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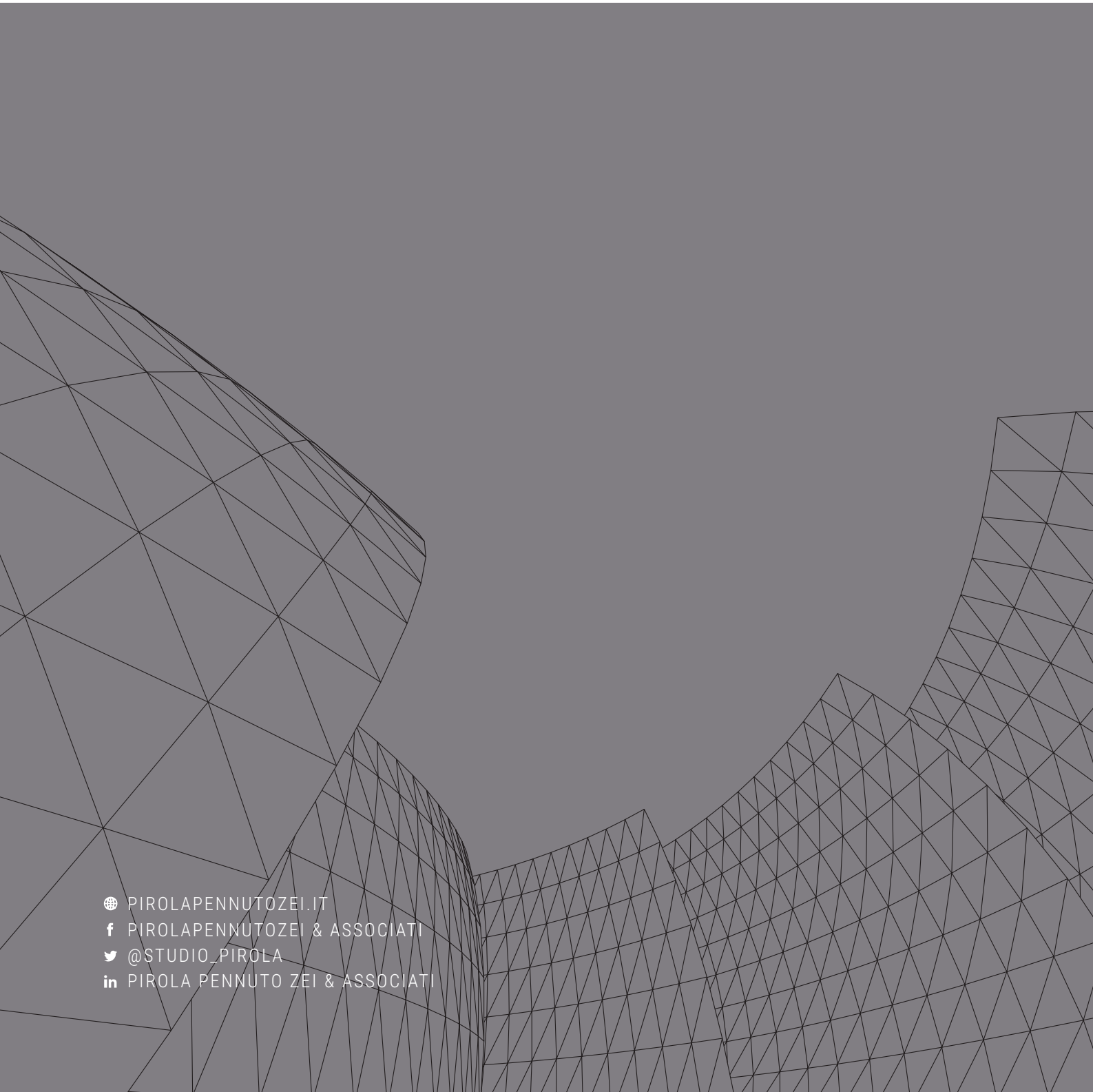

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LEGISLATION

1.1

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Art. 2477 Civil Code, which regulates the compulsory appointment of a supervisory body or auditor to limited liability companies (S.r.l.), has recently been amended by two pieces of legislation with opposite effects. The first amendment, made by art. 379(1) Legislative Decree 14/2019, the "*Business Crisis and Insolvency Code*", has considerably expanded the number of S.r.l. which are obliged to appoint a supervisory body. On the other hand this situation, considered by many to be excessive, has been rebalanced by Decree Law 32/2019, often referred to as "*Sblocca cantieri*" (construction site *stimulus*), converted into Law 55/2019.

The following is a summary of the changes introduced.

New features introduced by the Business Crisis and Insolvency Code (Legislative Decree 14/2019)

Art. 14 of Law 155/2017, entitled "*Government Delegation to reform business crisis and insolvency regulations*", has made significant changes in the field of company law, which are to be implemented through the amendment of various provisions of the Civil Code.
The Government was been delegated to:

- extend the cases in which the S.r.l. is required to appoint a supervisory body or an auditor to include the situation when the company has exceeded at least one of the following limits for two consecutive financial years: total balance sheet assets of Euro 2 million; revenues from sales and services of Euro 2 million; and average of 10 employees during the year (art. 14(1)(g));
- provide that the obligation to appoint the supervisory body or auditor of the S.r.l. ceases when, for three consecutive financial years, the aforementioned size limits are not exceeded (art. 14(1)(i)).

The delegation was implemented by Legislative Decree 14/2019 entitled, as stated above, "*Business Crisis and Insolvency Code*".

In implementation of the provisions of art. 14(1)(g) and (i) of Law 155/2017, art. 379(1) of the Decree replaces art. 2477(2) and (3) Civil Code, with the following text: "*The appointment of the supervisory body or the auditor is compulsory if the company:*

a) *is required to draw up consolidated financial statements;*
b) *controls a company required to carry out a statutory audit;*
c) *has exceeded for two consecutive financial years at least one of the following limits: (1) total assets in the balance sheet: Euro 2 million; (2) income from sales and services: Euro 2 million; (3) average number of employees during the financial year: 10 units.*

The obligation to appoint the supervisory body or the auditor referred to in point (c) of the third subparagraph shall cease when, for three consecutive financial years, none of those limits is exceeded."

In essence, apart from confirming the obligation to draft consolidated financial statements and that certain companies are to have their accounts audited, the previous requirement triggered by exceeding "*two*" of the limits indicated by art. 2435-*bis* Civil Code relative to abbreviated financial statements (total Balance Sheet assets 4.4 million euro, revenues from sales and services 8.8 million euro and average number of employees during the year 50 units), for two consecutive financial years, has been replaced with the express condition that for two consecutive years at least one of the following limits is exceeded:

- total assets in the balance sheet: Euro 2 million;
- revenues from sales and services: Euro 2 million;
- average number of employees during the year: 10 units.

With the aim of facilitating the detection and timely management of a crisis, which is the real objective of the new legislation, this rule lowered the requirements by which the appointment of internal control bodies and auditors becomes mandatory.

New features introduced by the Decree "*sblocca cantieri*" (Decree-Law no. 32/2019)

As a result of the changes introduced by art. 2-*bis*(2) Decree Law 32/2019, inserted at the time of conversion into Law 55/2019, in force since 18 June 2019, the conditions to be met for an S.r.l. to be required to appoint a supervisory body or auditor referred to in art. 2477(2)(c) Civil Code have been raised as follows:

- total assets of the balance sheet from 2 to 4 million euro;
- revenues from sales and services from 2 to 4 million euro;
- employees employed on average during the year, from 10 to 20 units.

All other provisions of art. 2477 Italian Civil Code remain unchanged. The obligation to make such appointment arises if, for two consecutive financial years, even only one of the parameters indicated is exceeded.

Also unaffected is the provision stating that the obligation to have a supervisory body or auditor ceases when, for three consecutive financial years, none of the above limits is exceeded. The final sentence of art. 379(3) Legislative Decree no. 14/2019 provides that the initial version of this provision continues to apply to financial years 2017 and 2018.

1.2

Decree Law 18 April 2019, n. 32 - "*Urgent provisions to revitalize the public contract sector, to accelerate infrastructure works, urban regeneration and reconstruction following earthquakes*" - converted into Law 14 June 2019, no. 55 – New provisions regarding public contracts

Decree Law 32/2019, converted into Law 55/2019 the Decree "*sblocca cantieri*", the full title of which is "*Urgent provisions to revitalize the public contract sector, to accelerate infrastructure works, urban regeneration and reconstruction following earthquakes*". The purpose of this legislation was to resolve the principal issues which came to light during the first three years of application of Legislative Decree 50/2016, the Public Contracts Code, as amended by Legislative Decree no. 56/2017, the "*Corrective Decree*".

The changes include the following:

Consolidation of legislation. Loss of validity of ANAC guidelines and ministerial decrees

In the area of public contracts, Legislative Decree 32/2019 radically inverted the effects of Legislative Decree 50/2016, which required that the Code be implemented by way of numerous ministerial decrees and ANAC Guidelines, numbering approximately 50 pieces of regulation, which had not been fully adopted.

As requested repeatedly by operators, given the disorientation caused by the fragmentation and incompleteness of the implementing rules of Legislative Decree 50/2016, Decree Law 32/2019 provides for a single regulation. This new regulation is to be adopted within 180 days from 19 April 2019 (date of entry into force of the Decree), i.e. by 16 October 2019 (art. 216(27-*octies*) of the Code, introduced by art. 1(20)(gg)(4) Legislative Decree 32/2019).

The single regulation containing provisions for the execution, implementation and integration of the Code must be adopted by the Government upon proposal of the Minister for Infrastructure and Transport, in agreement with the Minister for the Economy and Finance and after consultations with the State-Regions Conference.

Until such time as the single regulation has been adopted and come into force, the decrees and guidelines adopted to date to implement the previous provisions of the following articles of the Contracts Code continue to apply: arts. 24(2), 31(5), 36(7), 89(11), 111(1) and (2), 146(4), 147(1) and (2), and 150(2).

The new single regulation must also regulate design levels (art. 23(1)), the qualification of the companies (arts. 83(2) and 84(2)) and of the general contractors (arts. 197 and 199).

Anticipation of the contract price (art. 35 code)

The effect of art. 1(20)(g)(3) Decree Law no. 32/2019, which replaces the words "*of works*" in art. 35(18) of the Code with the words "*of services*", is that the advance payment of 20% of the contract price to be paid to the contractor is extended to supply and service contracts, as well as public works.

Integrated procurement contract

By amending art. 59 of the Code, the Decree modifies the "*integrated procurement contract*", i.e. the joint award of both design and execution. New art. 59(1-*quarter*) provides that when the economic operator uses one or more qualified persons in the execution of the project, the commissioning body must indicate, in the tender documents, the procedures for the direct payment to the designer of the portion of compensation corresponding to the design costs indicated in the tender documents, net of the auction discount. This is subject to approval of the project and upon presentation of the relevant tax documents of the designer or group indicated.

Abnormal bids

The numerous amendments made to art. 97 of the Code have the effect of changing the requirements needed to be able to utilise the automatic exclusion of abnormal bids for below threshold contracts, in

application of the principles developed in this area by the European Court of Justice (Section IV, judgement 15/5/2008, joined cases C-147/06 and C-148/06).

For below threshold works, services and supply contracts, awarded with the criterion of the lowest price, and which are not of a cross-border nature, art. 97(8) of the Code, as amended by Decree Law 32/2019, provides that the contracting authorities must (and no longer on an optional basis) provide that bids with a discount percentage equal to or greater than the anomaly threshold, as amended by the Decree Law, are to be automatically excluded from the tender, as per art. 97(2), (2-*bis*) and (2-*ter*). However, automatic exclusion shall not apply when fewer than 10 bids have been accepted.

The methods for calculating the anomaly threshold have been reduced from five to two (eliminating the ballot provided for by the previous regulations) and set out, as an anti-interference measure, separately according to whether 15 or more bids have been admitted (new art. 97(2)), or whether fewer than 15 bids are admitted (new art. 97(2-*bis*).

In any event, these methods for determining the anomaly threshold shall not apply when fewer than five bids have been admitted.

In addition, again as an anti-interference measure, in order that the reference parameters for calculating the anomaly threshold are not determinable by bidders, the Ministry of Infrastructure and Transport may, by decree, recalculate the calculation methods for identifying the anomaly threshold (art. 97(2-*ter*) as introduced by Decree Law 32/2019).

Where the criterion used is that of the most economically advantageous bid, the new art. 97(3) provides that the adequacy of the bids is to be assessed for those that score highly in relation to the price as well as the total of the points relating to the other elements of evaluation, both of which must be at least four fifths of the corresponding maximum points provided for in the invitation to tender. This calculation method is used when at least three bids have been admitted. This is without prejudice to the last sentence of art. 97(6) of the Code, according to which the contracting authority may in any case assess the appropriateness of any bid which, on the basis of specific elements, appears to be abnormally low.

Repeal of the "*super-expedited procedure*" (art. 120 Administrative Procedure Code)

Art. 1(22)(a) of the "*sblocca cantieri*" Decree eliminated the "*super-expedited procedure*" provided for in art. 120(2-*bis*) and (6-*bis*) Administrative Procedure Code, by which an exclusion ordered following the first phase of the tender, after verification of the documentation certifying the absence of the reasons for exclusion and the existence of the economic-financial and technical-professional requirements, could be immediately challenged.

As a result of this repeal, amendments have also been made to paragraphs 5, 7, 9 and 11.

Grounds for exclusion (art. 80 of the Code)

The amendments made to art. 80 of the Code relative to grounds for exclusion were essentially determined by the findings of infringement proceedings no. 2018/2273. The following main changes have been introduced (art. 1(20)(o) Decree Law):

- the grounds for exclusion of the subcontractor can no longer be used for the exclusion of the tenderer, but only relates to the subcontractor's authorisation;
- the commissioning body may exclude the tenderer should the former be aware and can demonstrate that the economic operator is not in compliance with its tax or social security obligations, even if such breach as not yet been definitively established. However, such exclusion cannot be made if the economic operator proves that it has fulfilled its obligations by paying, or "*committing itself in a binding manner*" to pay, the taxes/contributions due or if the debt has been fully discharged, provided that the discharge, payment or commitment has been completed before the deadline for the submission of the application to participate in the tender procedure;
- art. 80(10) of the Code has been reformulated in the following manner. If the final conviction does not set the duration of the additional penalty prohibiting the ability to contract with the Public Administration, such prohibition is (i) permanent, in cases in which the additional perpetual penalty follows automatically from the conviction, pursuant to the first sentence of art. 317-*bis*(1) Criminal Code, unless the penalty is declared extinct, pursuant to art. 179(7) Criminal Code; (ii) for 7 years, in the cases provided for by the second sentence of art. 317-*bis*(1) Penal Code, unless rehabilitation has been made; and (iii) for 5 years in cases other than those referred to in letters a) and b), unless rehabilitation has been made;
- it has been confirmed (art. 80(2)) that companies appealing anti-mafia disqualification may make

request via the Prefecture that the company be placed under judicial control, thus avoiding the ban on negotiating with the Public Administration and, therefore, exclusion from the tender (art. 34-*bis*(6) and (7) Legislative Decree 159/2011).

Partial suspension of the Procurement Code

Art. 1 of the Decree provides that, on an experimental basis until 31 December 2020, the following are not applicable:

- the purchase of works, services and supplies for municipalities that are not provincial capitals through central purchasing bodies (art. 37(4) Procurement Code);
- the prohibition of integrated procurement (fourth sentence of art. 59(1)), i.e. the prohibition of design and execution being jointly awarded, subject to certain exceptions;
- the obligation to choose commissioners from the register of experts kept by the National Anti-Corruption Authority, ANAC (art. 77(3) Procurement Code), while the obligation to identify commissioners according to rules of competence and transparency continues.

GUIDANCE

2.1

Ministry of Economic Development, Circular 15 July 2019, no. 3722/C - "*Innovative start-ups, certified incubators and innovative SMEs. Decree Law 135, 14 December 2018. Deadline for compliance*"

Following up on Circular no. 3718/C of 10 April 2019, in which the Ministry of Economic Development provided clarification on the new public registration rules for innovative start-ups, certified incubators and innovative SMEs under art. 31-*sexies* and 1-*septies* Law 12/2019, converting Decree Law no. 135/2019, the Ministry then issued Circular No. 3722/C on 15 July 2019. In this second Circular, companies are reminded to file, no later than 31 July 2019, confirmation that they meet the essential requirements.

Law 12/2019, which converted Legislative Decree 135/2018, introduced changes to the public registration rules for innovative start-ups and SMEs. The law provides:

- for certified start-ups and incubators, that "*within 30 days of the approval of the financial statements and in any case within six months of the end of each financial year, other than those situations set out in art. 2364(2) Civil Code, in which case seven months is provided for compliance, the legal representative of the innovative start-up or incubator is to certify by way of declaration filed with the registrar of companies that the requirements set out in paragraphs 2 and 5 have been met.*" (art. 25(15) Decree Law 179/2012);
- for innovative SMEs, that "*within 30 days of the approval of the financial statements and in any case within six months of the end of each financial year, other than those situations set out in art. 2364(2) Civil Code, in which case seven months is provided for compliance, the legal representative of the innovative SME is to certify by way of declaration filed with the registrar of companies that the requirements set out in paragraph 1 have been met.*" (art. 4(6) Decree Law 3/2015)

The Ministry sent out this reminder Circular, as to date only 64.5% of start-ups and 69.8% of SMEs have complied with the provisions. In other words 3,155 start-ups and 343 innovative SMEs have still not come forward.

The Ministry reiterated in the Circular that innovative start-ups which either loose the requisites or do not file a declaration certifying that the requisites continue to apply, loose their right to be registered in the special section of the Companies Register and are automatically registered in the ordinary section of the Companies Register.

The Circular states that, for the general good, it is important to ascertain which companies have not complied with the provisions to date and should therefore be wound up.

It is also stated in the Circular that information as to the new deadlines have not become widely known in the business world. Thus, the Ministry believes it necessary to interpret the legislation in an exceptional manner, so that the deadline for compliance must be understood as being 31 July 2019 - regardless of the method of approval of the financial statements. This therefore suspends all initiatives taken against companies with ordinary financial statements (to be approved within 120 days), requiring each Chamber to provide more extensive information to companies that are still silent, urging them to comply no later than 31 July. This includes approaching those start-ups and SMEs that have not come forward on an individual basis.

CASE LAW

3.1

Company - Directors - Court of Cassation, Section I, Decision 5 July 2019, no. 18182

In its Decision No. 18182 of 5 July 2019, the Court of Cassation set out the following principle of law "*with regard to the burden of proof regarding the director's right to compensation for damages for early termination of office. Pursuant to art. 2697 Civil Code, the company has the burden of proving that there is no right to compensation for damages, including cases in which an agreement for payment of an indemnity had been made by the parent company, which then takes the position that, as the subsidiary had been transferred to another company, constituting a differing aggregate of economic interests, there is no longer any such obligation to pay an indemnity". The Court also stated that, "the mere internal reorganization of the corporate structure, such as the decision of the parent company to transfer shares of the parent company to another company of the group, is not sufficient grounds for termination of the office of a company director, unless such reorganisation is motivated by circumstances or facts likely to adversely affect the continuation of the relationship and to cancel the trust initially vested in the abilities of the director*".

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LEGAL NEWSLETTER | JULY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JULY 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