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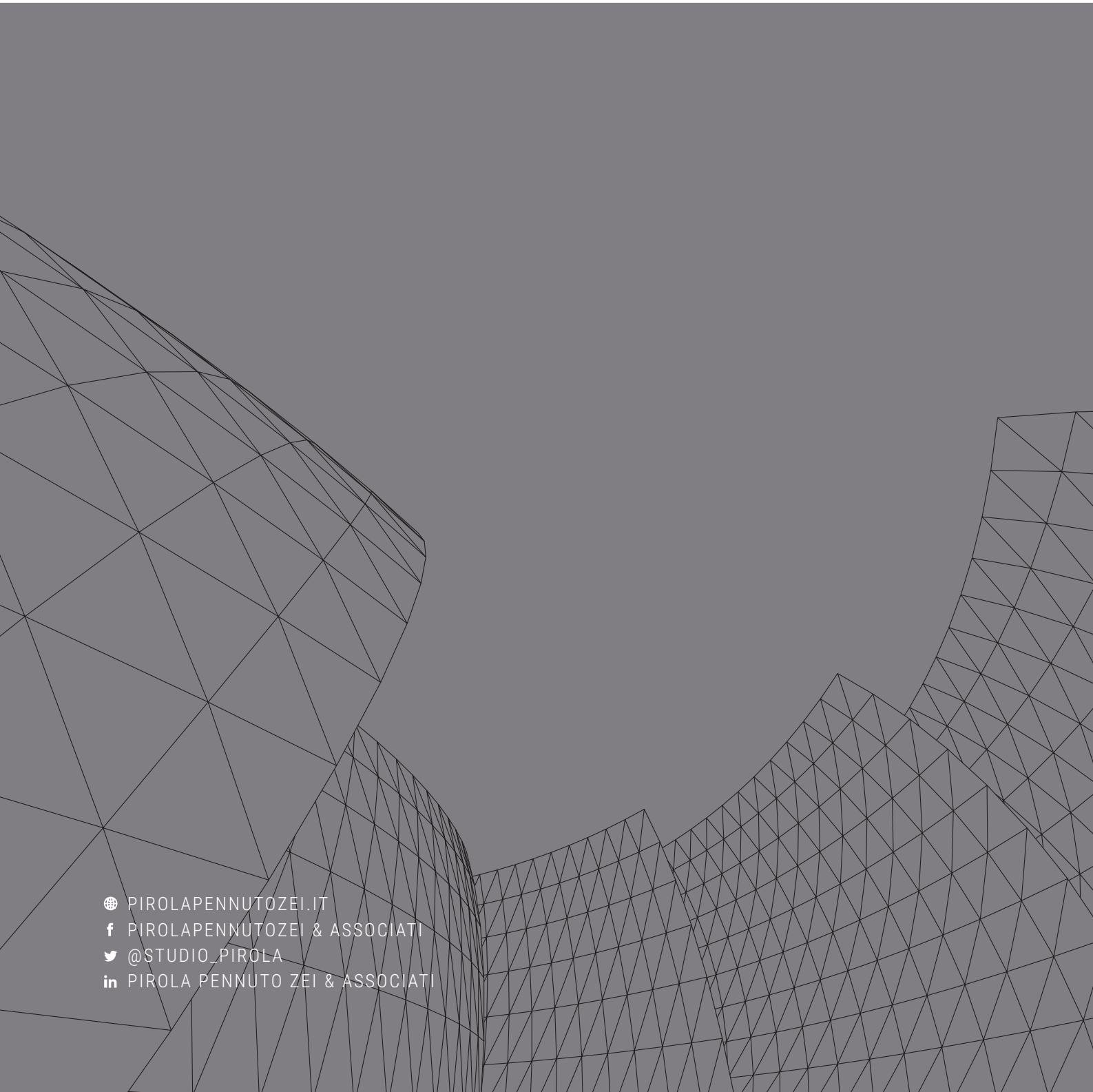
LEGAL

NEWSLETTER / MARCH 2019



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LEGISLATION

1.1

Legislative Decree No. 15 of 20 February 2019 - Implementation of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Official Gazette 8 March 2019, No. 57)

Legislative Decree 15/2019 was published in the Official Gazette of 8 March 2019, no. 57. It was passed in implementation of Law 163/2017 (European Delegation Law) to put into effect various European directives, including the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, as well as to bring Italian legislation into line with the provisions of Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending the Regulation on the Community trade mark.

This Decree made various amendments made to Legislative Decree 30/2005, the "*Industrial Property Code*", including:

- the introduction of the "*certification mark*". Art. 11-*bis*(1) of the Industrial Property Code provides that "*in order to ensure the origin, nature or quality of certain products or services, individuals or legal entities, including institutions, authorities and bodies accredited under current certification legislation, may obtain registration for special marks as certification marks, provided that they do not carry out an activity that involves the supply of products or services of the certified type*".
  The certification mark may be made up of signs or indications which in trade can serve to designate the geographical origin of the goods or services. Art. 11-*bis*(4) provides that in these cases the Italian Patent and Trademark Office may refuse the registration, by issuing a reasoned order, when the marks requested could create situations of unjustified privilege or otherwise prejudice the development of other similar initiatives in the region.
  The Patent and Trademark Office may also request an opinion for public authorities, categories and entities concerned.
  The registration of the certification mark consisting of a geographical name does not authorise the owner to prohibit third parties from trading under that name, provided that such use complies with the principles of professional correctness.

- the *licensee's entitlement to infringement proceedings.* New art. 122-*bis* of the Industrial Property

Code provides that, without prejudice to the provisions of the licensing contract, the licensee may bring trade mark infringement proceedings only if the trademark's proprietor consents thereto. However, the holder of an exclusive licence may bring such proceedings only if, after formal notice, the proprietor of the trademark does not initiate infringement proceedings within an appropriate period.

A licensee shall be entitled to take part in infringement proceedings brought by the proprietor of the trademark, in order to obtain compensation for damages suffered.

- a new method of *lodging appeals*. The new art. 136 of the Industrial Property Code provides that appeals are to be served on both the Italian Patent and Trademark Office and at least one of the other parties to whom the document directly refers, within the peremptory term of sixty days from the date on which the interested party received the communication or gained knowledge of the contested document. Failure to comply will lead to the appeal being inadmissible. Should the matter relate to documents which pursuant to law or regulation are to be published rather than be notified individually, the sixty day period is to run from the day on which the time-limit for publication expired. In addition, the Appeals Commission can order that further service be made on the other parties concerned.

Service of the appeal must be made in accordance with arts. 137 et seq. Code of Civil Procedure.

The appeal should be addressed to the Appeals Commission and contain the following:

a) the identification data of the appellant, the appellant's lawyer, if appointed, and the parties being challenged;

b) indication of the order being contested, the date the appellant was notified or became aware of the order, and the particular issue under appeal;

c) a summary of the facts;

d) the specific grounds on which the appeal is based;

e) an indication of the documents provided and;

f) the other means of proof which the applicant intends to use;

g) the signature of the appellant, if personally present in court, or of their attorney, together with, in this case, the special power of attorney.

An appeal is inadmissible if one of the indications referred to in points (a), (b), (c), (d) and (f) of paragraph 5 is missing or uncertain.

- the inclusion of rules *governing the revocation and invalidity of trade marks.* Pursuant to arts. 184-*ter* et seq. (Section II-*BIS*) of the Industrial Property Code, a written and reasoned request may be submitted to the Italian Patent and Trademark Office to ascertain the revocation or declaration of invalidity of a registered trademark. Art. 184-*ter* lists those entitled to make such a request and includes (i) any interested party; (ii) the owner of an earlier trade mark or person authorized by law to exercise the rights conferred by a protected designation of origin or geographical indication and (iii) the trade mark owner concerned.

The new provisions introduced by this Decree enter into force as of 23 March 2019. Art. 33 provides the following specific transitional regulations:

- within one year from the date of entry into force of the Decree, proprietors of national collective marks registered under the previous regulations may apply to the Italian Patent and Trademark Office to have them converted into collective marks or certification marks under the new regulations;

- without prejudice to the continuous effect of the registered collective mark as per the previous legislation, for the purposes of determining the duration, the registration of the new mark will have effect from the date the application is filed;

- if the application is not submitted, that trademark shall cease to be valid;

- preliminary proceedings relative to applications for the registration of national collective marks which have been initiated pursuant to the previous legislation, shall be suspended as of the date of entry into force of the Decree. Those who have submitted an application may restart the process by submitting an application for its conversion into an application for the registration of a collective mark or certification mark in accordance with the new regulations.

1.2

Legislative Decree No 18 of 19 February 2019 - Implementation of Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (Official Gazette 12 March 2019, no. 60)

Legislative Decree no. 18 of 19 February 2019, passed in implementation of the enabling provisions of art.

4 Law 163/2017 (European Delegation Law), for the adaptation and coordination of national legislation with the provisions of Regulation (EU) no. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, and to the provisions of the Agreement on a Unified Patent Court, was published in the Official Gazette of 12 March 2019, no.60.
The new provisions are in force as of 27 March 2019.

By effecting various amendments to Legislative Decree 30/2005 "*Industrial Property Code*", this Decree introduced innovations relating to patent protection, with particular reference to the European patent with unitary effect. The articles of the Industrial Property Code which have been amended are arts. 56 "*Rights conferred by the European patent*", 58 "*Transformation of the European patent application*", 59 "*Priority of the European patent in cases of multiple protection*", 68 "*Limitations of patent rights*", 70 "*Compulsory licence for non-implementation*" and 163 "*Supplementary certificate application for medicinal products and plant protection products*".

The new art. 56 provides that "*the European patent granted for Italy and the European patent with unitary effect confer on the proprietor the rights and limits as provided for in the Agreement on a Unified Patent Court, also establishing that the European patent granted for Italy and the European patent with unitary effect shall take effect from the date on which notice of the grant of the patent is published in the European Patent Bulletin.*"

Art. 68 now extends further limitations, providing that the exclusive right conferred by patent law does not extend, notwithstanding the subject of the invention, to:

- actions carried out on an experimental basis relating to the patented invention, or to the use of biological material for cultivation purposes, or the discovery and development of other plant varieties (art. 68(1)(a-*bis*));

- the use of the patented inventions on board vessels from other countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than Italy, relative to the hull of the vessel in question, machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter Italian waters, provided that such devices are used there exclusively for the needs of the vessel or the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or

of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter Italy (new art. 68(1)(c-*bis*).

A new Section VI-*bis* ("*European Patent*") has also been inserted in Chapter VIII ("*Transitional and Final Provisions*") of the Industrial Property Code. Pursuant to the new art. 245-*bis*, ("*Transitional regime*") proceedings concerning the European patent granted for Italy, which are pending until the date of entry into force of the Agreement on a Unified Patent Court, ratified and made enforceable pursuant to Law 214/2016, and those brought after the entry into force of the Agreement before Italian courts as a result of the transitional regime provided in art. 83(3) of the Agreement, shall be decided in accordance with the relevant Italian legislation.

1.3

Legislative Decree no. 19 of 13 February 2019 - "*Rules for adapting national legislation to the provisions of Regulation (EU) 2016/1011, on indices used as benchmarks in financial instruments and contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014//17/EU of Regulation (EU) no. 596/2014, and for adapting Italian legislation to the provisions of Regulation (EU) 2015/2365, on the transparency of securities financing transactions and re-use and amending Regulation (EU) no. 648/2012*". (Official Gazette of 13 March 2019, No. 61)

Legislative Decree no. 19 of 13 February 2019, on "*Rules for adapting national legislation to the provisions of Regulation (EU) 2016/1011 (Benchmark Regulation or BMR), on indices used as benchmarks in financial instruments and contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014//17/EU of Regulation (EU) 596/2014 as well as the adaptation of national legislation to the provisions of Regulation (EU) 2015/2365 (Securities Financing Transaction Regulation or SFTR), on the transparency of securities financing transactions and re-use and amending Regulation (EU) No 648/2012 (European market infrastructure regulation or EMIR)*", was published in the Official Gazette of 13 March 2019, No. 61.

Pursuant to this Decree, a number of amendments and additions were introduced to Parts I and V of Legislative Decree 58/1998 (Consolidated Finance Act or TUF). The various changes include:

- the inclusion of new definitions (such as "*benchmark*" and "*benchmark administrator*");

- the strengthening of the powers of CONSOB, that takes on the role of:

- competent authority for non-financial counterparties which are not subject to supervision by another authority, as defined respectively by EU Regulation no. 648/2012 and EU Regulation 2015/2365, relative to compliance with the obligations set out in arts. 9, 10 and 11 of EU Regulation no. 648/2012 and arts. 4 and 15 of EU Regulation no. 2015/2365 (new art. 4-*quater* TUF);
- competent authority over benchmark administrators and supervised contributors established in Italy, as defined in art. 3(1)(10) EU Regulation 2016/1011 (new art. 4-septies TUF);
- competent authority responsible for coordination, cooperation, exchange of information with the EU Commission, ESMA and the competent authorities of other Member States (new art. 4-*septies* TUF);

• the tightening of the disciplinary rules, with the introduction of new art. 190-*bis*.1 entitled "*Administrative sanctions relating to violations of the provisions of the EU Regulation 2016/1011*" and amendments to arts. 190, 193-*quater,* 194-*bis, quater* and *septies* TUF. Art. 193-*quater* TUF, previously governing administrative fines for the violation of Regulation EU 648/2012 (EMIR), has been amended by the addition of administrative penalties for violations of Regulation (EU) 2015/2365 (SFTR). Art. 193-*quater* now also includes a reference to art. 325-*bis* Legislative Decree 209/2005, as the notion of turnover is also present in the Private Insurance Code. The new art. 194-*septies*(1) TUF, provides for the possibility of applying the so-called "*public reprimand*" as an alternative to an administrative monetary fine, for violations of SFTR and BMR. This alternative penalty may be imposed in cases of minimally offensive or dangerous conduct, and if the alleged infringement has been terminated by Consob, the Bank of Italy, IVASS and COVIP.

The Decree came into force on 28 March 2019.

1.4

Italian Competition Authority - AGCM: Resolution of 7 March 2019 - Contribution to the burden arising from the functioning of the Competition Authority for 2019 (Official Gazette of 18 March 2019, No. 65)

In its Resolution of 7 March 2019, published in the Official Gazette of 18 March 2019, No. 65, the Italian Competition Authority - AGCM, confirmed that the amount of the contribution to be made for its operation for the year 2019 is 0.025 per thousand less than that required by law (0.08 per thousand).
AGCM also:

- confirmed that without prejudice to the criteria set out in art. 16(2) Law 287/90, joint-stock companies with total revenues in excess of Euro 50 million are to provide a contribution for 2019 at a rate of 0.055 per thousand of the turnover shown in their most recently approved financial statements;
- passed a resolution that the contribution to be paid by each company is not to exceed one hundred times the minimum amount and, therefore, be no greater than Euro 275,000.

1.5

National Anti-Corruption Authority - ANAC - Resolution no. 164 of 27 February 2019, "*Amendment of the Single Regulation on the exercise of the Authority's disciplinary power, currently governed by art. 213(13) Legislative Decree 50/2016, with the addition of arts. 7 and 8 of such Regulation*" (Official Gazette no. 72 of 26 March 2019)

With Resolution no. 164 of February 27, 2019, published in the Official Gazette no. 72 of March 26, 2019, the National Anti-Corruption Authority (ANAC) supplemented arts. 7 and 8 of the Single Regulation on the exercise of the Authority's disciplinary power, currently governed by art. 213(13) Legislative Decree 50/2016.

As a result of the changes introduced with regard to hearing the parties during the preliminary phase (art. 7), this Regulation provides that, in proceedings aimed at penalising the failure to provide information to the Authority by the Managers of Commissioning Bodies, such hearing is to be ordered ex officio by the head of the unit responsible for the proceedings (new paragraph 3), for the sole purpose of the preliminary investigation. It should be noted that, on the basis of the current Regulation, while the parties are being heard during proceedings aimed at sanctioning failure by the Managers of the Commissioning Bodies to inform the Authority, the head of the unit responsible for the proceedings is to invite the parties or their representatives to provide the clarifications deemed necessary. Economic operators are to be represented by their legal representative or proxy. Minutes of the hearing must be drafted, signed by the person responsible for the proceedings, by any other U.O.R. (*Unità Organizzativa Responsabile - Responsible Organizational Unit*) official present and by the parties or their representatives, to whom a copy of the minutes must be provided (art. 7(1) and (2)).

With regard to the conclusion of the preliminary phase (art. 8), the Regulations now provide that having examined the documentation acquired, the U.O.R. may propose to the appropriate General Manager:

- the archiving of the proceedings, in cases where it is clear that the conditions for initiating them are

not met. In this case, the U.O.R. must inform the parties of such archiving and is to provide a quarterly summary to the Authority's Board, giving adequate reasons as to the reasons for the archiving;

- the submission of the preliminary findings to the Board in order that the final resolution can be passed. Before the matter is referred to the Board, the U.O.R. is to send the parties communication containing a summary of the main findings of the investigation, and an indication of the time limit (not exceeding fifteen days from receipt of the communication) for the acquisition of further evidence and/or statements of defence, specifying that evidence and documents submitted after the deadline will not be taken into consideration. The period within which the Authority to close the procedure is to be suspended from the sending of the communication until the expiry of the period for compliance;

- that with the addition of the new paragraph 5 pursuant to the Resolution, the U.O.R. is not required to send communication containing a summary of the main findings of the investigation, mentioned above, in proceedings aimed at sanctioning the omission of the obligation to inform the Authority put in place by Managers of Commissioning Bodies.

GUIDANCE

2.1

Assonime Circular dated 18 March 2019, no. 8 - Simplification Decree: guide to the rules governing business activities

In its Circular dated 18 March 2019, no. 8, entitled "*Simplification Decree: Guide to the rules governing business activities*", Assonime (*Associazione fra le Società Italiane per Azioni* - The Association of Italian Joint Stock Companies) analysed various changes introduced by Decree Law 135/2018, converted with amendments by Law 12/2019, the "*Simplification Decree*". A few of the new provisions, which are of interest to businesses, are as follows:

Support for SMEs in relation to trade debts late payment of public entities

Decree Law 135/2018 contains a number of provisions aimed at providing support to small and medium-sized enterprises (SMEs as defined in the decree by the Minister of Production Activities on 18 April 2005, in line with the recommendation of the European Commission 2003/361/EC), which find themselves in difficulty due to late payment of trade debts by public entities (art. 1) and with respect to contractual clauses relating to the terms of payment of commercial transactions (art. 3(1-*terdecies*)).

Art. 1 contains a guarantee provision that can be activated to assist a company suffering financial difficulties, pending payment of debts by public entities. The SME Guarantee Fund, set up with *Mediocredito Centrale*, has a specific section to provide guarantees, at market conditions, in favour of SMEs:

a) that are experiencing difficulty in repaying loan instalments to banks and financial intermediaries and, at the same time;
b) which are owed money by public entities, as certified in accordance with art. 9(3-*bis*) Decree Law 1851/2008.

As stated in the Circular, the guarantee is granted to cover the unpaid loan (plus contractual interest and accrued arrears) or the claims against the public entity as certified and evidenced the appropriate digital platform, whichever is the lower, up to a maximum of 80% and up to a maximum guaranteed amount of Euro 2,500,000.

The repayment under the guarantee is to be no greater than 80% of the loss incurred by the bank or the intermediary and shall in any event cease to have effect upon payment of the certified claims by the public entity.

Art. 3(1-*terdecies*) Decree Law 135/2018 relates to payment terms in commercial transactions as per Legislative Decree 231/2002 which governs rules on late payment. Of note are the provisions relating to the nullity of contractual clauses that are particularly unfair to the creditor. The new art. 7(4-bis) Legislative Decree 231/2002 provides that if the creditor in a commercial transaction is an SME, payment terms exceeding sixty days is to be considered as grossly inequitable, unless all parties to the contract are SMEs.

Assonime explicitly states that these amendments do not affect commercial transactions in which the creditor is a large undertaking or where both parties are SMEs. However, when the debtor is a large business and the creditor is an SME there is a presumption of serious unfairness.

2.2

National Council of Chartered Accountants and Accounting Experts - CNDCEC, Document of March 2019 - "*Corporate governance report containing a corporate crisis risk assessment programme (ex art. 6(2) and (4) Legislative Decree 175/2016)*"

The National Council of Chartered Accountants and Accounting Experts - CNDCEC, in its Document of March 2019 entitled "*Corporate governance report containing a corporate crisis risk assessment programme*", commenting on the provisions of Legislative Decree 175/2016, ("*Consolidated Law on Publicly Owned Companies*"), provided a series of recommendations relative to instruments to monitor the risk of corporate crisis, together with a blueprint for the drafting of the managerial report.
The suggested form of report is to include:

- corporate risk assessment programme (art. 6(2) Legislative Decree 175/2016);
- statement on the monitoring and verification of corporate crisis risk for the financial year in question (art. 14, paragraph 2 of Legislative Decree no. 175/2016); and
- a section dedicated to additional corporate governance tools (art. 6(3) and (5)).

These indications are intended for "*publicly controlled*" investee companies, as defined in art. 2(1)(m) of the Consolidated Law, and therefore for "*companies in which one or more public body exercises powers of control pursuant to letter b)", i.e. "the situation described in art. 2359 Civil Code. There also may be control when, in application of the provisions of the law, the Articles of Association or the Shareholders' Agreement, the unanimous consent of all the parties sharing control is required for strategic financial and management decisions relating to the company's activities*".

This document, to be drafted by a working group specifically set up for this purpose, may be used as a tool for the fulfilment of legal obligations, particularly bearing in mind the consequences for non-compliance. It can also be used as a tool of general interest to assist publicly owned companies to equip themselves with suitable instruments to identify a crisis in good time and assist in managing it correctly.

Below are some of the clarifications provided by the CNDCEC.

Corporate crisis risk assessment

The CNDCEC considers that the assessment of corporate crisis risk cannot be carried out solely on the basis of balance sheet indices (which are only one of several diagnostic tools). When making reference to "*indicators*", the law is in fact referring to a broader concept than the mere "*indices*" that can be obtained from the financial statements, in order to identify warning signs pointing incontrovertibly or at least probably, to an insolvency situation that may occur in the future.

An important element according to the CNDCEC, is the "*Debt-Service Coverage Ratio (DSCR)*", which relates the cash flow available to pay current debt obligations, where a *ratio* greater than 1 is an indicator of financial equilibrium.

Divergence between concepts of corporate crisis and insolvency

CNDCEC made reference to its guidelines "*Information and Evaluation in the Corporate Crisis*" of 30 October 2015, in relation to the divergence between the concepts of corporate crisis and insolvency. These guidelines identified the qualitative and informative elements in the assessment of whether a company is actually in a state of collapse or potential collapse or, vice-versa, in a state of reversible crisis (physiological and therefore surmountable).

The CNDCEC defined the notion of "*crisis*" as "*current inability of the company to generate cash flows, present and future, sufficient to ensure the fulfilment of previously agreed planned future obligations.*"

2.3

National Council of Chartered Accountants and Accounting Experts - CNDCEC, - Circular of March 2019 "*Crisis Code and Transitional Rules*"

With its Circular of March 2019, entitled "*Crisis Code and Transitional Rules*", the National Council of Chartered Accountants - CNDCEC, provided clarification relative to the entry into force of the provisions introduced by Legislative Decree 14/2019, the "*Business Crisis and Insolvency Code*" and analysed the critical issues.

The CNDCEC noted that Article 389 of the Business Crisis and Insolvency Code provides various dates for its provisions to come into force:

- the Code as a whole is to enter into force on 15 August 2020;
- certain provisions, such as arts. 27(1), 3501, 356, 357, 359, 3632, 364, 3663, 375, 377, 378, 3794, 385, 386, 387 and 3885, came into force on 16 March 2019.

The transitional rules are provided in art. 390. CNDCEC explained that according to this article, "*petitions for the declaration of bankruptcy and proposed composition with creditors, for approval of restructuring agreements, for the initiation of the composition with creditors, for the assessment of the state of insolvency of companies subject to compulsory administrative liquidation and requests for access to procedures for the settlement of the over-indebtedness crisis filed before the entry into force of the Code - i.e. before 15 August 2020 - are defined in accordance with the provisions of the Bankruptcy Law (Royal Decree 267/1942) and the Law on over-indebtedness crises (Law 3/2012). In addition, pursuant to art. 390(2), the provisions of the Bankruptcy Law and the Law on over-indebtedness crises will continue to apply to the above proceedings which are still pending as at 15 August 2020, as well as to appeals or applications that must be decided according to the "old rules*".

CASE LAW

3.1

Joint Stock Company - Board of Directors - Duties - Court of Cassation, Section II, Decision of 22 March 2019, no. 8237

The Court of Cassation, in its decision no. 8237 issued on 22 March 2019, confirmed that current legislation imposes duties on the directors of banking companies, who are required to act not only in an informed manner but also in such a way as to check the occurrence of possible harmful events. This duty also falls on non-executive directors. In order to avoid liability, these individuals are required to prove that they have acted correctly, solicited missing information and refused to make decisions without adequate information. (On this point, see Cass. No 22848/2015 and Cass. No 2737/2013). The Court of Cassation then stated that "*art. 2381(3) Civil Code, as amended by Legislative Decree 6/2003, provides that the Board of Directors 'may give instructions to the delegated bodies and itself carry out operations that fall within the scope of the delegation' and may 'assess general performance on the basis of the reports provided by the delegated bodies'. Art. 2381(3)(6) requires that all directors 'act in an informed manner', and that 'each director may request that the delegated bodies provide information on the management of the company to the board'. The new Article 2392 of the Civil Code, in turn, continues to provide that the directors 'shall be jointly and severally liable if, having knowledge of prejudicial facts, they have not done everything they could to prevent their occurrence or eliminate or mitigate their harmful consequences'.*"

3.2

Joint Stock Company - Board of Directors - Duties - Court of Cassation, Section I, Decision of 14 March 2019, no. 7327

In decision no. 7327 issued on 14 March 2019, the Court of Cassation confirmed that "*Notwithstanding dominating conduct by the chairman of the board of directors, individual members of the board are always required to carry out their duties of controlling the company's performance, making the appropriate observations, requesting necessary clarifications, including these findings in the minutes of the meetings of the board of directors in which they take part, and - if necessary –voting against or at least formalizing their abstention vis-à-vis decisions that they do not consider in line with the proper management of the company*".

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LEGAL NEWSLETTER | MARCH 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MARCH 2019.
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