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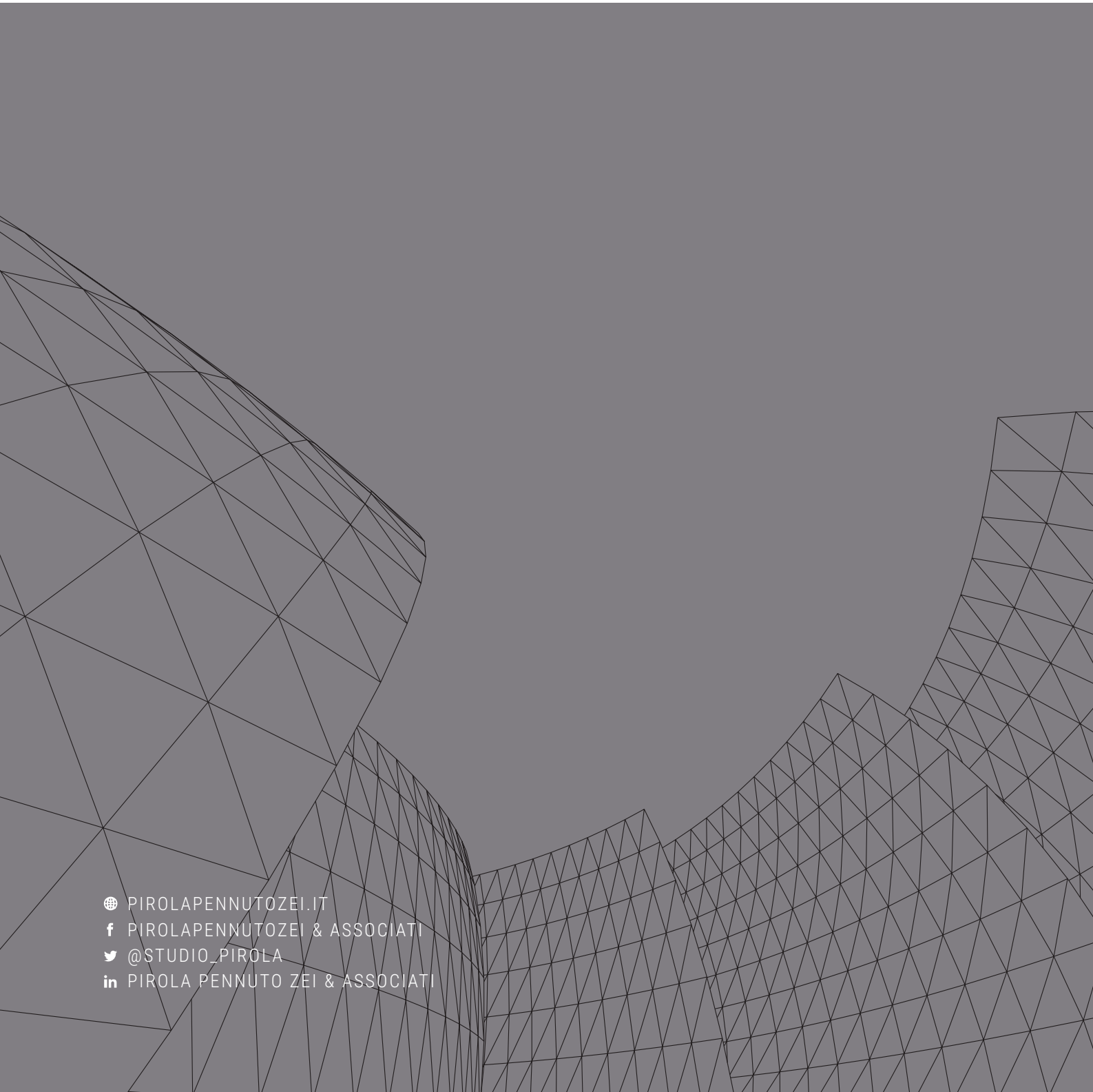
LEGAL

NEWSLETTER / DECEMBER 2018



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LEGISLATION

1.1

Bank of Italy – Ordinance 5 December 2018 - "*Measures on the transparency of banking and financial transactions and services – correct relations between intermediaries and consumers*"

In a measure dated 5 December 2018, published in the Official Gazette of no. 294 on 19 December 2018, the Bank of Italy amended and supplemented to its previous measure of 29 July 2009 relative to the "*Transparency of banking and financial transactions and services – Correct relations between intermediaries and consumers*".

The new measure brings local regulations into line with the Guidelines of the European Banking Authority (EBA) of 22 March 2016 on product oversight and governance arrangements for retail banking products.

The changes relate mainly to Section XI, dealing with requirements that each intermediary must adopt at an organizational level, to ensure constant and particular attention is paid to transparency of the contractual conditions and to the correctness of the conduct at every stage of the intermediation activity.

The measures apply to all transactions and services of a banking and financial nature governed by Title VI of the Consolidated Banking Act (TUB), such as deposits, loans, accounts and payment services. Its application is also extended to cover all retail banking and financial products, thus ensuring a level of protection similar to that provided to consumers.

The measures are aimed at banks authorized to operate in Italy, Italian branches of EU banks, financial intermediaries as per the provisions of art. 106 TUB, Poste Italiane SpA, Italian eLMI, payment institutions authorized to operate in Italy, Italian branches of payment institutions and EU eLMI, as well as "*indirect distribution channels*", i.e. third parties through which intermediaries offer their products, such as financial asset agents, credit brokers and other credit intermediaries.

A new clause, 1-*bis,* has been added to Section XI. This clause regulates the procedures of governance and product control, providing that they must be consistent with the company's policies relative to the approval of new products. These are to be adopted in accordance with the rules of internal control, are

to be approved and subject to periodic review by the strategic supervisory body, and are to be assessed periodically to verify their adequacy and effectiveness.

The details of these procedures are set out in the new clauses 1-*bis*.1 and 1-*bis*.2. Intermediaries must continually monitor and review the products to ensure that, during the stage of processing and offer, as well as throughout the duration of each product, the interests, objectives and characteristics of the customers, the typical risks of those products which may be detrimental to customers and possible conflicts of interest are all considered. In addition, intermediaries must adopt procedures relating to distribution of the products to ensure that the method of distribution is suitable for the target market and the specific product.

These measures must be applied only to products which have been developed (including those that have been substantially modified) and offered on the market as from:

- 1 January 2020 by cooperative credit banks, by intermediaries belonging to groups with consolidated balance sheet assets no greater than Euro 3.5 billion and by intermediaries, not belonging to groups, with balance sheet assets no greater than Euro 3.5 billion;
- 1 January 2019 by other intermediaries.

1.2

Ministry of Economy and Finance - Decree 12 December 2018 - "*Modification of the legal interest rate*" (Official Gazette 15/12/2018 No. 291)

By Decree issued on 12 December 2018, published in the Official Gazette no. 291 of 15 December 2018, the Ministry of Economy and Finance has provided that, as from 1 January 2019, the annual rate of legal interest, pursuant to art. 1284 Civil Code, is set at 0.8%.

Therefore, as from 1 January 2019, the legal interest rate will increase from 0.3% (in force until 31 December 2018) to 0.8%.

GUIDANCE

2.1

Circular issued by the Ministry of Labour 27 December 2018 no. 20 – Not-for-profit Sector Code. Clarifications relative to by-law amendments

With its Circular of 27 December 2018, no. 20, entitled "*Not-for-profit Sector Code, by-law amendments*", the Ministry of Labour has provided clarifications as to the correct exercise of the by-law autonomy of non-profit entities to be exercised by 2 August 2019. Particularly affected are Voluntary Organisations, Social Advancement Associations and Non-profit Organisations, as provided under art. 101(2) Not-for-profit Sector Code (Legislative Decree 117/2017).

Readers will recall that the Not-for-profit Sector Code under Legislative Decree 117/2017 was amended and added to by Legislative Decree 105/2018, published in the Official Gazette on 10 September 2018.

Included in the clarifications provided by the Ministry, are those relative to management, the supervisory body and statutory auditors.

Given that the new provisions regarding the managerial body, supervisory body and statutory auditors pursuant to arts. 26(1), 26(2), 30 and 31 Legislative Decree 105/2018, are mandatory and the adjustment to the by-laws is therefore compulsory, the Circular clarified that:

- with reference to the managerial body, "*there is a possibility for associations with at least 500 members to derogate from the requirement, by effect of the reference to art. 25(2) in art. 26(1). Conversely, arts. 26(3), (4) and (5) contain provisions of an optional nature, by which the abridged procedures as per art. 101(2) do not apply. Art. 26(7) provides for the possibility of inserting derogating provisions with respect to the requirement vis-à-vis the general power of representation of directors. Finally, art. 26(8) is specifically dedicated to the establishment of the Not-for-profit Sector and provides for the mandatory provision of a managerial body, while the requirement for the constitution of an assembly or policy body is to be regulated in the by-laws, rendering them optional in nature. If the board of directors is collective, the by-laws must either provide rules for its functioning (quorum for the validity of meetings, possible requirement for decisions to be made by qualified majorities) or defer to the rules set out in a specific regulation*".

- the obligation to amend the by-laws and to render the supervisory body operational "*relates primarily to foundations and those entities that have restricted assets as per art. 10, and secondly, to associations exceeding the size limits prescribed by law. It may however be possible that other circumstances will be identified*";

- in relation to the statutory auditors, "*the necessity that the provisions of the by-laws comply with the Code applies in particular to the procedures for the appointment of the auditor. The task of appointing and revoking, when applicable, the person responsible for the statutory audit of accounts falls upon the assembly, pursuant to Art 25(1)(b), without prejudice to the exceptions under art. 25(2). The task of appointing an auditor for foundations is to be assigned by way of an express provision in the by-laws, which is to take into account the nature of the institution and the intention of the creator of the foundation. In relation to the board of statutory auditors, an organisation that sets out in its by-laws the methods for appointing the auditor, subordinating this to the conditions of the law, is voluntarily bringing the organisation into line ahead of time, so that it is in a position to meet its future obligations. By making such a choice, it becomes eligible to use the abridged procedures"*.

The Circular also clarifies that "*the provisions referred to above regarding the internal regulations will be effective as from the amendment to the by-laws. However, in relation to reporting to the judicial authorities or the supervisory body, pursuant to art. 29, the situation is different. This provision is immediately applicable, and does not require any provision of the by-laws, as it is based directly in the law*".

CASE LAW

3.1

Company law - Court of Cassation, Sec. II, Decision of 17 December 2018, no. 32573

The Court of Cassation has clarified, in its Decision no. 32537 of 17 December 2018, that the provision referred to in art. 2391(1) Civil Code imposes a general and preventive obligation on a director, who has a conflict of interest, to clarify their situation in a subjective manner. This has the dual purpose of ensuring firstly that all the members of the management body and the corporate supervisory bodies know the circumstances, and also that it does not affect, even indirectly, the assessment and decision-making processes within the company organization, particularly the board of directors and other bodies specifically entrusted with the management of the company. The scope of application of art. 2391(1) is general and independent from the tangible impact of the conflict of interest on the actual resolutions taken by the board of directors. Further, making reference to numerous precedents, the Court of Cassation reiterated the principle according to which, "*in relation to administrative penalties for violations of the rules on financial intermediation, the complex organizational structure of a company, which includes a supervisory committee, cannot lead to the exclusion or simple weakening of the power-duty of control for each member of the board of statutory auditors. Each member has, on the one hand, the obligation to supervise, and on the other, the legal obligation to report to the Bank of Italy and Consob*" (cf: Cass., S.U., no. 20934/2009, Cass., no. 6037/2016).

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LEGAL NEWSLETTER | DECEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 DECEMBER 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