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tributaria e legale

LEGAL

NEWSLETTER / OCTOBER 2019

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LEGISLATION

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Legislative Decree no. 125 of 4 October 2019 - "Amendments and additions to Legislative Decrees no. 90 and no. 92 of 25 May 2017 implementing Directive (EU) 2015/849 as well as Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU" - (Official Gazette 26 October 2019, no. 252)

Legislative Decree 125 of 4 October 2019, published in the Official Gazette of 26 October 2019, no. 252, has made amendments and additions to Legislative Decrees 90/2017 and 92/2017, implementing two European directives: Directive (EU) 2015/849 and Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and territorial financing and amending Directives 2009/138/EC and 2013/36/EU ("*EU V Anti-Money Laundering Directive*"). The Decree, containing 6 articles, took effect on 10 November 2019.

Amending Titles I, II, III, IV of Legislative Decree 231/2007, art. 17-*bis* Legislative Decree 141/2010, art. 9 Legislative Decree 90/2017 and art. 11 Legislative Decree 90/2017, the Decree:

- sets out a list of the categories of entities required to comply with anti-money laundering obligations, including, *inter alia*, Italian branches of insurance intermediaries which have their registered office and central administration in another Member State or in a non-European state;
- indicates the heightened verification measures to be taken by banking or financial intermediaries in relation to customers operating in countries at high risk of money laundering or terrorist financing, including specific periodic reporting requirements of transactions made with persons operating in these countries;
- introduces a series of measures that supervisory authorities can use to mitigate the risk associated with third countries, such as, for example, refusing to authorise either foreign banking or financial intermediary activities or the opening of branches in countries at high-risk for Italian intermediaries;
- provides that the National Anti-Mafia and Counter-Terrorism Directorate can avail itself of the use of the Special Unit of the Currency Police;

- in line with the current prohibition on opening deposit and savings accounts anonymously or with aliases, prohibits the issue and use of anonymous electronic money products; and
- modifies the penalties and related enforcement procedures for violations of the two decrees which are amended.

1.2

Decree Law 26 October 2019, no. 124, "Tax Decree" - Amendments to predicate offences for administrative liability of entities

Decree Law no. 124 of 26 October 2019, the "Tax Decree" linked to the budget package for 2020, which has not yet been converted into law, introduces, *inter alia*, various amendments regarding predicate offences for the liability of legal entities pursuant to Legislative Decree 231/2001.

Art. 39(2) of Decree Law 124/2019 adds a new art. 25-*quinquiesdecies* into Legislative Decree 231/2001, entitled "Tax offences", which provides that the offence of fraudulent declaration by way of false invoices as per art. 2 Legislative Decree 74/2000, is to be considered a predicate offence for the administrative liability of entities under Legislative Decree 231/2001.

The new article 25-*quinquiesdecies* Legislative Decree 231/2001 states that "*in relation to the commission of the offence of fraudulent declaration through the use of invoices or other documents for non-existent operations as per art. 2 Legislative Decree 74/2000, the entity is to be fined up to the value of five hundred shares*".

GUIDANCE

2.1

National Council of Chartered Accountants and Accounting Experts - CNDCEC - Document dated 19 October 2019 "Alert indicators"

A press release was issued on 26 October 2019 by the National Council of Chartered Accountants and Accounting Experts – CNDCEC, regarding the draft document setting out business crisis indicators, which is to be submitted for approval to the Ministry of Economic Development - MISE.

Art. 13(2) Legislative Decree 14/2019, the "*Business Crisis and Insolvency Code*" (*Codice della crisi e dell'insolvenza d'impresa* – CCII), provides that, at least every three years and in accordance with national and international best practices, the CNDCEC is to draft indicators which when read together lead to a reasonable assumption that the relative company is in a state of crisis. The indicators are to be prepared for all types of economic activity as per the classifications of the Italian National Institute of Statistics. Once prepared by CNDCEC, the list of indicators is to be approved by decree issued by MISE.

In fulfilment of this obligation, CNDCEC has prepared a draft document containing the seven business crisis indicators necessary for the completion of the alert system. It also provided the criteria required to detect "*substantiated grounds*", which give rise to the obligation, pursuant to art. 14 CCII, to file a report with the supervisory bodies.

The document "*Alert indicators*" of 19 October 2019 is available on the CNDCEC website. The first part of the document, subject to MISE approval, sets out the indicators referred to in art. 13(2) CCII. The second part, which is not subject to the approval of MISE, includes instructions for the application of the indicators to identify "*substantiated grounds*" that there is a crisis and which the corporate supervisory body, the auditor and the auditing firm, each within its own range of functions, are obliged to promptly report to the managerial body pursuant to art. 14 CCII.

In accordance with the legislative provisions, the indicators drafted by CNDCEC are divided into two different types.

The first group, pursuant to art. 13(1), consists of the following two indicators, which are applicable to all companies:

- negative equity; and
- Debt Service Coverage Ratio (DSCR).

The first step is to monitor the shareholders' equity, which is the total of section A) in the balance sheet liabilities, net of receivables from shareholders for payments still due, any dividends approved but not yet recorded and own shares.

Should the net assets be positive, the value of the second indicator, the DSCR, is to be ascertained. This is a measure of the company's capacity to generate sufficient revenue in the following six months to cover the debts to be met during that period. In a normal situation, the value of this indicator should exceed 1. A value higher than 1 indicates the capacity to sustain debt over a period of 6 months, while a value lower than 1 is symptomatic of the company's inability to meet its debts.

If both the net assets and DSCR value are positive, the presence of a state of crisis can be ruled out. Should the DSCR value not be considered reliable, it is then necessary to proceed with the evaluation of the so-called "*sector indicators*", which made up the second group of indicators drawn up by CNDCEC. These indicators, which have different threshold values for various economic sectors, are the following:

- borrowing costs sustainability indicator (ratio of borrowing costs to turnover);
- capital adequacy indicator (ratio of net equity to total debt);
- liquid asset return indicator (ratio of cash flow to total assets);
- liquidity index (ratio of total assets to total short-term liabilities);
- social security or tax debt indicator (ratio of total social security and tax debt to total assets).

All five thresholds being exceeded is an indication of the existence of a state of crisis. Instead, if one to four are exceeded, this is an indication of a partial or possible state of crisis.

Pursuant to art. 13(3) Legislative Decree 14/2019, if a company does not consider these indicators to be appropriate due to the particularities of the company, it must set out the reasons for this position in the notes to the financial statements, together with a list of indicators which are suitable to identify the existence of a state of crisis, certified by an independent expert.

Finally, the CNDCEC document provides specific indicators for innovative start-ups, companies in

liquidation and newly established companies. Mention is also made of specific issues relating to the cooperative, consortium and construction sectors.

2.2

Italian Competition Authority - Press release of 21 October 2019 - “The new Legality Rating web platform is online”

In a press release dated 21 October 2019, the Italian Competition Authority announced that it has implemented a web platform dedicated to businesses for completing and submitting applications and communications concerning Legality Rating.

WebRating is a tool that allows businesses to submit quickly and simply all data necessary to obtain the Legality Rating, as well as any corporate changes, in the interests of transparency and mutual cooperation.

The new system, which envisages the compilation of an online form, is directly accessible via the institutional portal www.agcm.it.

As indicated in the Authority’s press release, the new procedure offers the following advantages:

- Simple, rapid and intuitive platform registration;
- Option for companies to print a copy of the application form even before completion, in order to identify immediately the required information and declarations;
- Rapid and guided compilation of every part of the application;
- Option of saving the information entered and returning to complete the application later;
- Automatic adaptation of the platform to the legal status and features of the company, with selective activation of the sections to be completed;
- Flagging of compulsory information to prevent the submission of incomplete applications;
- Applications submitted directly online;
- Real time checking of application status, in the interests of full transparency;
- Simplified requirements for Legality Rating holder companies, which can apply for Rating renewal or report significant changes by retrieving and updating the information already entered into the system.

CASE LAW

3.1

Director - Remuneration - Court of Cassation, Decision no. 27335 of 24 October 2019

In its Decision no. 27335 of 24 October 2019, the Court of Cassation clarified "*that holding the title of director of a limited company does not necessitate that such person has any contractual relationship with the company, pursuant to which the director has the legal right to remuneration (cf. Court of Cassation no. 15382/2017)*". The relationship that binds the director to the company is "*organic in nature, not categorised either as an employment relationship, or that of coordinated and continuous collaboration, but instead comes within the area of professional self-employment classified as a corporate relationship tout court (cf. 11.2.2016 n. 2759)*".

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LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 OCTOBER 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