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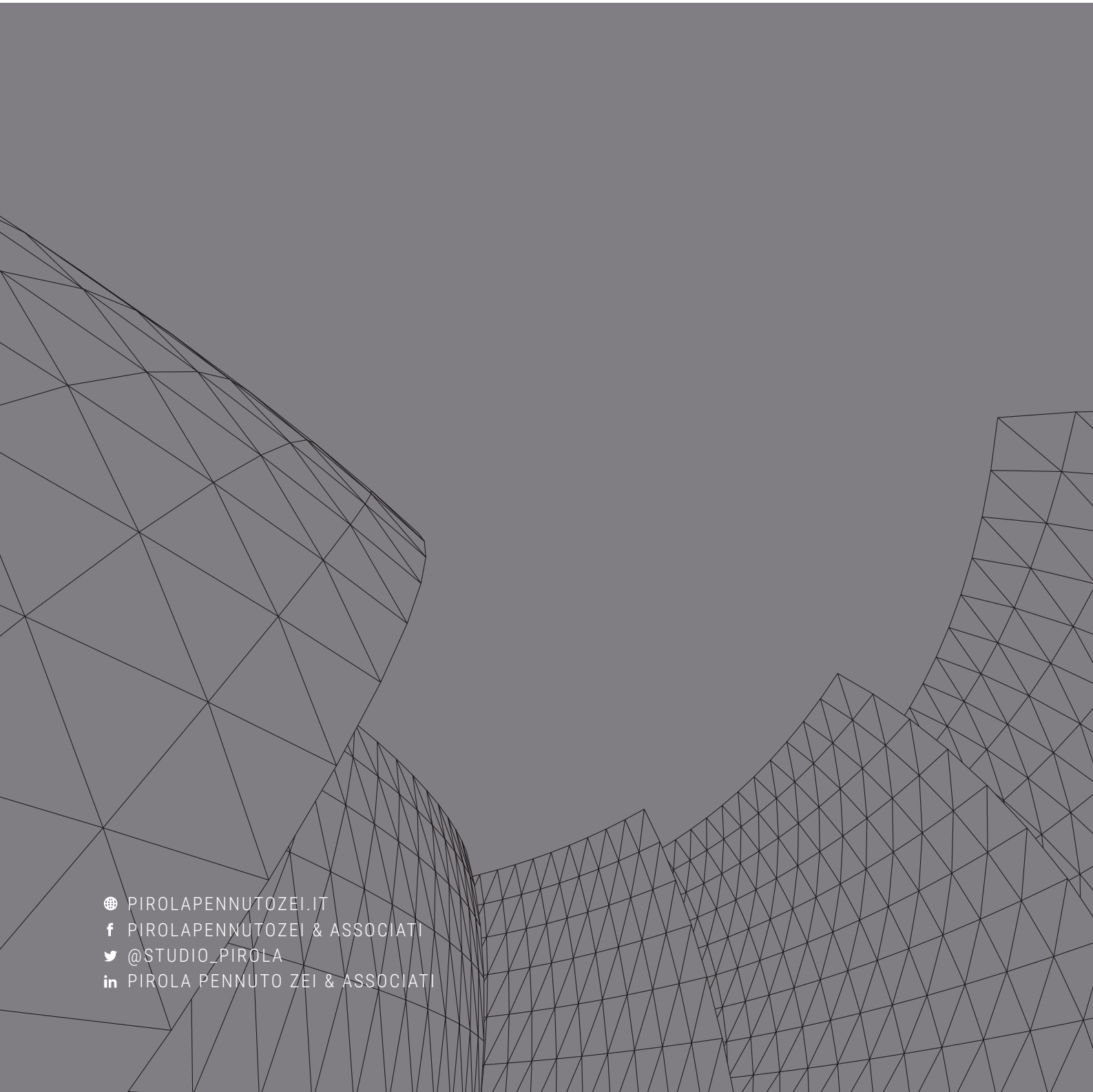
LEGAL

NEWSLETTER / OCTOBER 2018



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LEGISLATION

1.1

Draft Legislative Decree "*Business Crisis and Insolvency Law*" - Implementation of Law 19 October 2017, no. 155 ("*Rordorf reform*")

The Draft Legislative Decree entitled "*Business Crisis and Insolvency Law*", which is to implement Enabling Act 19 October 2017, no. 155 (the "*Rordorf Reform*"), has been put before the Government.
The purpose of the Decree relates to the organic reform of:

- bankruptcy proceedings under Royal Decree 267/1942; and
- the rules governing the management of businesses in crises due to over-indebtedness, pursuant to Law 3/2012.

As stated in the explanatory report accompanying the Draft, the Decree sets out both the legal principles common to the phenomena of insolvency, to be used as points of reference in the various procedures, and the specific principles to be applied to the various situations in which insolvency can occur.

The organic reform of the rules governing insolvency proceedings adheres to the following general principles, imposed by the Enabling Act:

- the term "*bankruptcy*" be replaced by that of "*judicial liquidation*";
- a definition of crisis state be introduced, which is to be understood as the probability of future insolvency, taking into account the concepts of corporate science, while maintaining the current notion of insolvency;
- that a single streamlined procedure to ascertain the state of crisis or insolvency of the debtor be adopted;
- that each category of debtor, whether an individual or legal entity, collective body, consumer, professional or entrepreneur carrying out a commercial, agricultural or artisan activity, with the sole exclusion of public bodies, be subjected to the procedures to ascertain the state of crisis or insolvency;
- that the notion defined by the European Union as "*the debtor's centre of main interests*" be adopted by Italian legislation;
- priority be given to proposals aimed at overcoming the crisis while ensuring business continuity, even through the use of another entrepreneur;

- in conjunction with the provisions on the digitization process, that the rules governing the various procedures relating to insolvency matters be standardized and simplified;
- that the service of the bankruptcy proceedings documents and the deed initiating the crisis assessment procedure be made to the debtor's certified electronic delivery service address or certified electronic mail address as either listed in the register of companies or taken from the national index of certified e-mail addresses of companies and professionals;
- to reduce the duration and costs of bankruptcy proceedings; to reformulate the provisions that gave rise to interpretative disagreement; to put together, at the Ministry of Justice, a list of individuals who can be assigned by the courts to perform management or control functions in the context of bankruptcy proceedings: such list is to indicate each individual's requisites of professionalism, independence and experience.

The decree also aims at coordinating crisis and insolvency management procedures of employers with employee and salary protection measures, in line with European legislation, in particular:

- the Revised European Social Charter (Strasbourg, 3 May 1996) ratified under Law 30/1999, which deals with the implementation of the rights and freedoms covered by the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer;
- Council Directive 2001/23/EC of 12 March 2001 as interpreted by the Court of Justice of the European Union on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

1.2

Art. 40 Legislative Decree 50/2016 - Obligation to use electronic means of communication in the performance of award procedures - Entry into force

The obligation for contracting authorities to make communications and to provide information in digital format as per the procedures established by the Procurement Code (art. 40 of Legislative Decree 50/2016 and subsequent amendments) entered into force on 18 October 2018.
That same obligation to send documents relative to the European Single Procurement Document (ESPD) in digital format, came into force on 18 April 2018. Art. 85 Legislative Decree 50/2016 provides that the

ESPD must be drawn up in accordance with the form approved by the European Commission. The ESPD is a self-declaration used as a first step substitution for the certificates issued by public authorities or third parties, attesting that the economic operator:

- is not covered by one of the exclusion criteria (set out in art. 80);
- meets the selection criteria (defined in art. 80);
- meets any objective criteria (established by art. 91).

In addition, the ESPD is to provide the same information concerning any other entities utilized by the economic operator, as well as the relevant information required by the contracting authority. It is to indicate the public authority or the third party responsible for issuing additional documents and is to include a formal declaration that the economic operator is able, upon request and without delay, to provide such documents.

The new art. 40 Legislative Decree 50/2016 provides that, as from 18 October 2018, the requirement to send all information electronically does not only relate to sending the ESPD, but also to the certification that the requirements to access the procedures have been met, participation requests, communications between companies and contracting authorities and offers made by economic operators.

1.3

Resolution 4 July 2018, no. 803 - National Anti-Corruption Authority (ANAC) - "*Regulations governing the exercise of the supervision of public contracts*" - (Official Gazette 16 October 2018, No. 241)

The Resolution of 4 July 2018 of the National Anti-Corruption Authority - ANAC, setting out the Regulations governing the Authority's proceedings concerning the exercise of supervisory powers over public contracts for works, services and supplies as per art. 213(3)(a), (b) and (g) of the Code, was published in the Official Gazette no. 241 on 16 October 2018. Below is a summary of the main changes.

Supervisory functions

The Chair and the Board of the Authority are to indicate the guidelines, the requirements and the objectives of the supervisory activity.

The Decree provides that by 31 January of each year, the Board must approve a programme directive, drafted, *inter alia*, in light of any shortfalls identified during the previous year's activities. On the basis of the programme directive, the Board must also approve the "*Annual inspection plan*", as per the operating procedures contained in the "*Guidelines for conducting inspections*", published on the Authority's website.

The Board can amend the directive if it deems it necessary to indicate further objectives or supervisory interventions.

Supervisory activities

The Authority's supervisory activity can be activated:

- by the appropriate office;
- by order of the Board;
- after reports presented to the Authority.

Should a case of malpractice be reported by a public employee ("*whistle-blower*"), the matter is to be entrusted to the relevant office.

Method of presenting reports

Third party reports must be submitted using the form attached to the Regulations, available on the Authority's website, and is to be sent by certified e-mail. The signed form must be accompanied by a copy of an identity document or other valid document of the person making the report. Should the prescribed form not be used, the report, signed and accompanied by a copy of an identity document or other valid document of the person making the report, must in any case indicate and document the relevant elements. Should the matter be reported anonymously, and relates to facts of particular relevance or gravity which are adequately detailed, it is to be recorded and may be taken into consideration and integrated with other information held by the office within the exercise of the supervisory authority activity.

Completion of the supervisory procedure

The supervisory procedure ends with the issuing of one of the following, either by way of a Board resolution or through a administrative action in the case of a simplified procedure:

- a document in which the Authority records that the contracting authority carried out correct administrative practices worth mentioning;
- a document attesting that illegal or irregular actions in the award procedure or in the execution of the contract had been found. Such document can be accompanied by recommendations, addressed to the contracting authorities involved, to remedy the illegitimacy or irregularities found or to adopt measures aimed at preventing the repetition of such irregularities in the future.

Communication of preliminary findings

Should the inspection come across particularly serious cases of illegal or irregular actions, or actions that would have significant economic or social repercussions in relation to the value of the contract and the number of operators potentially involved in the particular market, the supervisory official can prepare an Investigative Results Report (*Comunicazione di risultanze istruttorie* (CRI)). A CRI can also be drafted if, during the course of the supervisory activity, new facts emerge, which are in addition to and different from those indicated in the commencement notice. The recipients of the CRI can file counter-claims or communicate their willingness to comply with the indications contained therein.
Within sixty days from date by which the interested parties have been advised to provide feedback on the CRI, the supervisory official is to submit a proposed resolution to the Board for approval, setting out the facts and legal arguments by which the Authority can reach a decision. Alternatively, the officer may issue a note reporting the willingness of the contracting authority to remedy the illegitimacy and irregularities indicated in the CRI or to adopt measures aimed at preventing repetition of such irregularities in the future.

Entry into force

This Regulation, which replaces the previous "*Regulation 15 February 2017 on the exercise of the supervision of public contracts*", came into force on 31 October 2018.

CASE LAW

2.1

Company Law - Approval - Court of Cassation, Sec. I, Decision of 2 October 2018, no. 23950

In its decision no. 23950, issued on 2 October 2018, the Court of Cassation established the following principle of law "*Pursuant to Legislative Decree 224/2010, which amended art. 2357-ter(2) Civil Code, companies that do not make use of the risk capital market, are to include treasury shares both for the purposes of calculating the constitutional quorum and the deliberative quorum*".

2.2

Company Law – Director's compensation - Court of Cassation, Sec. VI, Order 3 October 2018, no. 24139

With its Order of 3 October 2018 no. 24139, the Court of Cassation clarified that according to the general principles, a company director's contract is one that the law assumes to be for consideration, unless there is a special provision to the contrary in the company by-laws or a specific clause in the contract entered into with that director. The director has the power to waive remuneration due, including by way of indisputable behaviour (or "*tacit waiver*"), from which must emerge however - according to the general principles regarding forgiveness of debt - a willingness which is objectively and correctly incompatible with that of maintaining the right to be paid. It follows - observes the Court, reverting to past precedent - that "*in order to interpret actions, that are not supported by written or spoken words or by other qualified semantic codes, as a waiver, it is necessary that these actions objectively and correctly evidence a willingness which is incompatible with that of maintaining the right*".

2.3

Corporate Groups - Associated Companies - Arrangement with creditors - Court of Cassation, Sec. I, Decision of 17 October 2018, no. 26005

With the Decision no. 26005 of 17 October 2018, the Court of Cassation, based its argument on previous case law, which deemed "*inadmissible a single proposal for an arrangement with creditors by companies connected by management and control constraints, which proposal provides that the creditors of each*

company can only claim on the assets of that company". The Court then clarified that "*an arrangement with creditors can only be proposed by each company belonging to the group before the court territorially competent for each individual proceedings, without the possibility of mixing assets and liabilities, to be, then approved by majorities calculated with reference to the debit positions of each individual company*".

2.4

Bankruptcy - Court of Cassation, Sec. I, Decision of 22 October 2018, no. 26646

The Court of Cassation has clarified in its decision of 22 October 2018, no. 26646, that "*acts of fraud, referred to in art. 173 Bankruptcy Law, such as actions aimed at concealing factual situations likely to affect the judgment of creditors, as they are potentially deceptive and could undermine the creditors' informed consent on the real possibility of settlement in the event of liquidation, must be viewed on an objective level. This is provided however that they are characterized, on the subjective level, by the conscious deliberateness of the actions, in relation to which, on the other hand, there is no requirement for malicious foreknowledge*". For the Court of Cassation, the failure to indicate outstanding legal proceedings brought by the debtor company in the proposed arrangement, does not constitute a case of fraud against the creditors and does not therefore justify the revocation of the company's admission to the procedure.

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LEGAL NEWSLETTER | OCTOBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 OCTOBER 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