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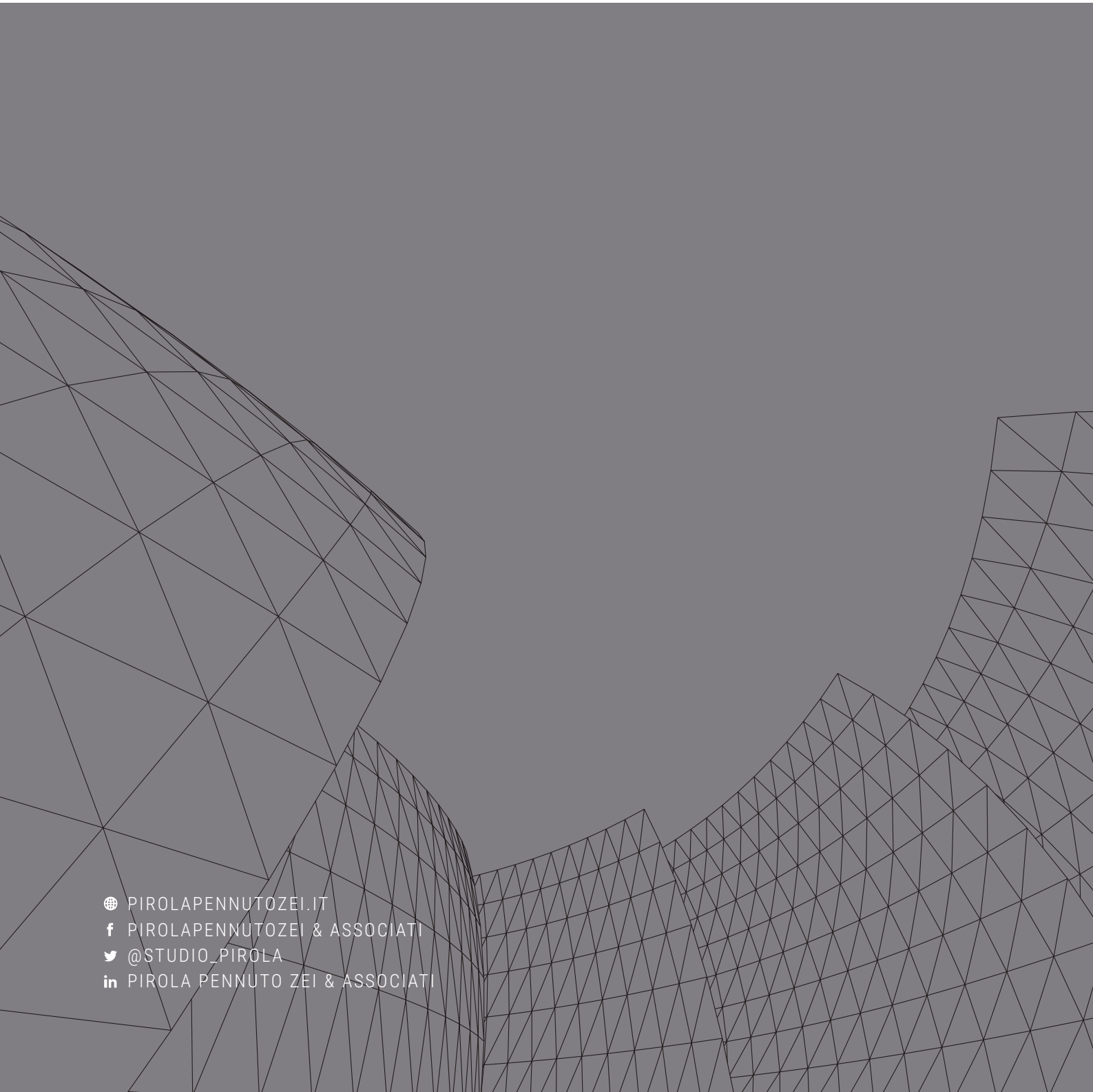
LEGAL

NEWSLETTER / JUNE 2019



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LEGISLATION

1.1

Legislative Decree No 49 of 10 May 2019 - '*Implementation of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement*' (Official Gazette No 134, 10 June 2019)

Pursuant to the enabling provisions of art. 4 Law 163/2017 (European Delegation Law), Legislative Decree 49/2019, published in Official Gazette no. 134 on 10 June 2019, was passed to implement Directive (EU) 2017/828 amending the previous Directive 2007/36/EU (Shareholders' Rights Directive or "*SHRD*") as regards the encouragement of long-term shareholder engagement.

Directive (EU) 2017/828 aims at improving the governance of listed companies, increasing their performance and long-term sustainability, through greater and more informed involvement and commitment of shareholders in corporate governance, in both the medium and the long term, facilitating the exercise of shareholder rights. This Directive contains specific provisions aimed at ensuring timely disclosure and adequate safeguards in the process of passing resolutions relative to transactions with related parties.

The changes introduced by the Decree are as follows:

Amendments to the Civil Code

Art. 1 Legislative Decree 49/2019 amends art. 2391-*bis* Civil Code concerning transactions with related parties, by the addition of a third paragraph. The new paragraph provides that CONSOB, in defining general principles aimed at ensuring the transparency as well as the substantive and procedural correctness of transactions carried out with the risk capital market, must identify "*at least:*

a) *the levels of relevance of related party transactions, taking into account quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity or turnover of the company, taking into account the nature of the transaction and the position of the related party;*
b) *procedural and transparency rules proportionate to the significance and characteristics of the transactions, the size of the company or the type of company using the risk capital market, as well as any exemptions from these rules, whether in whole or in part;*

c) *cases in which the directors (without prejudice to the provisions of art. 2391) and the shareholders involved in the transaction are required to abstain from voting in relation to such transaction, or measures to safeguard the interests of the company that allow such shareholders to take part in the vote on the transaction*".

Activity and regulation of centralised management

As part of the centralised regulation of financial instruments, Legislative Decree 49/2019 added paragraph 4-*bis* to art. 82 Legislative Decree 58/1998 TUF (*Testo Unico della Finanza* - Consolidated Finance Act), in which CONSOB, in agreement with the Bank of Italy, is required to identify, by way of regulation, the following:

a) the activities to be carried out by central securities depositories and intermediaries in accordance with Directive (EU) 2007/36;
b) the parties involved in the process of identifying shareholders and the related procedures;
c) the methods and terms of storage and processing of identification data acquired by issuers;
d) the operational arrangements for the provision of information and the facilitation of the exercise of shareholders' rights;
e) further provisions implementing aspects of that Directive relating to the regulation of centralised management.

Legislative Decree 49/2019 also introduced art. 83-*novies.1*, entitled "*Non-discrimination, proportionality and transparency of costs*", which provides that intermediaries and central securities depositaries must publicly disclose any charges for services provided, separately for each service. Furthermore, "*any charges levied by intermediaries and central security depositaries on shareholders, shareholding issuers admitted to trading on regulated markets in Italy or other Member States of the European Union, and other intermediaries, must be non-discriminatory and proportionate to the actual costs incurred for delivering the services.*
Any differences between the charges levied between domestic and cross-border exercise of rights shall be permitted only where duly justified and where they reflect the variation in actual costs incurred for delivering the services."

Art. 83-*duodecies* TUF, as amended by Legislative Decree 49/2019, concerning the identification of shareholders, now provides that in order to facilitate the communication of issuers with shareholders,

as well help coordinate the exercise of shareholder rights, shareholders and Italian shareholding issuers admitted to trading on regulated markets in Italy or other EU Member States, have the right to request the identification of shareholders who hold shares in excess of 0.5% of the share capital with voting rights. The costs of the identification process are borne by the issuer.

Remuneration and management policies

Legislative Decree 49/2019 also amended Part IV, Title III, Chapter II TUF, relative to reporting on corporate remuneration policy and compensation paid, and introduced the new section I-*ter* on the transparency of institutional investors, asset managers and voting consultants.

The amendments introduced to art. 123-*ter* TUF provide that listed companies must make available to the public a remuneration report, at least 21 days before the shareholders' meeting to approve the financial statements. The report, which is to be approved by the Board of Directors, is divided into two sections: the first dedicated to the company's policy on the remuneration of members of the Board of Directors, and the second detailing the items making up that remuneration.

The amendments made by Legislative Decree no. 49/2019 state that the remuneration policy is part of the company's strategy for its pursuit of long-term interests and sustainability of the company. Only in exceptional circumstances, in situations in which the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability, may companies temporarily derogate from the remuneration policy, and only if the policy itself sets out the conditions under which such waiver can be made, specifying the elements of the policy which may be waived (new paragraphs 3-*bis* and 3-*ter*).

The detailed content of both sections of the report, the remuneration policy and the actual remuneration paid, is to be governed by secondary regulation to be passed by CONSOB, after consultation with either the Bank of Italy or IVASS, whichever is appropriate (new art. 123-*ter*(7) and (8)).

Companies may only award compensation in accordance with the most recent compensation policy approved by shareholders.

Asset managers and proxy advisors

Art. 3(2) Legislative Decree 49/2019 implemented the new rules on the transparency of institutional investors, asset managers and proxy advisors, with the introduction of the new section I-*ter* (arts. 124-*quater* - 124-*novies*).

The new art. 124-*quarter* defines asset managers as asset management companies (SGRs), investment companies with variable and fixed capital (Sicavs and Sicafs) that manage their assets directly, and all persons authorized in Italy to provide the service of *portfolio* management.

The category of institutional investors includes insurance or reinsurance companies, including Italian branches of companies with their registered offices in a third country, authorised to carry out life insurance or reinsurance activities, and pension funds with at least one hundred members.

Finally, a proxy advisor is defined as a legal person who analyses, on a professional and commercial basis, corporate disclosure with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights.

Asset managers and institutional investors are subject to the rules not only when investing in companies listed on an Italian regulated market, but also when investing in companies listed on a regulated market in another Member State of the European Union.

Article 124-*quinquies* TUF, entitled *"Engagement policy"*, specifies that institutional investors and asset managers must adopt and make public an engagement policy that describes, with full transparency, how they integrate shareholder engagement in their investment strategy. They must also report, on an annual basis:

- how the engagement policy has been implemented;
- how they have cast their votes in the general meetings of companies in which they hold shares;
- a reasoned explanation as to why they have chosen not to comply with one or more of those requirements, if applicable.

The information must be made available on the websites of the institutional investors or asset managers or by other easily accessible online methods.

Institutional investors are also to publicly disclose the manner in which the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

Article 124-*septies* sets out the obligations of proxy advisors pursuant to the Directive, providing for the annual publication of a report containing information on the essential features of the methodologies and main information sources used in the preparation of the proxy advisors' research, advice and voting recommendations and the procedures put in place to ensure quality of such research, advice and voting recommendations, as well as the qualifications of the staff involved.

Article 124-*octies* requires proxy advisors to identify and disclose to their clients, as part of the performance of the service requested, any actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice or voting recommendations, together with actions taken to eliminate, mitigate or manage such conflicts.

Preliminary shareholders' questions

Art. 3(4) Legislative Decree 49/2019 amended art. 127-*ter* TUF, enhancing shareholders' ability to exercise their rights to submit questions prior to shareholders' meetings (and to obtain answers to the questions submitted), as provided in art. 9 of the Directive. These amendments are intended to allow companies more time to respond to questions on the items on the agenda received prior to the general meeting.

Penalties

Art. 4 Legislative Decree 49/2019 amended the penalties provisions of the TUF, introducing further administrative fines, including:

- an administrative fine ranging from Euro 30,000 to 150,000 for failure to comply with the provisions relative to the centralised management of financial instruments;
- in relation to transactions with related parties, an administrative fine between Euro 10,000 and 150,000 is to be applied to companies listed on regulated markets that violate art. 2391-*bis* Civil Code and the relative implementing provisions adopted by CONSOB pursuant that article;
- for violations indicated in art. 2391-*bis*(1) Civil Code, a fine ranging from Euro 5,000 to 150,000 is to be applied to persons performing administrative and managerial functions;

- with regard to the transparency, institutional investors, asset managers and proxy advisors are to be fined between Euro 2,500 and 150,000 for failing to comply with the relevant provisions.

Arts. 5 and 6 respectively adapt the rules on pension funds and insurance undertakings to the provisions of the SHRD II Directive, while art. 7 contains the transitional and final provisions.

With the exception of a few provisions, the Decree came into force on 10 June 2019.

GUIDANCE

2.1

Bank of Italy – Italy's Financial Intelligence Unit (FIU) - Press release of 17 June 2019

In a press release dated 17 June 2019, Italy's Financial Intelligence Unit (FIU) provided information for banks, Poste Italiane S.p.A., as well as payment and electronic money institutions, relative to the notification, which, as required by anti-money laundering legislation, is to be sent by 15 September 2019.

Registration in the notification system

As stated in the press release, after having been registered in the notification system, these communications must be transmitted electronically via the Infostat-Uif portal. Those already qualified to transmit SARA (*segnalazioni antiriciclaggio* aggregate - aggregated anti-money laundering reports), having already communicated the data and the username of the person responsible for anti-money laundering communications, are to be automatically registered with the new reporting system. The username of the SARA contact person is automatically enabled to send communications.

The contact person may, at their own risk, authorise other parties to send communications, with the usual procedure of request/concession of a power of attorney.
In addition, the reporting person authorised to transmit SARA are invited to verify the correctness of the data communicated to FIU and, where necessary, promptly correct outdated data.

Those not registered for SARA reporting should request such registration under the new reporting system, providing the name and username of the person responsible for AML. As from July 2019, a new application form will be made available on the FIU website for this purpose. The application form is to be sent via certified email (PEC) to: uif.registrazione@pec.bancaditalia.it. The press release also specifies that those enabled to transmit Suspicious Transaction Reports, but not enabled to send SARA reports, will still have to send the application form, selecting the option "*adesione successiva*".

Exemption from monthly reporting

Persons who do not trade in cash or who only trade in cash below the threshold of €1,000, may request exemption from the requirement to transmit a monthly report.

The press release specifies that, for this purpose, that those authorised *ex-ufficio* must send an attestation not in any particular form, via PEC to: uif@pec.bancaditalia.it This attestation must contain the code of the reporting person and specify whether the exemption is required due to the fact that they do not trade in cash or if they do, at a level below the threshold.

Timing of sending of communications

The FIU specifies that communications are to be made as from 1 September 2019 and must be completed by the 15th of that month. In this period, four communications must be sent for the months of April, May, June and July 2019. Subsequently, the notification is to take be effected from the first day of the month following the reference month.

CASWE LAW

3.1

Listed companies - Auditing - Court of Cassation, Section II, Decision of 21 June 2019, no. 16780

In its Decision of 21 June 2019, the Court of Cassation set out the following principle of law: "*the verification and supervisory function entrusted by law to auditors or auditing firms with reference to listed companies, is part of the internal control system of the company. This control system is aimed at ensuring, inter alia, the verification of the correctness of the accounting data contained in the financial statements of the company and, consequently, the correct accounting management of the company itself. This function is aimed, on the one hand, at ensuring that the actual accounting management methods can be made known, as can, in the final analysis, the stability and reliability of the audited company, and, on the other hand, at protecting orderly competition and market performance. Consequently, when, as part of the audit of the financial statements of an insurance company, an auditor is called upon to express an opinion on the correctness of the assessment made by the actuary auditor as to the adequacy of the technical reserves provided for by the regulations on such companies, and, more generally, when the auditor is to evaluate the results of specific verification and control operations entrusted to the company's own supervisory bodies or to third parties engaged by the audited company, the auditor's verification must extend to checking the manner in which the aforesaid specific operations were conducted. The auditor must also explain the evaluation method used by the auditor, the operations actually carried out and the reasons for the final opinion of adequacy or non-adequacy*".

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LEGAL NEWSLETTER | JUNE 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 JUNE 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