provide their subsidiaries with everything necessary for the latter to properly fulfil their obligations to disclose inside information;

- **regulated information:** in line with the "*Transparency*" Directive 2013/50/EU, regulated information is to be filed with CONSOB and the market operator with which the issuer has requested or has approved the trading of its securities or closed-end funds, in order to ensure the operator's exercise of the supervisory functions;

- **definition of privileged information;** the definition of privileged information contained in art. 181 has been abrogated and the definition contained in art. 7 of the MAR Regulation is applied under art. 180(1)(b-*ter*);

- **delay in the communication of inside information:** without prejudice to notification being made to the competent authority of any delay in public disclosure of inside information, explanations as to the manner in which the conditions provided by the Regulations to avoid any delay in communications have been met, are only to be provided upon a request by CONSOB and not as a general rule (art. 114(3) TUF);

- **obligation for market transparency (internal dealing);** art. 114(7) TUF has been amended, now requiring transparency (communication to CONSOB and the public) in all transactions "*concerning shares issued by the issuer or other financial instruments connected thereto*," including by those carried out by closely associated persons who control or hold more than 10% in a listed company;

- **penalties:** Legislative Decree 107/2018:
  - introduced, as a type of market manipulation, the concept of the "*benchmark*", and included conduct involving financial instruments traded on OTFs (Organised Trading Facilities) (Article 185 TUF) in the list of punishable offences;
  - reproduced the maximum sanctions provided by the MAR as administrative penalties for the abuse of inside information. These now range, in the case of an individual, from Euro 20,000 to Euro 5 million (previously the maximum was 3 million), with the possibility of increasing such penalty to at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined, if the maximum is inadequate (art. 187-*bis*, TUF);

- has inserted a new article to apply administrative sanctions for violations of the provisions regarding public disclosure of inside information, operations of managers, insider registers, investment recommendations contained in art. 30 of the MAR (art. 187-*ter.*1 TUF);

- ***powers of CONSOB;*** greater powers granted to CONSOB;

- ***Ne bis in idem;*** a significant change concerns the concept "*ne bis in idem*". The text of art. 187-*terdecies* TUF, relative to the execution of fines and pecuniary penalties in criminal trials, has been amended, now providing that when "*for the same fact*" an administrative fine has been applied ex art. 187-*septies* TUF i.e. a criminal penalty or an administrative penalty depending on the offence:
  - the judicial authority or CONSOB is to take into account, in the application of the penalties for which they are responsible, the punitive measures already imposed;
  - in the collection of the pecuniary sanction, the amount of the fine depending on the offense or administrative offence is limited to the part exceeding that already collected by the administrative or judicial authority.

1.3

Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights

Commission Implementing Regulation (EU) n. 2018/1212 of 3 September 2018, laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, was published in issue no. L 223 of the Official Journal of the European Union of 4 September 2018.

Directive 2007/36/EC gives the right to listed companies to identify their shareholders and requires intermediaries to cooperate in that identification process. That Directive also aims at improving the communication by listed companies to their shareholders, in particular in relation to the transmission of information along the chain of intermediaries and requires intermediaries to facilitate the exercise of shareholders' rights. Those rights include those of participating and voting in general meetings, and financial rights such as the right to receive distributions of profits or participate in other corporate events initiated by the issuer or third party.

Consistent with the purpose of granting powers and principles of proportionality, this Regulation only includes minimum requirements which can be varied according to the needs of different markets. The Regulation focuses on the convening of the general meeting. In order to guarantee a fully automated treatment, minimum requirements regarding the types and format of information in the standardized call notice have been established.

The Regulation is effective from 24 September 2018, and will be mandatory in its entirety and directly applicable in each of the Member States with effect from 3 September 2020.

GUIDANCE

2.1

National Council of Notaries - Study no. 91-2018/I - "*The new rules governing social enterprises*"

With Study no. 91-2018/I, the National Council of Notaries further examines the new rules governing social enterprises introduced by Legislative Decree 112/17, supplemented subsequently by Legislative Decree 95/2018. Among the various analyses carried out in-depth, the following are worth noting:

- **notion of social enterprise.** The National Council of Notaries emphasized that with the new definition of social enterprises, the legislation explicitly refers to the concept of general interest business activity, rather than the exercise of organized economic activity in order to produce an exchange of goods or services (as per art. 1 Legislative Decree 155/2006). The Council stated that the absence of profit is a characteristic element and that those activities must comply with the notions of civic responsibility, and have purposes of solidarity and social utility;

- **elements that characterize the rules governing social enterprises.** In the study the Council of Notaries focused on various elements essential to characterizing social enterprises, including:
  - *general interest business activity.* In identifying the areas in which the social enterprise can operate, the previous legislation referred to the concept of social utility. Instead, as highlighted by the Council, the current law refers to general interest business activity, which must be met for the requirements of stability and principle activity. The Council states that the activity is considered to be carried out primarily when the relative revenues exceed 70% of the total revenues of the social enterprise, according to the calculation criteria to be defined by the Minister of Economic Development together with the Minister of Labour and Social Policies;

  - *the absence of profit making purpose.* The Council clarified that the social enterprise is to first allocate any profits and operating surpluses to the performance of the activity set out in its bylaws or to increase its assets. To this end, there is a prohibition on the distribution, even indirectly, of profits, operating surpluses, funds, and reserves, under any title, to founding members, shareholders or associates, employees or collaborators, directors and other members of the corporate bodies, including in the case of withdrawal or other individual termination of the relationship. In its Study, the Council also listed various cases of indirect distribution of profits;

- **ownership structure and group rules.** The Council stated that the person who, by statutory provisions or for any other reason, has the right to appoint the majority of the management bodies of the social enterprise, is considered to be exercising management and coordination activities. It clarified that the subjective limit of the social enterprise's qualification is also relevant in the regulation of the ownership structure: companies consisting of a sole shareholder, profit making entities and public entities pursuant to Legislative Decree 165/2001 cannot exercise management and coordination activities or have control of a social enterprise pursuant to art. 2359 Civil Code, in any form, even if similar, joint or indirect;

- **operations of transformation, merger, spin-off, sale of business and devolution of assets.** The new art. 12(1) Legislative Decree 112/2017 includes a significant exception for cooperative companies, which in substance excludes them from the rules of transformation (merger or division) governing social enterprises, reaffirming the applicability of the provisions of the Civil Code for such operations that involve cooperatives. This is confirmed by art. 1(1) Ministerial Decree 27 April 2018, which provides that "*cooperative companies are governed by the special provisions of the Civil Code*". On this point, the Council specified that, while any transformation concerning entities other than cooperatives does not imply any obligation to devolve on the condition that the entity resulting from the transformation maintains the status of social enterprise, in cases in which the company is a cooperative its transformation into another entity, even if not accompanied by the loss of such qualification, implies the obligation to devolve to mutual funds;

- **insolvency procedures.** On the subject of insolvency proceedings, art. 14 subjects social enterprises, in the event of insolvency, to compulsory administrative liquidation as per Royal Decree 267/1942. The Council stated that there are new procedural rules, previously not contemplated by art. 15 Legislative Decree 155/2006. The provision requiring compulsory administrative liquidation for social enterprises, except those in the form of a cooperative company, as well as the simultaneous or subsequent appointment of the relative liquidation commissioner pursuant to art. 198 Bankruptcy Law, are adopted by decree of the Minister of Labour and Social Policy. The law also provides the criteria for determining and settling the fees due to liquidators and to the members of the supervisory committees.

CASE LAW

3.1

Company Law - Court of Cassation, Sec. I, Decision 5 September 2018, no. 21662

In its decision of 5 September 2018, the Court of Cassation laid down the following principle of law: "*In relation to the limitation of an action for damages filed by the creditors of a company pursuant to art. 2394 Civil Code, the company's financial statements, given their particular function, constitute the main source of information vis-à-vis the situation of the company, which can be used not only by the shareholders, but also creditors and third parties in general. Thus a balance sheet showing a positive or zero net equity provides reassuring and reliable information. Therefore, when notwithstanding that the report of the statutory auditors on the financial statements points to the inadequacy of the valuation of certain items, the shareholders nonetheless decide to distribute profits to the shareholders pursuant to art. 2433 Civil Code, without any objections being raised at that time by the management or supervisory bodies, the question as to whether such auditor's report can be used as the element of objective notice to creditors vis-à-vis the falsity of the results attested to in the company's financial statements, remains a matter of fact to be ascertained by the trial judge.*"

3.2

Bankruptcy - Court of Cassation, Sec. I, Order 25 September 2018, no. 22785

With Order issued 25 September 2018, no. 22785, the Court of Cassation laid down the following principle of law "*in relation to a challenge made as to the statement of liabilities in bankruptcy. A professional who has requested recognition of their fees for the preparation of the report prepared pursuant to art. 161(3) Bankruptcy Law on behalf of the company proposing an arrangement with creditors, which company was then declared bankrupt, but whose request was not recognised due to apparent lack of due diligence by the professional, cannot invoke as a demonstration of diligence, the admission of the company to the arrangement with creditors. Indeed, the assessment made by the court pursuant to art. 163(1) Bankruptcy Law does not constitute an approval of the report, nor an admission of the exclusive jurisdiction of the court in the context of the agreement with creditors, in as much as the admission to such procedure does not definitively confirm, with the weight of a court decision, proper professional performance. This is because such an assessment could be later rejected by the same court in the bankruptcy proceedings, as*

a result of an investigation of greater depth made by the judicial commissioner (in this case, to ascertain the unreliability of relevant data presented in the report)".

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LEGAL NEWSLETTER | SEPTEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 2018.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY LEGAL DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.

FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM