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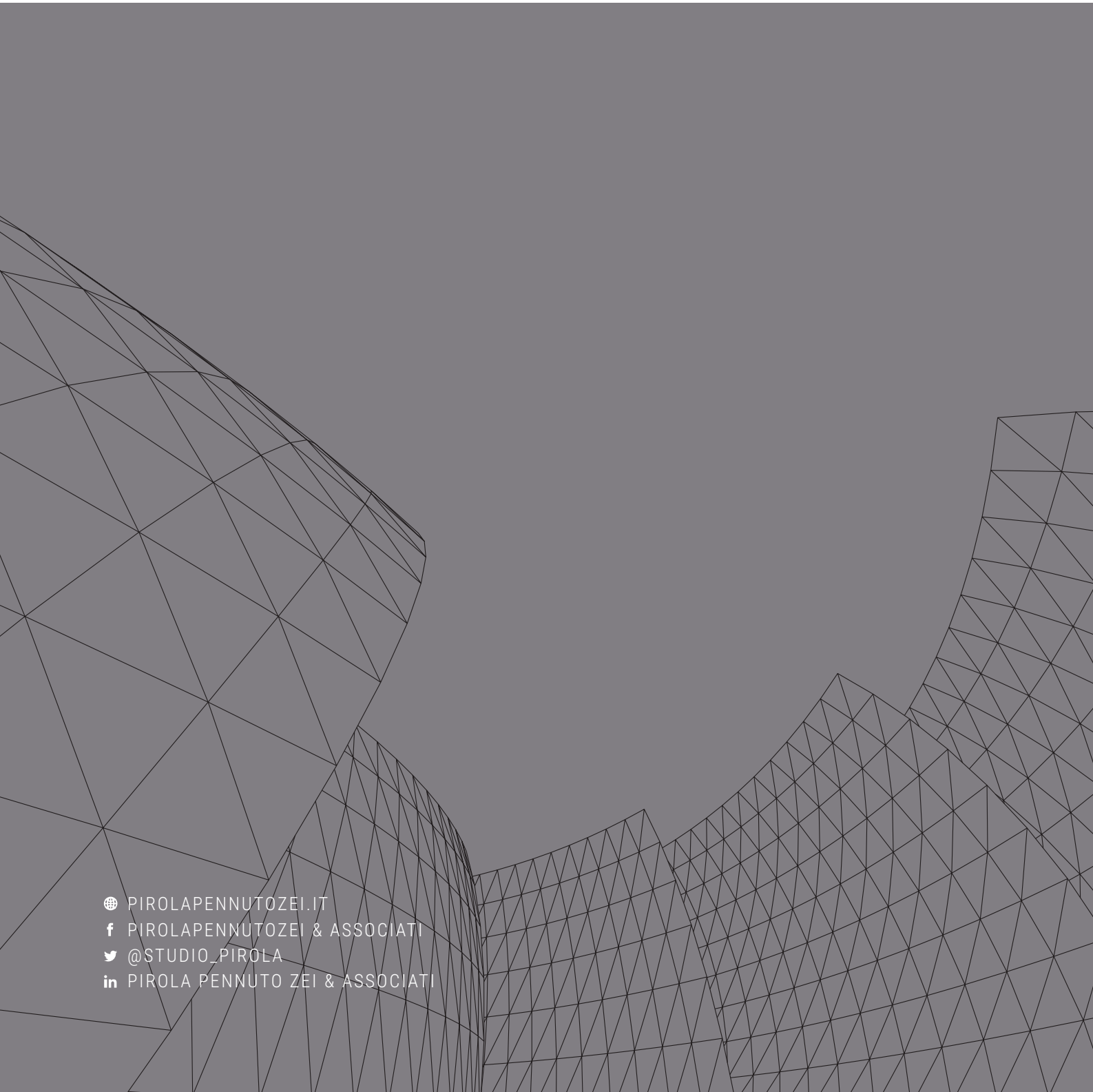
LEGAL

NEWSLETTER / SEPTEMBER 2019



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LEGISLATION

1.1

CONSOB - Resolution no. 21028 of 3 September 2019 - "*Amendments to the Regulation implementing Legislative Decree no. 58 of 24 February 1998 governing markets, adopted under Resolution 20249/2017*" (Official Gazette no. 212 of 10 September 2019)

With Resolution no. 21028 of 3 September 2019, published in Official Gazette no. 212 of 10 September 2019, CONSOB (Italian Companies and Exchange Commission) introduced a number of amendments to the Regulation implementing Legislative Decree no. 58 of 24 February 1998 governing markets, adopted under Resolution 20249/2017.

The amendments relate mainly to the following aspects.

Activities

The amendments made to Part II, Title I of the Regulation provide that operators of regulated markets, may, in the context of activities connected with and instrumental to the organisation and management of regulated markets, acquire holdings in the following: central counterparties and central depositories; companies that directly or indirectly manage regulated markets, multilateral trading systems or organised trading systems; companies authorised to receive and transmit orders, provided that these companies prepare and manage information circuits allowing for the insertion of financial instrument trading conditions, but not for the conclusion of contracts through the circuit itself (art. 1(1)(a) Resolution 21028/2019).

Communications as to position limit exemptions

Part V, Title II of the Regulation is amended to provide that "*market makers*" who deal on their own account in commodity derivatives or emission allowances or derivatives thereof and who do not intend to request CONSOB authorisation for the provision of investment services and activities, must, by 1 April each year, communicate to CONSOB their intention to apply the exemption, due to the fact that this is ancillary to their principle activity (Article 1(1)(d)(ii) Resolution 21028/2019).

1.2

Data Protection Guarantor - Press release of 19 September 2019 - "*Privacy Guarantor: New rules for credit information systems in the digital economy*"

With the press release of 19 September 2019, the Data Protection Guarantor – Privacy Guarantor, announced that the new "*Code of conduct for information systems operated by private entities in terms of consumer credit, reliability and punctuality in payments*" (*Sistemi di informazioni creditizie* - SIC) had been approved.

The new Code, proposed by trade associations and approved by the Guarantor on 12 September 2019, is a revision of the previous Code of Conduct, rendered obsolete by the changes introduced pursuant to the European (GPDR) and national legislation on privacy. The aim is to provide greater protection for the data of consumers contained in credit databases, more transparency as to the operation of algorithms that analyse financing risks and an opening to new Fintech technologies.

The most important aspects are set out below.

Application

The Code of Conduct refers to the processing of personal data of natural persons, limited to the territory of the Italian State, and is applicable only at the national level. In the press release of 19 September, the Guarantor specified that the new rules for the analysis of credit risk not only relate to data on loans and mortgages, but also to the various forms of leasing, long-term rental and the most innovative forms of lending between private individuals through Fintech platforms.

The Guarantor noted that in order to ensure the proper functioning of the financial and credit market, the data examined may be processed without the consent of the parties concerned, on the basis of the "*legitimate interest*" of companies participating, provided that the data used is limited to that which is essential, relevant and does not exceed credit risk assessment purposes, and that the broadest rights afforded by the European data protection regulations are guaranteed. For example, should an application for a mortgage be refused, it will be possible to find out if the decision was based, inter alia, on a risk score ascribed by an algorithm and, in that case, request the logic behind the algorithm.

Principle innovations

As the Guarantor pointed out, the new Code of Conduct includes the plan to check and update, at least every two years, the statistical analysis models, as well as the algorithms used to protect data from unlawful access and to guarantee reliability of the systems.

In order to simplify procedures to notify interested parties prior to registration in SIC, new forms of contact have also been identified, such as those guaranteed by instant messaging systems used on smartphones.

The following innovations introduced by the new Code are also of interest:

- Rights: The privacy rights of interested parties have been strengthened;
- Information: more complete information has been provided on the processing of data by member companies;
- Monitoring body: an independent body has been set up to monitor the operations of SIC;
- New forms of contact: by prior agreement with the interested parties, it is now also possible to send "*alerts*" through instant messaging systems that guarantee traceable delivery;
- New types of relationships: the type of data examined has been widened to include various forms of leasing, rental, and loans between private individuals (peer to peer lending);
- Longer positive time series: to protect credit and to respond to supervisory requests, positive customer time series can be retained for 60 months;
- Transparency in decisions: in the case of the denial of credit based on automated analysis, the interested party may request the logic of the algorithmic operation;
- "*Pseudonymized*" data for algorithm training;
- Security: further measures to protect data security and against unlawful access have been agreed upon.

Entry into force

The new Code of Conduct will become fully effective only upon completion of the accreditation phase of the monitoring body by the Guarantor in the Committee that brings together the European Data Protection Boards (EDPB). However, the parties have undertaken to comply immediately with the rules and principles.

CASE LAW

2.1

Companies - Merger - Court of Cassation, Decision no. 23641 of 24 September 2019

In Decision no. 23641 issued on 24 September 2019, the Court of Cassation confirmed that merger by incorporation does not extinguish the company being acquired, nor does it create a new legal entity, but rather creates a participative unification by way of reciprocal integration of the companies involved in the merger (cf. Cass. Sez. Un., 8.2.2006, no. 2637 Cass., Sez. Un., 17.9.2010, no. 19698; Cass., Sez. Un., 14.9.2010, no. 19509). That which is created following the merger by incorporation is only an evolutionary-modifying phenomenon of the company, which is not related to the extinction of one entity and the creation of another. The Court then set out the principle of law by which "*in company matters, mergers by incorporation, although not giving rise to a phenomenon of succession linked to the extinction of the company being incorporated and the creation of a new legal entity, the incorporating company, it does not permit solely the retention of procedural legitimacy by the company being acquired, except in so far as there is a need to protect the good faith reliance of a third party unaware that the merger has taken place*".

2.2

Companies - Demerger – Withdrawal – Court of Cassation, Order No. 23095 17 September 2019

In Order No. 23095 issued on 17 September 2019, the Court of Cassation, referencing previous case law, clarified that "*corporate demerger, governed by arts. 2506 et seq. Civil Code, consists in the transfer of assets to one or more companies, whether pre-existing or newly established, in exchange for the assignment of shares or quotas of those companies to the shareholders of the company being demerged. This has translational effects, which, at the procedural level, do not lead to the extinction of the demerged company and entry of "new" companies into all its legal relationships. Instead, there is a particular succession under the law, including that relative to litigation (Cass. Sez. U. no. 23225, 15.11.2016; Cass. no. 31313, 4.12.2018). This is to be distinguished from the effects of a corporate transformation, even if it is a legal entity (Cass. no. 23575, 9.10.2017; Cass. no. 10332, 19.5.2016; Cass. no. 13467, 20.6.2011).*"
It follows that:

- the demerged company and the receiving company must be regarded as autonomous entities and not as a development of the same entity;

- the duration of the demerged company and the receiving company may not be combined;
- art. 2473(2) Civil Code, which grants the right of withdrawal to shareholders of companies with an indefinite term, cannot be utilised by shareholders of a "*new*" company by arguing that the duration of a company established pursuant to a demerger from another company is to be cumulated with the duration of the latter, thus making the total term indefinite.

2.3

Limited liability companies - Failure to convoke – challenge of decision – Court of Cassation, Order No 22987 of 16 September 2019

On 16 September 2019, the Court of Cassation issued Order no. 22987, in which it stated that "*Article 2479-bis Civil Code, which governs general meetings of limited liability companies (S.r.l.), clearly and imperatively provides not only that shareholders are to be convoked, but also prescribes the minimum content of such convocation: 'timely information on the matters to be discussed'.* Thus, the principles of interpretation by which art. 2479-ter(3) Civil Code is to be read, are provided. The Court of Cassation thereby clarified that should a shareholder not be convoked to the general meeting of an S.r.l, the shareholder may petition, within three years from the transcription in the shareholders' register of the relative resolutions, that such resolutions be declared null as they would fall within the class of decisions made in the absolute absence of information. For the Court of Cassation, the expression "*absolute absence of information*", in article 2479-*ter*(3) Civil Code, refers to the defect of nullity of resolutions passed by shareholders of an S.r.l. and includes the case of failure to convoke.

2.4

Official Receiver - Appeal against preventative attachment for the purposes of confiscation pursuant to Legislative Decree 231/2001 - Court of Cassation, Decision no. 37638 of 11 September 2019

In its Decision no. 37638 issued on 11 September 2019, the Court of Cassation clarified that the Official Receiver is fully entitled to put forward a motion for the review of preventative attachment for the purposes of confiscation pursuant to Legislative Decree 231/2001, thus distancing itself from the previous orientation of the Full Bench Decision no. 11170/2015. According to the Court, "*if the Official Receiver is the person administrating and has access to the assets, it follows that, in the case of preventive attachment after the declaration of bankruptcy, the Receiver has a real interest in challenging a criminal attachment order. The Receiver has power over the bankruptcy assets corresponding to a substantial relationship and this*

power is closely related to the public nature and functions granted to the Receiver. This gives the Receiver the "right", pursuant to art. 322 Criminal Code, to appeal against the preventive attachment order".

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LEGAL NEWSLETTER | SEPTEMBER 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 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