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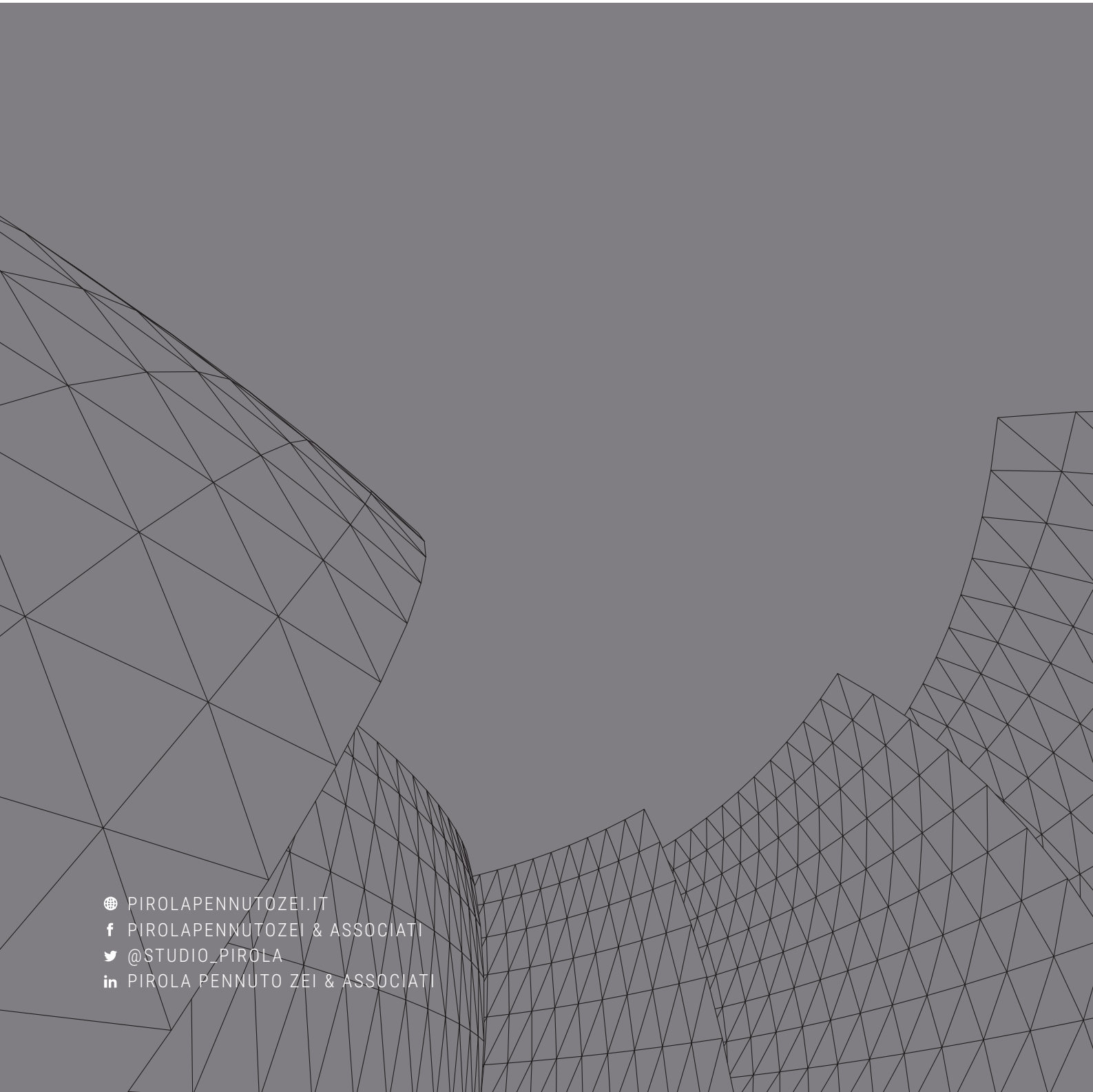

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LEGISLATION

1.1

Draft Legislative Decree "*Business Crisis and Insolvency Law*" - Implementation of Enabling Act 19 October 2017, no. 155 (the "*Rordorf Reform*") – Definitive approval - Council of Ministers - Press release of 10 January 2019, no. 37

On 10 January 2019, the Council of Ministers definitively approved the Legislative Decree enacting the "*Business Crisis and Insolvency Law*", in implementation of Enabling Act 155/2017, (the "*Rordorf Reform*"). The final text has yet to be published in the Official Gazette.

As set out in the Council of Ministers' press release no.37, dated 10 January 2019, this Legislative Decree provides for the organic reform of the bankruptcy proceedings governed by Royal Decree 267/194 and the rules governing the management of businesses which find themselves in difficulty due to over-indebtedness (Law 3/2012). The stated aims are:

- to provide an early diagnosis of the difficulties experienced by companies;
- to safeguard the entrepreneurial skills of those risking a business failure due to particular circumstances.

Another aim, in line with European legislation, is that of harmonising the procedures of managing business crises and employer insolvency with measures to protect employees and salaries. The most significant of these European laws are:

- the Revised European Social Charter (Strasbourg, 3 May 1996) ratified under Law 30/1999, which deals with the implementation of the rights and freedoms covered by the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer; and
- Council Directive 2001/23/EC of 12 March 2001 as interpreted by the Court of Justice of the European Union on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

The draft Legislative Decree is divided into 4 parts. The first sets out the definitions of business crisis and insolvency, debit and over-indebtedness. It is divided into ten sections and has 373 articles. The second part concerns the coordination and implementation of the new code, and amends certain provisions of the Civil Code (Title II and Title V of Book V), labour law provisions and governs coordination with the relative penal legislation.
The third part of the Code deals with guarantees issued to protect purchasers of buildings to be constructed.
Part four concerns the Decree's entry into force and its transitional provisions.
It should be noted, in this regard, that the Decree is expected to come into effect eighteen months after the date of publication in the Official Gazette. Exception is made for certain provisions listed in art. 389 of the Decree (that can immediately facilitate a better management of procedures or the investigation into bankruptcy actions), and amendments to the Civil Code. These will enter into force on the thirtieth day following the publication of the Legislative Decree in the Official Gazette.

1.2

Law no. 3 of 9 January 2019, on "*Measures to combat offences against public authorities, provisions relating to limitation periods for offences and the transparency of political parties and movements*" (Official Gazette 16 January 2019, no. 13)

Law no. 3 of 9 January 2019, "*Measures to combat offences against public authorities, provisions relating to limitation periods for offences and on the transparency of political parties and movements", the "Anti-corruption Law*", was published in the Official Gazette no. 13 on 16 January 2019, and will come into force on 31 January 2019.

This Law contains measures to combat offences against public authorities and consists of a single article divided into 30 paragraphs, each of which concerns and amends various provisions of the Penal Code, the Code of Criminal Procedure, the prison system and the rules governing the liability of entities for offences as set out in Legislative Decree 231/2001. The innovations include provisions relating to the role of the "*agent provocateur*", increased penalties for those convicted of a "*corruption*" offence, the introduction of the concept of protection from punishment for those who report corruption (art. 323-*ter* of the Criminal Code), changes to the length and commencement of limitation periods. Another important innovation concerns *ex officio* prosecution for offences of bribery between private individuals and the incitement to bribery by private individuals, respectively governed by arts. 2635 and 2635-*bis* of the Civil Code.

The new legislation also affects the liability of legal entities pursuant to Legislative Decree 231/2001. The anti-corruption law adds to the list of predicate offences, set out in art. 25 Legislative Decree 231/2001, illicit trafficking of influences as per art. 346-*bis* Penal Code (introduced for individuals by Law 190/2012 and amended by Law 3/2019), with a fine of up to two hundred shares imposed on legal entities.

The penalties of disqualification for entities have been increased for the offences of extortion, and for improper inducement to give or promise benefits or corruption.
These penalties include the prohibition from carrying out activities, the suspension or revocation of authorisations, licences or concessions linked to the commission of the offence, the prohibition from contracting with public authorities (other than making use of a public service), the exclusion from receiving facilitation, financing, contributions or subsidies, the possibility that those already granted be revoked and the prohibition from advertising goods or services, as regulated by art. 9(2) Legislative Decree 231/2001.

Under Law 3/2019, the disqualification penalty (originally set at a minimum of one year) has been lengthened to a minimum of four years and a maximum of seven years when the offence is committed by a high-ranking figure, and between two and four years if the offence is committed by a subordinate.

Art. 25(5-*bis*) has been added, which provides for a reduced duration (minimum three months and maximum two years) of those same disqualification penalties when, prior to the first instance sentencing, the entity has taken effective steps to prevent the criminal activity leading to further consequences, to preserve the evidence of the offence, to identify those responsible or to seize the money or other benefits transferred and has eliminated the organizational short-falls that lead to the commission of the offence by adopting and implementing organisational systems which can prevent that type of offence occurring.

The provisions of this Law come into force on 31 January 2019, with the exception of the rules governing the limitation periods, which will come into force on 1 January 2020.

GUIDANCE

2.1

Ministry of Economic Development - Circular no. 3712/C 17 January 2019 - "*Request for cancellation from the Register of Companies of companies that have not communicated their certified e-mail address - Art. 5(2) Decree Law 179/2012 and art.16 Decree Law 5/2012*"

With Circular no. 3712/C issued on 17 January 2019, the Ministry of Economic Development provided clarification as to the request for the cancellation from the Register of Companies by companies and sole proprietorships that have not communicated their certified e-mail address – PEC (*Posta elettronica certificata*).

Art. 5(2) Legislative Decree 179/2012 provides that sole proprietorships are always required to communicate their PEC address and that upon non-compliance the Registrar of Companies is to suspend applications received from those companies until the PEC address has been provided. Pursuant to art 16(6-*bis*) Decree Law No. 5/2012, corporations are also required to provide their PEC address, with applications for registration in the Register of Companies being suspended for three months, pending compliance with this obligation.

In a previous Circular, no. 3666/2013, the Ministry of Economic Development had stated that "*the penalty for failure to communicate the PEC address as per art. 5(2) Decree Law 179/2012, i.e. the temporary suspension of the request for registration in the Register of Companies, was not applicable in cases of applications for the cancellation of a sole proprietorship from the Register of Companies*".

The Chamber of Commerce of Bari, with Note no. 68418/2018, posited the question whether this interpretation can still be considered applicable, given the principle established by the Court of Cassation in Orders 16365/2018 and 30532/2018, according to which "*[...] every entrepreneur, individual or collective, registered in the register of companies is required to have a certified e-mail address ... and that ... such address is the public digital address that these entities have the responsibility to activate, maintain and renew from the time of registration in the register of companies and including for the twelve months following any cancellation of the same.*"

The Circular makes it clear that art. 5(2) sets out the obligation to register a PEC applies to sole proprietorships which are active, thus excluding those which have completed their life cycle and, consequently, have made application that the cancellation be registered. The Ministry confirmed the applicability of the previous Circular no. 3666, even if "*one cannot fail to observe at this time that, given that so many years have passed since the application of the obligation to communicate the PEC, there should no longer be any entity that has not yet communicated its PEC address. It should be noted that new entities comply with the obligation at the time of initial registration and that upon entry into force of Legislative Decree 185/2008 (for companies) and Legislative Decree 179/2012 (sole proprietorships) they were to respectively register their PEC by 29 November 2011 and 30 June 2013.*"

As regards the requirement that the entity be active, the Ministry stated that this must be an essential condition for the application of the penalty, since "*denying the registration of the request for cancellation would create a false representation of the real state of those entities that, although no longer operational, would continue to be falsely active, even though they have expressed a desire to be removed from the Register of Companies*".

The Ministry also specified that the company is responsible to communicate any change in the valid PEC address for the duration of the registration.

CASE LAW

3.1

Company - Confiscation of proceeds of crime - Court of Cassation, Criminal Section V, decision 16/01/2019, no. 1971

In its Decision of 16 January 2019, no. 1971, the Court of Cassation, making reference to the current judicial leaning on the subject of seizure of monetary proceeds of crime and in particular to the clarifications made by the Full Bench (Decision 31617 of 26/06/2015 and Decision 10561 of 30/01/2014), relating to the nature of confiscation of monetary proceeds of crime, clarified that: *(...) the logical presupposition of both decisions of the Full Bench is that the confiscation of the money without proof of pertinence to the crime can only be permitted vis-à-vis those whose monetary resources stem directly from the crime and not others, who have not benefited from the enrichment*".

The Court clarified that: "*the direct seizure and confiscation may be of sums of money available to the recipient entity of the enrichment rather than those in the possession of the legal representative, even though the latter committed the offence. The logical corollary of this statement is that, when the director of a company has legitimately received compensation due to the position they hold, this amount cannot be considered to be proceeds of the crime. Exception is made when it is proven that, despite the formal manifestation of the situation, there is an economic osmosis between the legal entity and individual representing it, as in the situation when the company is a mere formal screen lacking in consistency, through which the individual acts as the effective owner of the assets of the company and directly pockets the funds received by the company. This "pathological" structural situation in the relationship between the company and the person naturally representing it, must be specifically demonstrated by those requesting the seizure and confiscation. There must also be a correlated justification in the order of seizure and confiscation, as in any other situation, even if less striking, more circumscribed and occasional, in which just once there has been the unjustified transit of monetary proceeds from the beneficiary entity to the individual whose assets are intended to be attached*".

The Court also stated that, "*in support of this reasoning is the consideration that the legal system allows for direct action to be taken against the legal representative of a company which has benefited economically from the crime committed by an individual. This is effected through an alternate method of the confiscation (and seizure) of equivalents - provided that it is not possible to directly seize the*

proceeds of the crime from the entity that has benefited from the commission of the crime. This is an penalty of dispossession that requires a specific legal provision. On the contrary, in this case it is simply seizure with the aim of the classic confiscation of monetary proceeds of a crime."

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LEGAL NEWSLETTER | JANUARY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JANUARY 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