

Pirola  
Pennuto  
Zei  
& Associati

studio di consulenza  
tributaria e legale

# LEGAL

NEWSLETTER / MARCH 2018

PIROLAPENNUTOZEI.IT  
f PIROLAPENNUTOZEI & ASSOCIATI  
t @STUDIO\_PIROLA  
in PIROLA PENNUTO ZEI & ASSOCIATI

## LEGISLATION

<b>1.1</b> .....	<b>4</b>
Council of Ministers 16 March 2018 – Preliminary approval of legislative decree “ <i>Regulations governing situations of incompatibility for judicially appointed administrators, their assistants, official receivers in bankruptcy and others involved in insolvency proceedings, pursuant to Law 17 October 2017, no. 161</i> ”	
<b>1.2</b> .....	<b>4</b>
Council of Ministers 21 March 2018 - Third Sector Reform - Legislative decrees approved	
<b>1.3</b> .....	<b>6</b>
Ministry of Economy and Finance - Decree 28 March 2018 - “ <i>Determination of effective average interest rates pursuant to the usury law. Period 1 October - 31 December 2017</i> ” - Application from 1 April to 30 June 2018	

## CASE LAW

<b>2.1</b> .....	<b>7</b>
Companies - Court of Cassation, Sec. I, Decision 7 March 2018, no. 5477	
<b>2.2</b> .....	<b>7</b>
Listed companies - Board of Statutory Auditors - Court of Cassation, Sec. I, Decision 12 March 2018, no. 5914	
<b>2.3</b> .....	<b>8</b>
Bankruptcy - Ineligibility of the claim - Court of Cassation, Sec. I, Decision 12 March 2018, no. 5892	
<b>2.4</b> .....	<b>8</b>
Express termination clause - Discipline - Court of Cassation, Sec. III, Decision 15 March 2018, no. 6386	
<b>2.5</b> .....	<b>8</b>
Section specialized in business issues - Jurisdiction - Court of Cassation, Sec. VI, Order 20 March 2018, no. 6882	
<b>2.6</b> .....	<b>9</b>
Bankruptcy - Director - compensation for damages - Court of Cassation, Sec. VI, Order 21 March 2018, no. 6998	



## INDEX

<b>2.7</b> .....	<b>9</b>
Company sale - Conditions - Court of Cassation, Sec. II, Order 22 March 2018, no. 7166	
<b>2.8</b> .....	<b>9</b>
Photocopy of private deed produced – Disavowal - Court of Cassation, Sec. II, Order 26 March 2018, no. 7465	
<b>2.9</b> .....	<b>10</b>
Liability of company directors - Limits - Court of Cassation, Sec. I, Decision 27 March 2018, no. 7545	
<b>2.10</b> .....	<b>10</b>
Bankruptcy - Discharge from Bankruptcy - Court of Cassation, Sec. I, Order of 27 March 2018, no. 7550	
<b>2.11</b> .....	<b>11</b>
Execution - Court of Cassation, Sec. VI, Order 28 March 2018, no. 7754	

## LEGISLATION

### 1.1

**Council of Ministers 16 March 2018 – Preliminary approval of legislative decree “Regulations governing situations of incompatibility for judicially appointed administrators, their assistants, official receivers in bankruptcy and others involved in insolvency proceedings, pursuant to Law 17 October 2017, no. 161”**

On 16 March 2018 the Council of Ministers gave its preliminary approved to a legislative decree proposed by the Minister of Justice to pass an implementation law entitled “Amendments to the Anti-Mafia Laws and Prevention Measures, as per Legislative Decree 159/2011, to the Penal Code, and to the rules of implementation, coordination and transition of the Code of Criminal Procedure and other provisions. Delegating the Government to grant labour protection in seized and confiscated companies” (Law 161/2017). This decree regulates rules of incompatibility for judicially appointed administrators, their assistants, official receivers in bankruptcy and others involved in insolvency proceedings, to guarantee maximum transparency in the execution of the appointment.

The decree provides:

- 1) that there is considered to be incompatibility for judicially appointed administrators, their assistants, the official receivers and others involved in insolvency proceedings in the following situations:
  - relations of kinship;
  - affinity;
  - cohabitation;
  - when these persons frequent magistrates in the court to which the magistrate who has conferred the assignment belongs;
- 2) that the President of the Court of Appeal is to supervise such appointments.

### 1.2

**Council of Ministers 21 March 2018 - Third Sector Reform - Legislative decrees approved**

In its session of 21 March 2018, the Council of Ministers gave its preliminary approved to two legislative decrees proposed by the Minister of Labour and Social Policies, that introduce supplementary and corrective provisions to the legislative decree revising the law on social entrepreneurship (Legislative Decree 112/2017) as well as the Non-Profit Sector Code (Legislative Decree 117/2017), pursuant to the enabling act on the reform of the Non-Profit Sector (Law 106/2016).

The principal measures approved are the following:

*1- Supplementary and corrective provisions to Legislative Decree 112/2017, revising the rules governing social entrepreneurship, as per Art 1(7) of Law 106/2016.*

The corrective and supplementary measures envisaged by the decree essentially concern the employment of the most disadvantaged workers and of volunteers, the adjustment of the by-laws of social enterprises, as well as fiscal measures and economic support.

Changes have also been made to the regulation of investments in the capital of social enterprises, clarifying both that investments eligible for assistance must be made after the entry into force of Legislative Decree 112/2017, and that the status of social enterprise must have been acquired for no more than five years. In this way, the rules are aligned with the law on innovative start-ups (Art. 25 Decree Law 179/2012), previously approved by the European Commission.

*2 - Supplementary and corrective provisions to Legislative Decree 117/2017, the Non-Profit Sector Code, pursuant to Art. 1(2)(b) Law of 106/2016.*

The decree makes various changes to the Non-Profit Sector Code, in order that national and regional legislation is better coordinated. The observations made by the significant stakeholders have also been taken into account.

Changes are made to the following areas of the rules governing Non-Profit Sector entities: activities of general interest that may be exercised by such entities; the acquisition of legal personality; statutory audits; voluntary organizations and associations with social aims; tax concessions in favour of such entities.

Of note, the new text, *inter alia*:

- supplements the list of activities of general interest that may be exercised by Non-Profit Sector entities;
- clarifies that, without prejudice to the existing requirement for accounting controls, the obligation to undergo a statutory audit only exists for larger Non-Profit Sector entities and that, by way of by-law provision, the Non-Profit Sector entity can entrust the audit of its accounts (if obligatory) to its internal control body, on the condition that a fully registered statutory auditor is a member of such control body;

- provides that second level voluntary organizations must principally use the voluntary activities of individuals associated with the first level organizations on which they are based;
- increases the size of the National Council of the Non-Profit Sector by four members, in order to ensure a wider representation of the organizations, including the association networks.

### 1.3

#### **Ministry of Economy and Finance - Decree 28 March 2018 - "*Determination of effective average interest rates pursuant to the usury law. Period 1 October - 31 December 2017*" - Application from 1 April to 30 June 2018**

In Ministerial Decree 28 March 2018, published in the Official Gazette on 31 March 2018, no. 76, the Ministry of Economy and Finance set out the effective average interest rates applied by banks and financial intermediaries under the usury law. The rates set out in detail in the table attached to the decree, recorded in the period from 1 October to 31 December 2017, must be applied from 1 April 2018 until 30 June 2018.

The Ministry has also established that, for the determination of usurious interest, the rates shown in the table should be increased by one quarter, to which a margin of a further 4 percentage points should be added. In any case, the difference between the limit and the average rate must not exceed eight percentage points.

## CASE LAW

### 2.1

#### **Companies - Court of Cassation, Sec. I, Decision 7 March 2018, no. 5477**

In its decision of 7 March 2018, no. 5477, the Court of Cassation made it clear that the fact that the chief executive officer of a joint stock company does not have the power to determine their own compensation derives not only from the by-laws, which reproduce the legislative provisions, but directly from the rule contained in Art. 2389 Civil Code. This article, which, as was recognized in the 2008 decision of the Full Bench, no. 21933, *“is of an imperative and mandatory nature, as it is part of the rules governing the functioning of the company, both from the point of view of the public interest in the normal performance of its business, as well as from the fact that it is an offence to receive compensation not previously approved by the shareholders”*.

### 2.2

#### **Listed companies - Board of Statutory Auditors - Court of Cassation, Sec. I, Decision 12 March 2018, no. 5914**

In its decision of 12 March 2018, no. 5914, the Court of Cassation clarified that *“the fact that a listed company has a complex organizational structure cannot lead to the exclusion or weakening of the power-duty to control falling to each of the members of the board of statutory auditors. Should shortcomings in the corporate procedures designed to ensure correct corporate management be ascertained, the members of such board can be sanctioned for complicit omission quoad functione”* (Cass. Civ. 29 March 2016 no. 6037). In addition, the statutory auditors *“are obliged to take part in the meetings of the Board of Directors and of the executive committee. Art. 151 Consolidated Finance Act gives them the power and duty to carry out inspections and checks and to request information from the directors as to the performance of company or relative to certain business transactions, including with regard to subsidiaries. They are to assume a role that is not limited to only receiving the legal minimum required from the directors, but are to be active in the search for elements of evaluation. Therefore, it is not a question of controlling management as to the “merit” of managerial decisions, but to exercise the broad powers of inspection and monitoring of imposed by law on statutory auditors, which is to include timely communications to Consob”*.

## 2.3

### **Bankruptcy - Ineligibility of the claim - Court of Cassation, Sec. I, Decision 12 March 2018, no. 5892**

The Court of Cassation reaffirmed, in its decision of 12 March 2018, no. 5892, that *“the knowledge required by the court in the context of a petition against an order close a bankruptcy, pursuant to Art. 119(2) Bankruptcy Law, is limited to verifying the existence of one of the situations set out in Art. 118 numbers 1) to 4). In the affirmative, the bankruptcy institutions have no discretionary power to continue with the procedure and thus defer the closure. Consequently the petition is inadmissible if the petitioner has not proven the absence of these situations”* (cf. Cass. Nos. 17337/2017, 395/2010, and 22105/2007). The Court also clarified that the rationale behind this approach *“is based on the necessary character of the closure of the bankruptcy procedure when the relevant conditions are met. This does not mean, of course, that the bankrupt cannot make known, outside of the procedure, their grievances in relation to the conduct of the procedure by the relevant authorities”*.

## 2.4

### **Express termination clause - Discipline - Court of Cassation, Sec. III, Decision 15 March 2018, no. 6386**

In its decision no. 6386, issued on 15 March 2018, the Court of Cassation stated that *“if the express termination clause relates to periodic services, the essential nature justifying termination of the contract must refer only to the first non-fulfilment, without prejudice to the creditor’s right to receive fulfilment of all the services within the ordinary prescription period (Art. 2946 Civil Code). Indeed, the potestative right to terminate the contract by manifesting a willingness to avail oneself of that clause is subject to prescription as per Art. 2934 Civil Code, as it is not a personal right or a subjective legal situation whose extinction is excluded by law. The starting of the period of prescription coincides, according to the general rule in Art. 2935 Civil Code, with the moment in which the right itself can be asserted, that is, at the time of the non-fulfilment”*.

## 2.5

### **Section specialized in business issues - Jurisdiction - Court of Cassation, Sec. VI, Order 20 March 2018, no. 6882**

In its Order no. 6882, issued on 20 March 2018, the Court of Cassation clarified that for the purposes of



establishing jurisdiction of the section specialized in business issues, even when the matter relates to the transfer of company shareholdings and provided there is a 'causal' link between the two issues, *"the dispute must be directly inherent to the corporate issue and to the exercise of rights deriving from the ownership of corporate titles. In other words, its 'endocompany' basis must be transparent, in the sense that the claim, and more importantly its source, must derive from the corporate relationship and the consequent acquisition of the status of shareholder, as well as the manner of its expression"*.

## 2.6

### **Bankruptcy - Director - compensation for damages - Court of Cassation, Sec. VI, Order 21 March 2018, no. 6998**

In Order no. 6998 of 21 March 2018, the Court of Cassation has reiterated the principle that, *"the rule that all directors be held responsible for illegal accounting and management actions of the company need not be applied to those directors who had been in office for too short a period to be able to reasonably assume that they had already realized the situation or had been able to intervene with corrective measures"*.

## 2.7

### **Company sale - Conditions - Court of Cassation, Sec. II, Order 22 March 2018, no. 7166**

In Order no. 7166 of 22 March 2018, the Court of Cassation reiterated its position whereby *"in the case of the sale of a company, the registration of the operating debts of the company sold in the required accounting books is a essential element of the purchaser's responsibility. Given the exceptional nature of the rule setting out such responsibility, that element cannot be replaced by evidence that the existence of the debts was in any case known by the purchaser"*.

## 2.8

### **Photocopy of private deed produced – Disavowal - Court of Cassation, Sec. II, Order 26 March 2018, no. 7465**

In its Order issued on 26 March 2018, no. 7465, the Court of Cassation stated that Art. 2719 Civil Code, which ascribes photocopied deeds with the same value as originals, provides the specific process of disavowal to contest conformity, rather than a counterfeit claim, the latter only being applicable when

the deed is recognized by the other party. The Court reiterated the recently affirmed principle according to which “*Art. 2719 Civil Code applies both to the disavowal of the conformity of the copy to its original and to the disavowal of the authenticity of the deed or its execution. It follows that an unauthenticated photocopied document is recognized, both in its conformity to the original deed and execution, when the appearing part does not disavow it. The burden of disavowal falls on the party producing the original, without prejudice to the court’s power to ascertain conformity*”(See Cassation No. 5077/2017).

## 2.9

### **Liability of company directors - Limits - Court of Cassation, Sec. I, Decision 27 March 2018, no. 7545**

The Court of Cassation, in its decision of 27 March 2018, no. 7545, has reaffirmed that “*the director of a company cannot be held responsible for having made inappropriate choices from an economic point of view, given that such an assessment falls within entrepreneurial discretion. Such a reason can therefore be used as a just cause for revocation of their office, but not as a source of contractual responsibility towards the company*”. The Court went on to state that it follows that “*the evaluation as to the diligence of the director in the fulfilment of his mandate can never impinge on management choices or the methods and circumstances of such choices, even if they present characteristics of significant economic risk, but only the diligence shown in the operation to be undertaken, i.e. omission of such precautions, controls and information normally required for a choice of that type, made in those circumstances and in such a manner*”.

## 2.10

### **Bankruptcy - Discharge from Bankruptcy - Court of Cassation, Sec. I, Order of 27 March 2018, no. 7550**

In its Order of 27 March 2018, no. 7550, the Court of Cassation, recalling the principle of law sanctioned by the Full Bench of that Court (Decision no. 24214, 18 November 2011), reiterated that “*in relation to discharge from bankruptcy, the benefit of the non-collectability of residual debts owed to bankruptcy creditors from a bankrupt individual, requires, pursuant to Art. 142(2) Bankruptcy Law, that there has been at least partial satisfaction of bankruptcy creditors. In a constitutionally oriented interpretation, in line with that already formulated by the enabling law, this condition is to be interpreted as having been*

*fulfilled even when some creditors have not been paid at all, as it is sufficient that, objectively, at least part of the existing debt is extinguished, the trial judge being permitted to carry out a prudent comparative assessment of that amount with respect to the total amount owed".*

## 2.11

### **Execution - Court of Cassation, Sec. VI, Order 28 March 2018, no. 7754**

According to Order no. 7754 issued by the Court of Cassation on 28 March 2018, *"an order for the early closure of the execution procedure, pursuant to Art. 164 bis Implementation Rules of the Code of Civil Procedure, cannot be challenged as an extraordinary cassation appeal pursuant to art. 111 of the Constitution, as it is subject to an executive action appeal".* The Court stated that *"in relation to the order to terminate the execution procedure, the remedies that can be theoretically invoked are either a complaint, pursuant to Art. 630 Code of Civil Procedure, or a challenge to the execution actions, depending on whether the order of the executing judge was issued on the basis of one of the typical extinction scenarios under the executive process, in order to arrive at an 'atypical' extinction of the execution procedure".*

## LEGAL NEWSLETTER | MARCH 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 MARCH 2018.  
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](mailto:UFFICIOSTUDI@STUDIOPIROLA.COM)