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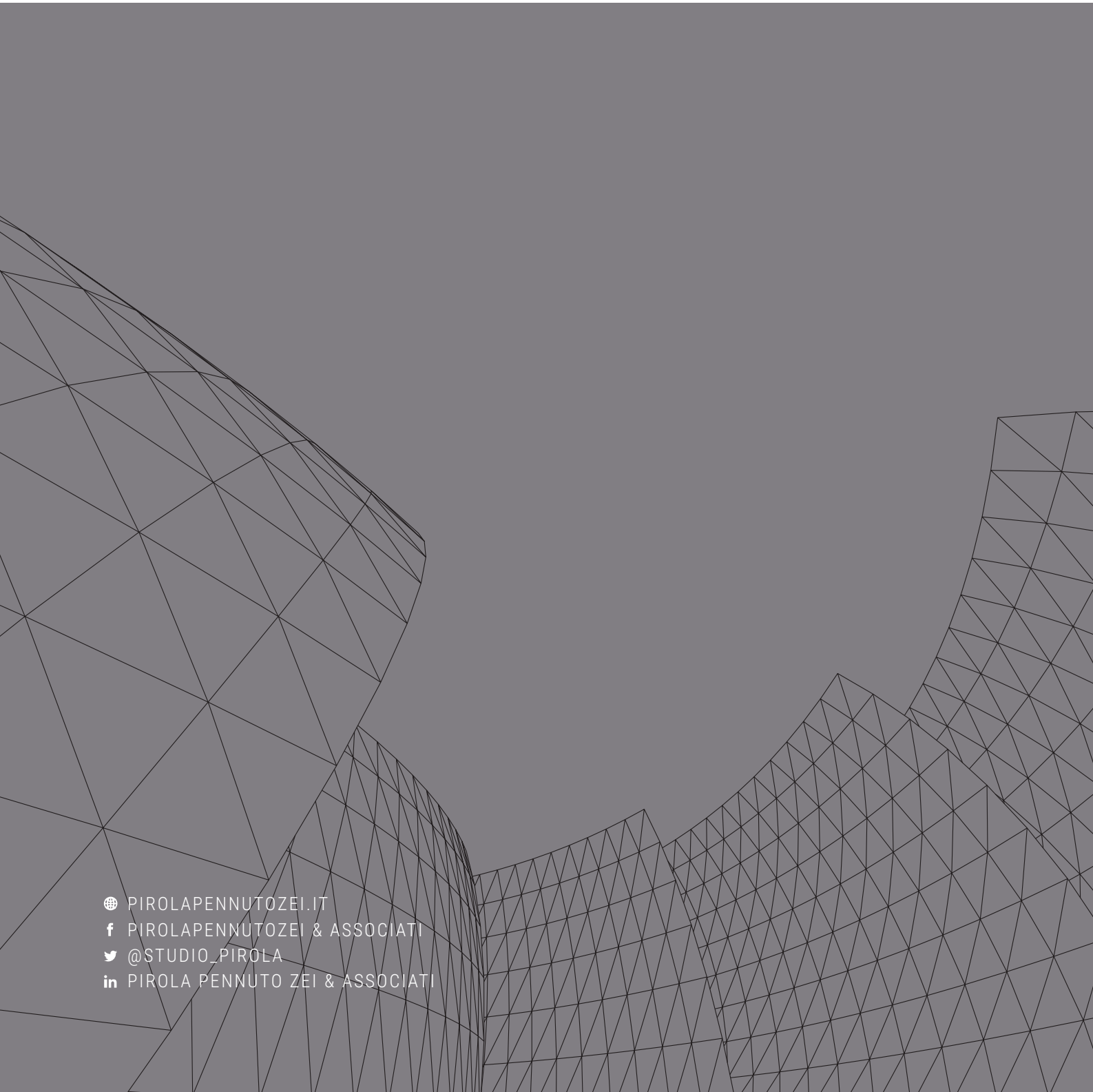
LEGAL

NEWSLETTER / AUGUST 2019



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INDEX

LEGISLATION

GUIDANCE

LEGISLATION

1.1

Order issued by the Bank of Italy on 30 July 2019: "*Rules relative to appropriate customer due diligence in the fight against money laundering and terrorist financing*" (Official Gazette 13 August 2019, no. 189)

With the publication in the Official Gazette of 13 August 2019, no. 189, of an Order issued on 30 July 2019 entitled "*Rules relative to appropriate customer due diligence in the fight against money laundering and terrorist financing*", the Bank of Italy has implemented, in line with European legislation:

- provisions on customer due diligence (transposition of Directive (EU) No 2015/849, the "*Fourth AMLD*");
- the both the guidelines of the European Supervisory Authorities on simplified and enhanced customer due diligence measures and the factors that credit and financial institutions should take into account when assessing the risks of money laundering and terrorist financing associated with individual ongoing relationships and occasional transactions.

The Rules, in force as of 28 August 2019, must be complied from 1 January 2020.
Customers who have been acquired before the entry into force of the provisions must be requested, at the first available opportunity but no later than 30 June 2020, to provide any missing data and identification documents.

The following is a summary of the main changes.

Application

The Order applies to the following obliged entities:

- banks;
- stockbroking firms;
- asset management companies (SGR);
- investment companies with variable capital (SICAVs);
- investment companies with fixed assets, securities and real estate (SICAF);
- intermediaries registered as per art. 106 of the Consolidated Banking Act (TUB);

- electronic money institutions;
- payment institutions;
- fiduciary companies registered as per art. 106 TUB;
- trust companies referred to in art. 155 TUB;
- micro-credit providers, pursuant to art. 111 TUB;
- *Poste Italiane S.p.A.,* for its postal banking activities;
- *Cassa Depositi e Prestiti S.p.A.*

The Rules also apply to Italian branches of banks, intermediaries, and payment and electronic money institutions, which have their registered offices and head offices in another European Community state or which are required to designate a contact point in Italy for anti-money laundering purposes.

Contents of the Order

The Order establishes the general criteria to be followed by obliged entities in order to identify and assess money laundering and terrorist financing risks associated with their customers and, as a consequence, to adjust the methods by which they carry out the appropriate verification.

Importantly, the principle of the risk-based approach, whereby intermediaries carry out controls based on the money laundering risk of the counterparty identified according to internal policies, is reaffirmed.

When identifying risk factors relating to a customer, intermediaries must also consider the beneficial owner and the executor if any. Service recipients are to assess the range of activity and characteristics of the customer, beneficial owner or executor, as well as the state or geographical area in which they have their headquarters or residence. If the customer is a legal entity, the reasons for its incorporation, its corporate purpose and the methods used to achieve such purpose, must all be taken into account.

As far as possible, the risk profile is to be based on computer algorithms and procedures. The risk level proposed automatically by the computer systems must be consistent with actual knowledge of the customer, which can lead to a more rigorous assessment and the attribution, if necessary, of higher level of risk.

Customer verification

Adequate customer verification is carried out in the following manner:

a) the customer and executor, if any, are to be identified;
b) the beneficial owner, if any, is to be identified;
c) identities of the customer and the executor/beneficial owner, if any, are to be verified on the basis of documents, data or information obtained from a reliable and independent source;
d) for a continuing business relationship, information on its purpose and nature is to be acquired and assessed. This also applies to occasional transactions when there is a high risk of money laundering and terrorist financing;
e) during the course of an continuing business relationship, the monitoring should be carried out on an ongoing basis.

The Order provides that if intermediaries are unable to meet customer due diligence obligations they are not to establish a continuous relationship, or, if the relationship has already begun, are not to complete the transaction or the relationship should be suspended.

The identification process must be carried out in the presence of the customer or, in the case of a legal entity, the executor and/or the beneficial owner. The verification of the identification data of the customer, the executor and the beneficial owner requires that the data contained in the documents and information acquired at the time of identification is accurate. Therefore, the authenticity and validity of the identification document must be ascertained and data relating to legal entities must be verified with information obtained from reliable external sources.

Intermediaries assess the purpose and nature of the ongoing business relationship by acquiring information as to the aims in setting up the relationship, the activity carried out, the origin of the funds, the economic and financial situation of the company and the beneficial owner as well as the relationships between customer, beneficial owner and executor.

In addition, the consistency of the data and information provided by the customer with the information acquired from other sources and with the data obtained during the relationship, is to be verified. During the course of the relationship, constant monitoring is required to promptly identify any significant inconsistencies, which may give rise to the requirement to report a suspicious transaction.

Simplified and enhanced requirements for adequate verification

The Order provides for a simplified procedure where there is a low risk of money laundering and terrorist financing. The simplified due diligence is reduced in scope and frequency *vis-à-vis* the requirements of the ordinary procedure.

Conversely, the obliged entities are to carry out enhanced customer due diligence when there is a high risk of money laundering and terrorist financing on the basis of specific regulatory provisions or as a result of their own evaluation.

According to the Order, the following are always considered high risk, as per art. 24(3) and (5) AML Decree:

a) occasional relationships and transactions involving high-risk third countries in the cases referred to in art. 24(5)(a) AML Decree;
b) cross-border correspondent relationships with a correspondent banking or financial intermediary established in a third country;
c) continuing or occasional transactions with customers and their beneficial owners who are politically exposed persons;
d) customers who carry out transactions with unusually high amounts or in relation to which there are doubts as to the purpose for which they are arranged.

Adequate verification obligations carried out by third parties

The Order provides for and regulates the possibility for obliged entities to delegate the fulfilment of the due diligence obligations *vis-à-vis* their customers to third parties, provided that the ultimate responsibility for customer due diligence should remain with the obliged entity.
There are two categories of third parties:

a) those who may carry out all stages of the due diligence, with the exception of the ongoing monitoring of operations; and
b) those who only carry out the identification of the client, the executor and the beneficial owner, including the acquisition of copies of identity documents.

GUIDANCE

2.1

Financial Intelligence Office of the Bank of Italy (FIU) - Document - "*Objective Reporting FAQs*"

In its document entitled "*Objective Reporting FAQs*", updated to 30 August 2019, the Financial Intelligence Office of the Bank of Italy (FIU) provided clarifications as to "*objective reporting*" for anti-money laundering purposes relating to cash transactions in excess of €10,000, including split amounts, to which financial intermediaries are subject as from September 2019.

The document responds to requests for clarification from interested parties, by way of a series of FAQs, which provide details as to the deadlines, the criteria for defining the amounts and type of transaction, as well as information relating to transactions, relationships and parties involved.

Below is a summary of the clarifications related to timing, criteria for assessing and selecting the parties and transactions.

Obliged parties, deadlines and exemptions

Banks, Poste Italiane SpA, payment institutions and electronic money institutions, as well as Italian branches of intermediaries established abroad, intermediaries established in a Member State are obliged to send reports and to designate a central contact point with Italy.

FAQ 1 sets out the timing of the reports to be filed after the initial report: the deadline for filing objective reports is the 15th of the month following that to which the transactions relate. The first objective report, regarding cash transactions of more than Euro 10,000 carried out by customers during the months of April through July 2019, must be sent to the FIU between 1 and 15 September 2019. From October onwards, the communication will take place on a monthly basis.

Multiple cash transactions (deposits, withdrawals, transfers for cash) exceeding Euro 1,000 made by the same person in a particular calendar month must be added together in the report. Mention of at least

one person - the customer in the relationship or the executor of the transaction – must be included in the report. No report can be made without reference to a particular person.

Intermediaries who have not carried out any relevant transactions during the course of the reference month are in any case to send a negative report.

Exemption from objective reporting must be expressly requested and is permitted only to persons who do not operate in cash or operate in amounts of less than Euro 1,000.

In FAQ 10 states that the following cash transactions do not have to be reported due to their particular character, even if above threshold:

- technical movements of cash between banks and the Bank of Italy;
- technical movements of cash between the banks of a group and the parent bank;
- technical movements of cash between banks and outsourced cash managers;
- cash withdrawals from ATMs made with cards issued by foreign banks.

Calculation of amounts

In cases of partial cash transactions (e.g. payment by cheque and cash), the amounts to be added together to calculate whether the threshold has been exceeded are only the cash portions, with the other types of transactions carried out simultaneously not being included in the calculation. While in cases of cash transactions between current accounts of the same holder, all transactions must be added together, without any offsetting.

Where an individual carries out several cash transactions in various capacities during the calendar month, for example as a customer and as an executor, the amounts involved must be added together and attributed to that person for the purposes of the report.

The legal nature of the person (whether an individual or legal entity) must always be indicated, and for this purpose sole proprietorships and members of liberal professions are considered to be natural persons. It is possible for an exception to be made to this rule in cases where it is not possible to trace the legal nature of the subject, without so derogating from the obligation to examine the identification data of the subject as fully as possible.

Each person must be referred to only once in individual operations. If the same person simultaneously holds different roles *vis-à-vis* the same transaction, e.g. executor, legal representative and beneficial owner, preference must be given to the last of these.

For the purposes of objective reporting, the definition of "*beneficial owner*" is the following, as set out in the anti-money laundering Decree:

- any natural person(s) on whose behalf the customer establishes a continuous relationship or carries out a transaction (TE (*titolare effetivo* – beneficial owner) sub 1);
- should the customer or person, on whose behalf the customer establishes a continuous relationship or carries out a transaction, be a corporate entity, the natural person(s) who ultimately owns or controls the legal entity through direct or indirect ownership (TE sub 2).

2.2

Assonime Circular No. 19 of 2 August 2019 – "*New corporate rules on the early emergence of business crises and alert mechanisms*"

In Circular No. 19 of 2 August 2019 entitled "*New corporate rules on the early emergence of business crises and alert mechanisms*", Assonime explains the provisions of Legislative Decree 14/2019, the "*Business Crisis and Insolvency Code*", which introduces measures to encourage the emergence and timely management of a crisis.

The Decree provides for the:

- strengthening of the organisational aspects and duties of the corporate bodies to assist in effectively detecting situations of crisis and loss of business continuity;
- introduction of alert procedures and assisted crisis composition;
- incentive mechanisms to encourage entrepreneurs to take timely action in dealing with any crisis.

It will be recalled that under the Business Crisis and Insolvency Code, the Bankruptcy Law enacted with Royal Decree 267/1942 was abrogated, as was the law relating to over-indebtedness under Law 3/2012. This area has now been codified in a single law, which governs crises and insolvency of businesses, professionals and consumers.

The provisions of the Code are effective at different times:

- the insolvency and crisis resolution mechanisms will enter into force in 2020, and within two years the Government will be able to adopt corrective and supplementary measures;
- the rules that modify aspects of corporate law, organisational structure, duties and responsibilities of the corporate bodies are already in force.

The Assonime Circular examines the provisions of the Code relating to company structures and the mechanisms for the detection, reporting and management of crisis and insolvency, the parties involved and the obligations and responsibilities placed on corporate bodies.

Assonime pointed out that, in order to encourage the early emergence of a crisis, the Code introduces an alert system, based on the obligation to report any crisis to an entity outside the company (the assisted crisis composition body - OCRI). Such reporting obligation is to be borne by the supervisory body, the statutory auditor and qualified public creditors (INPS, Revenue Agency, and Collection Agents).

The Circular reviewed in depth another new important element of the Code - the incentives provided to stimulate the crisis management mechanism. These incentives are economic and procedural in nature, providing exemption or mitigation from criminal liability for those who act voluntarily and in a timely manner to deal with any crisis, by filing a request, either for assisted settlement of the crisis or for access to the procedures for regulation of the crisis and insolvency provided for in the Code. These incentives apply to all companies, including those excluded from the requirement to adopt the alert system (large companies, large groups, listed companies, companies operating in supervised sectors).

The Circular also analyses the impact that the new measures are destined to have on companies, an impact that will go beyond the field of competition, and which will affect company law and the activities and responsibilities of directors, statutory and independent auditors, effecting a significant change in the approach to management.

In addition, the Circular illustrates the changes to the rules governing limited liability companies (s.r.l.) and the other changes to the Civil Code aimed at achieving a coordination between corporate and bankruptcy laws.

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LEGAL NEWSLETTER | AUGUST 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 AUGUST 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