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DLA PIPER

Contents

Governance Principles on artificial intelligence in insurance

BRUNO GIUFFRÈ, ANGELO BORSELLI, ALESSANDRA PLOCCO

New technologies such as artificial intelligence (**AI**), cloud computing or the internet of things are having a growing impact in the insurance sector. Insurers mainly use artificial intelligence in underwriting and claim processing, or to launch targeted marketing campaigns or offer new products and services to consumers, such as usage-based insurance products.

Artificial intelligence is applied to predict premiums and losses, and to permit fast settlements and targeted investigations because it can go through a large volume of claims and select those that require further investigation. In this way it can also be used to curb fraud. Other uses of artificial intelligence in insurance include: direct marketing and predicting litigation; customer assistance through automatic chatbots and assistants; driver performance monitoring; and insurance market analytics.

However, the increasing reliance on artificial intelligence also causes potential concerns, especially as regards financial inclusion of protected classes or vulnerable consumers and, generally, the impact that new technologies can have on society as a whole.

While a comprehensive legislative framework concerning the activity of insurance firms exists and can apply also to the use of artificial intelligence within their organizations, including the Solvency II Directive that requires (re)insurance undertakings to have in place an effective system of governance which provides for sound and prudent management of the business, EIOPA's Consultative Expert Group on Digital Ethics (**GDE**) has issued a report in 2021 developing six AI governance principles to promote an ethical and trustworthy use of artificial intelligence in insurance.

Ethical issues in insurance may result from the different interests of the stakeholders involved in the insurance activity, namely the (prospective) insured, the pool of insured risks, and the insurer who manages the pool. In particular, a central issue regards the fair treatment of an individual when the interests of the pool and the insurer diverge.

The six governance principles developed by the GDI aim at allowing the insurance stakeholders to benefit from the use of artificial intelligence, while at the same time addressing the relevant challenges.

The governance principles for an ethical and trustworthy AI in the European insurance sector

Principle of proportionality: according to which insurance firms should conduct an impact assessment in order to determine the governance measures required for a specific AI use case. The impact assessment and the governance measures should also be proportionate to the concrete AI use case. Once the insurance firm has assessed the impact of a specific AI use case, it will be able to determine the governance measures (e.g., transparency and explainability, data management etc.) that need to be put in place across the lifecycle of the AI system in a proportionate manner. When all the relevant governance measures have been implemented, insurance firms should assess once again the risks of AI uses and determine whether the "mix" of governance measures is sufficient to ensure ethical and trustworthy AI systems.

Principle of fairness and non-discrimination: according to which insurance firms should adhere to principles of fairness and non-discrimination when using AI, taking into account the outcomes of AI systems, while balancing the interests of all the stakeholders. Fair use of data means guaranteeing that it is fit for purpose and respect the principle of human autonomy by developing AI systems that support consumers in their decision-making process.

Insurance firms should: i) make efforts to monitor and mitigate biases from data and AI systems; and ii) develop their approach to monitor records on the measures adopted to secure fairness and non-discrimination. Insurance firms should thus be transparent about how they use the data and be able to appropriately explain these uses to consumers as well as to competent authorities.

Principle of transparency and explainability: Explainability is part of the concept of transparency and relates to the ability to explain the output of the AI system to a particular audience. Insurance firms need to tailor explanations to specific AI use cases and to the relevant stakeholders, ensuring that they are conscious of interacting with an AI system.

In particular, in pricing and underwriting it should be clearly explained to customers why a certain risk cannot be accepted, or what the main rating factors influencing the premium are.

Transparency measure will help build consumer confidence, enabling them to make informed decisions and to know how to obtain better premiums. Insurance intermediaries should be able to receive more detailed information from insurance companies in order to better explain products to customers. Insurance firms should transparently communicate the data used in AI models to consumers.

Principle of Human Oversight: this principle (aka "human in the loop") represents a central governance measure for the responsible implementation of AI in the insurance sector, providing for an adequate level of human oversight throughout the life cycle of an AI system. While AI can increasingly automate tasks and processes, there will always be a degree of human engagement in the implementation of AI systems along the different stages of the AI model's life cycle, as humans may be engaged, for example, in the selection and cleaning of the data used to train the AI system and/or in the selection of the AI algorithms best suited to perform a specific task.

Principle of data governance of record keeping: insurance firms should ensure that data used in AI systems is accurate, complete and appropriate and they should apply the same data governance standards irrespective of whether data is obtained from internal or external sources. Data should be properly stored and insurance firms should establish appropriate record keeping measures that are proportionate to the potential impact of the specific AI use case at hand.

Principle of Robustness and Performance: insurance firms should use robust AI systems that should be fit for purpose and their performance should be assessed and evaluated on an on-going basis. Robustness should be intended both in a technical and ethical sense, ensuring that AI operates reliably and without causing damage. In particular, performance plays a central role in achieving robust AI, considering that a high-performance AI system generally offers greater confidence in the reliability of its results. The calibration, validation and reproducibility of AI systems should be done in a sound manner that ensures that the AI system's outcomes are stable over time and of a steady nature. AI systems should be deployed in resilient and secured IT infrastructures.

The AI governance principles draw attention to some important issues and challenges arising from the use of AI in insurance and in society in general, and emphasize the importance of continuous dialogue among all stakeholders involved in order to ensure the sound and appropriate use of AI. The principles are expected to be reviewed in the coming years to consider on-going technological developments.

The "Project Insurance" commenced by the Italian Supreme Court

MARCO DIMOLA

One of the key features of the Italian Supreme Court's mission is to ensure certainty in the interpretation of the law (according to article 65 of Law 30 January 1941 no. 12, the Supreme Court must ensure *"the exact observance and consistent interpretation of the law"*).

In recent years it has become increasingly difficult for the Court of Cassation to perform this task due to the ever-increasing number of disputes that have been brought up to the last instance, which has to be decided by the Supreme Court. In 2021 the civil sections of the Supreme Court handed down 42,145 decisions – an average of 115.47 per day, 4.81 per hour, one every 12.47 minutes.

While it is true that productivity has increased (thanks to the number of judges assigned to the civil sections progressively increasing to over 200 and the adoption of the "telematics system" by Court of Cassation) this volume of disputes prevents the Supreme Court from guaranteeing the consistency of the system and the interpretation of the law in any case.

That is why the working methodology carried out a few years ago by the President of the third civil section of the Court of Cassation, who organized the work of that section "by projects", is of great interest. He has carefully selected appeals posing similar legal issues of major importance, brought them together and set the relevant decision in a public hearing, as well as involving lawyers and scholars in the resolution of such issues.

The first projects concerned enforcement of decisions (2017), leases (2019) and medical malpractice (2019).

At the hearing on 24 February 2022 "Project Insurance" was given this same treatment and eleven issues of relevant interest were examined in the areas of compensation of damages, life insurance, liability and motor liability insurance. The aim was obviously to clarify and simplify uncertain and controversial issues in order to set guiding principles and prevent litigation.

In the field of insurance law – where contracts are often very different from each other and are constantly under evolution, with new clauses or contract types being introduced, the need for certainty is particularly felt by business operators.

First EIOPA report on the implementation of Insurance Distribution Directive 2016/97

DAVID MARIA MARINO, VALENTINA GRANDE

According to Article 41(4) of Insurance Distribution Directive 2016/97 (IDD) "*at least every two years … EIOPA shall draft a report on the application of the Directive*". On 6 January 2022, EIOPA published its first report.

Despite some uncertainties in the data analysis due to the fact that, in some countries, the Directive has only recently been transposed and that the market has been affected by the significant acceleration of digitalization processes due to the pandemic, EIOPA offers a preliminary analysis of the impact of the IDD on consumers, intermediaries and national supervisory authorities.

The results of EIOPA's analysis are summarized below.

The European framework

Even if the IDD has attempted to harmonize the distribution of insurance products, the EU insurance distribution markets still remain highly fragmented.

National differences still exist, for example in registration requirements and reporting systems.

DECREASE IN THE NUMBER OF DISTRIBUTORS

The number of intermediaries – in the period from 2016 to 2020 – has largely decreased. The reasons for the decline are attributed, among other factors, to the consolidation of the sector; the increasing age of natural person intermediaries; the reorganization of distribution models; the introduction of stricter professional requirements; and the removal of inactive intermediaries from national registers.

BANCASSURANCE

Bancassurance has played a significant role in the distribution of 'life' products, while the non-life sector remains mainly dominated by agents.

DISTANCE SELLING

Distance selling has experienced strong growth and a significant increase was caused by the restrictions on the movement of people which followed COVID-19 related measures.

FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

Despite the decrease in the number of intermediaries over the period 2016 to 2020, an increase in intermediaries authorized to operate under the right of establishment or the freedom to provide services was nevertheless observed in the majority of Member States.

Impact of the new regulatory framework

ANALYSIS OF CUSTOMER NEEDS AND BUSINESS PRACTICES

While, according to some trade associations, the IDD had a generally positive impact on distribution patterns, consumer associations highlighted some problems in relation to the sale of "unit-linked" life, mortgage and credit insurance products.

Moreover, in some Member States, criticisms have emerged concerning the actual analysis of customers' needs before the purchase of insurance products. In some cases, it emerged that this analysis is very low-level.

COMBINED SALE

Critical issues emerged in the combined sale of "unit-linked" products and credit insurance policies, often distributed through aggressive sales practices that prevent the customer from fully understanding the features and costs associated with the products purchased.

TRAINING

EIOPA paid special attention to the topic of training, which is becoming increasingly important in light of the growing complexity of certain product categories (e.g. IBIPs) and the growing market for sustainable financial products.

DIGITALIZATION AND NEW DISTRIBUTION MODELS

Some critical issues emerged, for example:

- in the definition of "*insurance distribution*" contained in Article 2(1) of the IDD, because of the uncertainty as to what is to be understood by an insurance contract concluded "*indirectly*", especially when the conclusion of the contract takes place through price comparison sites: when is it a distribution activity and when is it a mere information activity accompanied by redirection to the distributor's site?
- in the hard copy concept of pre-contractual information, which is not always easily compatible with the structure of IT platforms or the use of smartphones or other devices.

LACK OF UNIFORMITY AND EXCESS OF PRE-CONTRACTUAL INFORMATION

The IDD has led to an increase in the amount of information (which in some cases differs from state to state) provided to customers in the pre-contractual stage. EIOPA hopes that a greater degree of uniformity will be achieved through coordinated amendments to the various EU legislative acts, as well as through guidelines that can contribute to a consistent interpretation of the various applicable provisions.

National authorities' supervisory activities and cooperation

The number of resources that national authorities dedicated to the supervision activities increased between 2018 and 2021. However, not all authorities still have sufficient tools to carry out effective supervision activities. Uncertainties still exist with reference to the competences of national supervisory authorities in the case of cross-border activity. Moreover, in EIOPA's view, some authorities may lack "*intermediate powers*" between taking adequate remedial measures and banning products.

Product Oversight Governance (POG)

The IDD introduced a set of provisions governing the process of product design and implementation to ensure their compliance with the needs and requirements of the target market. EIOPA has seen progress in a number of states on the path to adopting effective POG policies, including measures shared with distributors.

However, some difficulties still seem to exist in the actual involvement of distributors in the product development and review process.

Conflicts of interest and level of commissions

EIOPA's thematic review on travel insurance has shown that some business models entail heightened conduct risks, including remuneration structures based on very high commissions and extremely low claims ratios.

Consumer associations raised concerns about the payment of inducements to insurance intermediaries and undertakings, which can negatively affect the quality and objectivity of advice that is given to consumers. On this matter EIOPA noted that, although not prohibited by the IDD, Member States still have the possibility to limit or prohibit such benefits.

Underwriting agency

There has been a growing phenomenon of insurance companies outsourcing important portions of their business to intermediaries (typically an 'Underwriting Agency' or 'Managing General Agent'): from claims management to risk underwriting, from market definition to pricing to product development.

EIOPA refers to these intermediaries as 'virtual insurers' and some concerns have been expressed, mainly arising from the need for constant and timely monitoring by the companies, given that the risks underwritten by the Underwriting Agencies are passed on directly to the companies.

Italy: things still to do

With respect to Italy, EIOPA identified two specific aspects.

REGISTER OF INTERMEDIARIES

Italian implementation of IDD updated the Italian Insurance Code envisaging that a newly set-up entity (called ORIA) would be responsible for the Italian Register of insurance, reinsurance and ancillary insurance intermediaries (RUI). ORIA has not been set up yet, pending the issuance of a Ministerial Decree: according to the Insurance Code, IVASS is still in charge of the maintenance of the Register until ORIA is in place.

INSURANCE ADR

Despite IVASS having already provided logistic, technical and human resources for the start-up of the insurance ADR, it is not yet operational due to the legislative process to fully regulate ADR having not been completed.

Banks are data processors in the distribution of insurance policies in Italy

GIULIO CORAGGIO, GIORGIA CARNERI

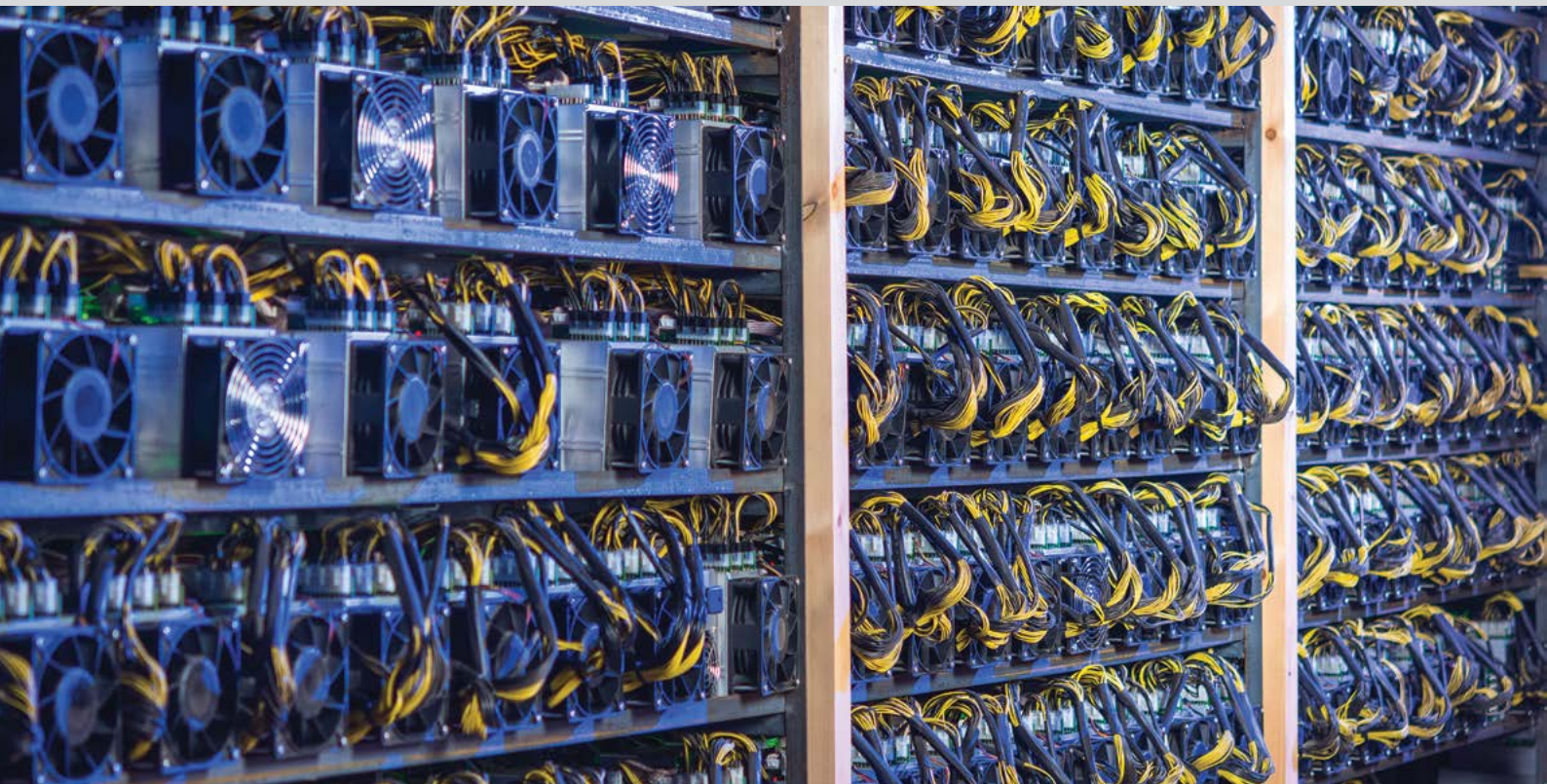
According to the Italian Data Protection Authority (Garante), a bank that distributes insurance policies of an insurance company is a data processor pursuant to Regulation (EU) 679/2016 (GDPR) instead of an autonomous data controller. This position is the key takeaway of the Garante's opinion, provided in its opinion dated May 17, 2022, which was delivered in response to the queries raised by a company operating in the insurance sector.

The concept of controller and processor under the GDPR applied to the so-called insurance chain

GDPR distinguishes between data controller and processor depending on the entity bearing the decision-making power concerning the purposes and modalities of processing of personal data.
In particular, pursuant to article 4(7) of the GDPR, a "data controller" is he entity which, alone or jointly with others, determines the purposes and means of the processing of personal data; while, pursuant to article 4(8) of the GDPR, a "data processor" is the entity that processes personal data on behalf of the controller.
According to Guidelines 07/2020 on the concepts of controller and processor in the GDPR of the European Data Protection Board (**EDPB**), the factual circumstances of the case need to be assessed in order to properly identify the decision-making entity and to correctly allocate the privacy roles and responsibilities of the parties.

With specific reference to the insurance sector, the Garante (in its decision dated April 26, 2007) analyzed the activities carried out by the operators of the insurance sector and came to the conclusion that the relevant processing may be articulated in a plurality of "phases", starting from the distribution up until the claim settlement stage. As a result, personal data of prospect customers and policyholders may be processed by several different entities, under different privacy roles, depending on the "phase" and this scenario gives rise to the so-called insurance chain.

As a result, it is necessary for insurance companies to carefully assess the role actually played by the entities involved in processing and determine whether, and which of such, entities bear a real and autonomous decision-making power with regard to the purposes of processing or whether they instead conform to the instructions of the insurance companies.



The opinion of the Garante on the role of banks in the distribution of insurance policies

The Garante was questioned on the privacy role to be attributed to banks that sell and distribute insurance policies issued by an insurance company. In its opinion, the Garante noted that, pursuant to Article 58(3) of IVASS Regulation 40/2018:

- distributors are required to propose contracts consistent with the policyholder's or insured person's requests and needs for insurance and pension coverage. To this end, distributors shall collect necessary information from the client, concerning specific references to the policyholder's age, health, work activity, family unit, financial and insurance situation and his or her expectations in relation to the underwriting of the contract, in terms of coverage and duration, also taking into account any insurance coverage already in place, the type of risk, characteristics and complexity of the contract offered;

at the same time

- insurance companies, for each product distributed, shall issue suitable instructions to guide distributors in the pre-contractual stage, along with useful and relevant information in relation to the type of contract offered.

In light of the foregoing, according to the Garante, since distributors operate on the basis of instructions from insurance companies, the former do not have operational freedom in defining the manner in which they process personal data and, therefore, banks operating under this scheme are always data processors.

Is the Garante's paradigm a "one-size fits all"?

In the recent years, new insurance-distribution models have entered the Italian market. In some of these distribution models, agents are a specialized type of insurance agent/broker that, unlike traditional policy distributors, are vested with underwriting authority from an insurer. Hence, they perform certain functions ordinarily handled only by insurers, such as binding coverage, underwriting and pricing, appointing retail agents within a particular area, and settling claims. Under such scenarios, agents have considerable decision making power that allows them to determine the modalities of processing personal data.

Therefore, one may legitimately question whether the Garante's paradigm enshrined in the afore-mentioned opinion is actually applicable by analogy to other distribution models.

Since no further guidance is provided by the Garante, the view resorts to the general data protection principles to assess, on a case-by-case basis, the privacy roles of the parties. Indeed, as per the EDPB's guidelines, the allocation of the roles usually should stem from an analysis of the factual elements or circumstances of the case, considering that "*[t]he concepts of controller and processor are functional concepts: they aim to allocate responsibilities according to the actual roles of the parties.*" Besides, it should be considered as part of the analysis that the stringent obligations applicable to banks in the distribution of insurance policies do not apply to other categories of distributors, such as agents.

Thus, operators shall carry out a case-by-case assessment and analyze the relevant circumstances of the processing, in particular whether a party:

- operates as a mere intermediary or bears an actual decision-making power; and
- receives operational instructions from another entity or is merely requested to achieve certain results and/or targets, without further ado.

However, in our view, this is still a grey area. There is leeway to argue whether other distribution models fall under the controller-processor paradigm identified by the Garante in the context of insurance policy distribution activities carried out by banks on behalf of insurance companies.

Tax Aspects of the Key Man insurance policies – how insurance tools can ensure business continuity

ANTONIO LONGO, ANGELA DULCETTI

Insurance policies that protect a company against the loss of key figures are becoming increasingly important in business practice.

When a key figure disappears a company faces a number of difficulties: the momentary freezing of important decisions; a possible slowdown in production; the loss of leadership or a specific company know-how; and recruitment for a suitable replacement. In these situations, a company does not always have the financial resources to cover short-term impediments, and the Key Man Policy can be a suitable instrument to limit the damage. The stipulation of Key Man Policies provides a company, deprived of its leader, with a financial return that can be used, for example, to replace a figure who has died and/or recruit a new manager capable of continuing the work of the previous one.

Generally speaking, such insurance products envisage (i) the payment of a limited number of annual premiums by the policyholder-beneficiary; (ii) coverage for the death of the key insured (the so-called "demographic risk"); and (iii) the payment by the insurance company of an indemnity which can be revalued over time.
Two types of Key Man policies can be chosen: "term life" and "whole life". The "term life" policy requires the payment of a lump sum only if the insured dies within the period indicated in the insurance contract. On the other hand, the "whole life" insurance policy provides for the payment of a lump sum at the date of death of the policyholder with no time limits.

The deductibility of the insurance premiums paid by the company for direct tax purposes has been disputed with the Italian tax authorities that have taken a quite strict approach in this respect.

On the contrary, there are arguments to maintain that the premiums paid are inherent costs to the company's activity, as they are incurred to protect both the assets and the company's continuity and, therefore, are linked to the company's business. In this connection, the Supreme Court has repeatedly stated that inherency must be assessed in relation to the business activity performed and not simply as a correlation between costs and revenues. In the case of Key Man policies, insurance premiums have a functional connection with the business activity, since they are paid by the company to protect the company's assets and the continuation of the business activity (which would otherwise be threatened by the premature death of the key man).
In this prospective, on the other hand, the sums paid to the company in the event of the death of the insured person would be considered positive income components subject to taxation.

It is then essential to structure these insurance contracts correctly, considering the role and responsibilities of the manager, the internal organization of the company and the business activity carried out, in order to protect the company from any possible challenges from the Tax Authorities regarding the alleged non-deductibility of the key man insurance premiums.

The Supreme Court's revision on litigation management clauses in insurance contracts – The decision no. 21220/2022 of 5 July 2022

DAVID MARIA MARINO, VALENTINA GRANDE

With Judgment no. 21220/2022, issued on July 5 2022, the Supreme Court ruled on the matter of litigation management clauses in insurance contracts.

In the Italian market, it is common to find clauses that exclude payment of litigation costs incurred by the insured to resist against a third-party claim in the event that the insured does not appoint legal counsels or experts pre-approved by the insurer.

In the past, clauses of this kind had been considered lawful by the Supreme Court as they were considered the result of an agreement between the insured and the insurer.

In the case at stake, the Supreme Court – contrary to its previous opinion – ruled that such litigation management clauses were in contrast with Article 1917 of the Italian Civil Code, which stipulates that: "*Legal costs incurred by the insured to defend against the claim of the injured party shall be borne by the insurer to the extent of one-fourth of the sum insured...*". Pursuant to Article 1932 of the Italian Civil Code, the aforesaid Article 1917 cannot be derogated unless the change is more favorable to the insured.

According to the Court:

- a clause requiring the insured to use only the legal counsels and experts previously approved by the insurer to obtain reimbursement of litigation expenses is a limitation of the insured's rights, not permitted by law and, therefore, null and void;
- the costs to resist against a third-party claim are borne by the insured also in the interest of the insurer and fall within the definition of salvage costs under article 1914 of the Italian Civil Code which are to be reimbursed to the Insured, save that the insurer proves that they have been recklessly incurred.

The draft reform of alternative dispute resolution instruments

NICOLA NACCARI

Last December, the Italian Parliament approved Law No. 206/2021, which came into force on 24 December 2021, containing the "*delegation to the government for the efficiency of the civil process and the revision of the discipline of alternative dispute resolution instruments and urgent measures for the rationalization of proceedings concerning the rights of persons and families as well as enforced execution*"; this delegated law, now known as the Cartabia Reform from the name of the current Ministry of Justice, has the declared aim of making justice more efficient and, above all, speeding up its time.

This is also because of the Country Specific Recommendations that the European Commission (in 2019 and 2020) addressed to Italy, inviting it to increase the efficiency of the civil justice system. Among other things, the legislative intervention is a necessary condition to be able to take advantage of the European funds linked to the National Recovery and Resilience Plan (PNRR); this is an essential objective agreed with the European Commission, which concerns the reduction of trial times by 40% in the civil sector within the next five years. In fact, it must be remembered that, unfortunately, Italy has been the recipient of numerous convictions for violation of Article 6 of the ECHR with regard to the duration of trials.

Law 206/2021 consists of a single article that contains both the delegation to the Government to reform the civil process and the amendment of certain provisions of the Civil Code and the Code of Civil Procedure.

We will briefly analyze the novelties to be introduced, following the enabling act, with regard to alternative dispute resolution institutions, namely mediation and assisted negotiation.

The stated objectives (Article 4, letters a – p) of the enabling act are:

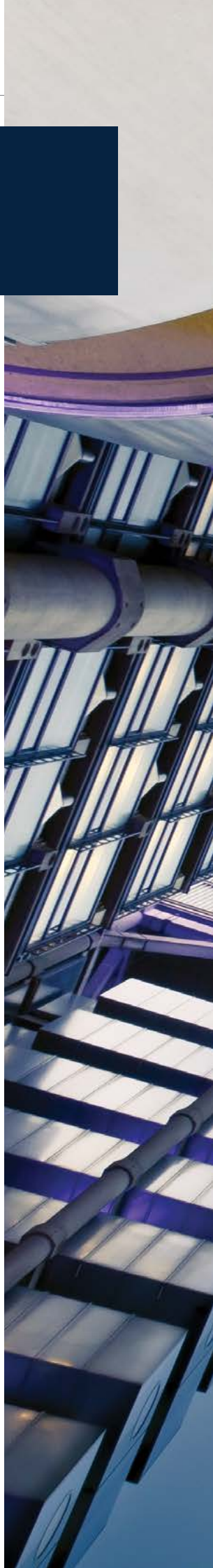
- extend the compulsory nature of mediation to matters other than those already indicated in the current rules (Article 5(1a) of Legislative Decree No. 28/2010).
- induce the parties to concretely enter into negotiations aimed at conciliation, i.e. to go beyond the mere information phase of the first mediation meeting provided for in Article 8, Legislative Decree No. 28/2010.
- provide for the entry of an evidentiary parenthesis in both mediation and negotiation, with evidentiary effect also in any subsequent litigation.
- improve the attractiveness of mediation by:
  - increasing its cost-effectiveness;
  - improving the training of operators and quality of organizations; and
  - creating synergies between magistrates, mediators, lawyers and mediation organizations.

Expansion of compulsory mediation

The enabling act envisages "*extending compulsory recourse to mediation, on a preventive basis, in matters of partnership, consortium, franchising, work, network, administration, partnership and subcontracting contracts*".

Reference is therefore made to the work contract without mentioning the intellectual work contract; the possibility of extending the procedural condition to the latter type of contract is therefore still doubtful, despite the fact that such an extension had already been hoped for by the commission chaired by Prof. Guido Alpa, who had previously worked to reorganize the discipline of compulsory mediation.

The text of the Commission chaired by Prof. Francesco Luiso, appointed by Minister Cartabia to formulate proposals for amendments to the current discipline of mediation and to the code of civil procedure, had indicated that they were *"without prejudice to the cases for which the law provided for other compulsory procedures for the out-of-court settlement of disputes";* the enabling act, which should have incorporated the Luiso Commission's indications, instead uses the words *"without prejudice to the recourse to alternative dispute resolution procedures provided for by special laws".*



The Luiso Commission's proposal therefore considered the compulsory nature of mediation as residual, destined not to apply in the event of the coexistence of sectoral compulsory instruments. The enabling act instead opted for the coexistence of several alternative dispute resolution instruments.

The implementing decrees will therefore necessarily have to regulate the relationships between the various mandatory sectoral instruments, providing that the conditions of admissibility are cumulative and thus must be satisfied jointly, or that the condition of admissibility is only one and can be satisfied by having recourse alternatively to mediation or to another procedure provided for by law (for example, the current Article 5 of Legislative Decree 28/2010 allows for the satisfaction of the condition of admissibility in the banking sector also by turning to the Banking and Financial Arbitration – ABF. Lgs 28/2010 allows the condition of admissibility in banking matters to be satisfied also by applying to the Banking and Financial Arbitrator – ABF).

Moreover, the Delegated Law, contrary to what was proposed by the Luiso Commission, makes no mention of the possibility of settling labor disputes by mediation (not compulsory, but optional) pursuant to Article 409 of the Code of Civil Procedure, allowing, instead, only assisted negotiation.

The burden of initiating mediation in proceedings for opposition to an injunction order

The current rules (Article 5(4) of Legislative Decree No. 28/2010) provide that the condition of admissibility – and thus the need to initiate mediation proceedings – arises only in proceedings for opposition to an injunction and only after the judge *"rules on the applications for the granting and suspension of provisional enforcement,"* but does not specify who has the burden of initiating the proceedings and what the consequences of failure to do so are.

There were two opposing theses on these issues:

- The first thesis held that the defendant-opponent bears the burden of initiating mediation, and failure to do so results in the opposition being declared inadmissible with the consequent enforceability and res judicata of the injunction (Court of Cassation, 3 December 2015, no. 25629, Trib. Torre Annunziata, 5 December 2017, Trib. Bologna, 8 March 2018, Trib. B. ari, 11 September 2018, Trib. Rome, 28 December 2018, Trib. Naples, 19 July 2019);
- The second thesis held that the burden of initiating mediation rests instead on the opposing creditor, as a result, if he fails to do so, the injunction decree must be revoked and the court application must be declared inadmissible (Court of Cassation Un. 18 September 2020, no. 19596, Tribunal of Ferrara 7 June 2018).

The Commission chaired by Professor Luiso, in its concluding report, had indicated to clarify "*the clarification on the burden of activating mediation following special proceedings, in particular by definitively clarifying the obligation to be borne by the opposing party in mediation following opposition to an injunction. After a long jurisprudential contrast, in the aftermath of the judgment of the unified sections of the Supreme Court of Cassation No. 19596/2020, it is appropriate to transpose this principle by way of legislation, also to avoid further contrasts that have already occurred*".

The Delegated Law did not implement the Luiso Commission's suggestion but remits to the implementing decrees to "*identify, in the event of mandatory mediation in proceedings for opposition to an injunction, the party that must submit an application for mediation, as well as to define the regime of the injunction where the obliged party has not fulfilled the condition of procedural feasibility*".

The effective participation of the parties in mediation

The current discipline provides that:

- "during the first meeting, the mediator shall clarify to the parties the function and modalities of the mediation process. The mediator, during the same first meeting, then invites the parties and their lawyers to express their opinion on the possibility of starting the mediation procedure and, if positive, proceeds with the proceedings' (Article 8, Legislative Decree 28/2010);
- "When the conduct of the mediation procedure is a condition for the admissibility of the court proceedings, the condition shall be deemed to have been fulfilled if the first meeting before the mediator is concluded without agreement" (Article 5(2-bis), Legislative Decree 28/2010).

The literal fact, in the current rules, therefore leads to the conclusion that the parties' participation in the mediator's information meeting is sufficient for the condition of admissibility to be fulfilled, and the subsequent conduct is not necessary.

The jurisprudence had taken conflicting positions on the question whether the condition of admissibility could be deemed to be fulfilled with the mere participation in the first information meeting or whether the continuation of the proceedings was necessary: the Supreme Court, in judgment No. 8473/2019, had held that 'In compulsory mediation proceedings, the condition of admissibility may be deemed to be fulfilled at the end of the first meeting before the mediator if one or both parties, requested by the mediator after having been adequately informed about the mediation, communicate their unwillingness to proceed further'. This judgment was opposed by the position of the jurisprudence on the merits which held, on the other hand, that *"it is necessary for the party charged to agree to proceed, the condition of admissibility is not satisfied if actual mediation is refused"* (Trib. Florence, 17 March 2014, Trib. Palermo, 16 July 2014, Trib. Bologna, 16 October 2014, Trib. Siracusa, 17 January 2015, Trib. Rome, 19 February 2015, Trib. Milan, 7 May 2015).

The enabling act, incorporating the proposals of the Luiso Commission, provides for 'reorganising the provisions concerning the conduct of the mediation procedure in the sense of favouring the personal participation of the parties, as well as the effective discussion of the disputed issues, regulating the consequences of non-participation'.

However, such 'consequences' cannot be considered to consist in the non-fulfilment of the condition of admissibility, for the following reasons:

- the rule refers to the 'conduct' of the procedure and not to its compulsoriness;
- The Delegated Act does not allow for the elimination of the parties' option, at the end of the information phase of the first meeting, to comment on the start of the actual mediation;
- Paragraph 4(c) of the enabling act provides, for the new matters subject to the condition of procedability, that the latter is deemed fulfilled if *'the first meeting' is* concluded without agreement;
- Finally, for opposition to an injunction, paragraph 4(d) clearly links the actual fulfilment of the procedural condition to the submission of the application and not to the conduct of mediation.

In conclusion, the Delegated Act, in paragraph 4(e), only allows for a revision of the sanctions – "consequences" – for non-participation currently contained in Article 8 of Legislative Decree No. 28/2010 and does not affect the condition of procedural compliance, which must therefore be deemed fulfilled even with the parties' participation in the first information meeting before the mediator.

The possible appointment of a party representative

The Supreme Court, in Judgment No. 8473/2019 had provided that "in the compulsory mediation proceedings governed by Legislative Decree No. 28 of 2010, as amended, the personal appearance of the parties before the mediator, assisted by their defence counsel, is required. In the compulsory appearance before the mediator, the party may also be replaced by its own substantive representative, possibly in the person of the same defence counsel who is assisting it in the mediation proceedings, provided that he or she has the appropriate substantive power of attorney".

The Delegated Act provides for "the possibility for the parties to the mediation proceedings to delegate, in the presence of justified reasons, one of their representatives with knowledge of the facts and endowed with the powers necessary for the resolution of the dispute and to provide that legal persons and entities participate in the mediation proceedings by making use of representatives or delegates with knowledge of the facts and endowed with the powers necessary for the resolution of the dispute".

This provision inevitably entails application problems that the implementing decrees of the enabling act will have to resolve: in fact, the notion of 'justified reasons' will have to be clarified, who will have to assess the presence or absence of serious reasons will have to be provided for: the mediator or the judge? What will be the consequence of the absence of serious reasons?

Public administration participation in mediation

The Luiso Commission had pointed to "the tendency, which has spread among public administrations, to avoid mediation proceedings, hiding behind the fear that any participation might cause financial damage. In particular, public bodies tend to desert conciliation procedures, even if they are duly convened, even in cases of mediation ordered by the judge [...] At times, the official's fear of incurring a pecuniary liability of which, in most cases, the exact contours and causes are not identified'.

Acknowledging the indications of the Luiso Commission, the Delegation Law would like to introduce a 'financial shield', providing that 'for the representatives of the public administrations referred to in Article 1,

paragraph 2, of Legislative Decree No. 165 of 30 March 2001, that conciliation in mediation proceedings or in court does not give rise to accounting liability, except in the case of willful misconduct or gross negligence, consisting in inexcusable negligence resulting from a serious breach of the law or misrepresentation of the facts'.

In the perspective of the reform, this exemption should facilitate the participation of public administrations in mediation, however, the reticence of the latter could only be definitively overcome when it is clarified that the choice not to appear exposes the entity to sanctions and, should the judge impose a conviction qualifying the absence as unjustified, the official would be exposed to the serious risk of incurring fiscal responsibility.

Technical consultancy in mediation

The current rules (Article 8 of Legislative Decree 28/2010) provide that "the mediator may make use of experts enrolled in the registers of advisors at the courts" and that (Article 10 of Legislative Decree 28/2010) "the information acquired during the mediation proceedings cannot be used in proceedings having the same subject-matter, even if partial, initiated, resumed or continued after the failure of the mediation, except with the consent of the party making the statement or from whom the information comes. Witness evidence shall not be admissible on the content of such statements and information and no decisive oath may be administered."

The enabling act provides for "the possibility for the parties to stipulate, when appointing the expert, that his report may be produced in court and freely evaluated by the judge".

However, the provision raises some questions: What happens if a party is absent from the mediation proceedings? Does the waiver of confidentiality also have to come from the party absent at the mediation?

A negative answer could derive from the current Article 10 Legislative Decree 28/2010: information acquired in mediation is unusable "*except with the consent of the party from whom it originates*"; since the absent party does not provide any information, its authorization should not be necessary.

With regard to the evidentiary effectiveness of the technical consultant's report, the Luiso Commission had proposed to prevent the risk of duplication of costs by providing that *"the judge's power should* remain intact with regard to *his evaluation* [of the report], to the possible renewal of the oath, and to the integration of questions". Since the substitution of the OTC was not mentioned, it followed that the appointment of a technical consultant should be entrusted to someone who had already served as an expert in mediation, in order to obtain a kind of supplementary expertise.

Instead, the Delegated Law leaves more freedom to the judge, reducing the scope of the reform. In fact, with the provision of *'free appraisal'* only, it has become clear that the judge is not only free to deviate from the expert's opinion, but can also order a technical consultancy without *ex novo* constraints and appoint a person other than the mediation expert as technical advisor.

The mention of free assessment also denotes the intention of the delegating legislature to consider the expert's report as evidence in the proper sense; the expert's report may also be used for the ascertainment of facts – and alone ground the decision, like other free evidence – to the same extent that the use of 'expert witnesses' is permitted.

The activity of out-of-court instruction in the context of assisted negotiation

The Delegated Act proposes to provide, within the scope of the assisted negotiation procedure, when the parties expressly provide for it in the negotiation agreement, *"the possibility of carrying out, in compliance with the principle of cross-examination and with the necessary participation of all the lawyers assisting the parties involved, preliminary investigation activities referred to as 'out-of-court investigative activity', consisting in obtaining statements from third parties on facts relevant to the subject-matter of the dispute and in requesting the opposing party to declare in writing, for the purposes of Article 2735 of the Civil Code, the truth of facts unfavourable to it and favourable to the requesting party".*

The Delegated Act also provides for "the usability of the evidence gathered in the course of the out-of-court investigation in the subsequent proceedings having as their object the ascertainment of the same facts and commenced, resumed or continued after the failure of the assisted negotiation procedure, without prejudice to the possibility for the judge to order its renewal, making the necessary amendments to the Code of Civil Procedure".

The reorganization and simplification of the regulation of tax incentives

With regard to the reorganization and simplification of the discipline of tax incentives, the Delegated Law allocates EUR44 million for 2022 and EUR60.6 million from 2023; it also provides for *"a monitoring of compliance with the expenditure limit for the measures envisaged which, in the event of any deviation from the aforesaid expenditure limit, provides for a corresponding increase in the unified contribution"*; these resources should be used to

- increase the exemption from registration tax provided for in Article 17 of Legislative Decree 28/2010;
- increase the tax credit under Article 20 Legislative Decree 28/2010 by simplifying the procedure for recognition;
- finance the extension of legal aid to mediation (as well as to assisted negotiation);
- provide mediation bodies with a tax credit commensurate with the fees not payable by those eligible for legal aid.

With reference to the exemption from registration tax, the current regulation (Article 17 of Legislative Decree 28/2010) provides that "*the minutes of the agreement are exempt from registration tax up to the value limit of EUR50,000, otherwise the tax is due for the exceeding part".*

The Delegated Law does not indicate the extent to which the exemption of the minutes of the agreement from registration tax is to be increased, however, both the report of the Luiso Commission and the technical report submitted to the Parliament (Dossier 225/1 relating to DDL no. 1662) assume it will double, from the current EUR50,000 to EUR100,000.

On the other hand, with regard to the tax credit, the enabling act provides for a simplification of the procedure for granting the tax credit and an increase in the amount that will have to be matched. This includes:

- the remuneration of the lawyer assisting the party in the mediation procedure, within the limits set by professional parameters;
- the unified contribution paid by the parties in the event that the proceedings are terminated following the conclusion of the mediation agreement; and
- the reform of the costs of initiating mediation proceedings and the fees payable to mediation organizations.

Finally, the enabling act provides for the "extension of legal aid to mediation and assisted negotiation procedures".

Legal and regulatory updates

CHIARA CIMARELLI, INA DOCI

A. Communications reminding life insurance undertakings of AML reporting obligations

On 23 May, the Italian Insurance Supervisory Authority (IVASS) published two communications reminding life insurance undertakings of AML reporting obligations.

FIRST COMMUNICATION

The first communication is addressed to ***all Italian insurance undertakings and branches of UE/EEA undertakings transacting life insurance business in Italy***, and requires them to assess their risks of money laundering and terrorist financing.

As of 2021, the aforementioned insurance undertakings and branches have been required to transmit by **30 June 2022** the relevant information (only if the risk profile has materially changed compared to the 2020 financial year) based on the instructions provided by IVASS through the Letter to the Market of 16 July 2021, which can be found (only in Italian) at the following link: *https://www.ivass.it/normativa/nazionale/secondaria-ivass/lettere/2021/lm-16-07-144828-ita_e_rapp/144828_ITA_Rappr..pdf?language_id=3*

The Annex to the Letter to the Market mentioned above is available at the following link: *https://www.ivass.it/media/avviso/imprese-italiane-antiriciclaggio-2022/?com.dotmarketing.htmlpage.language=1*

SECOND COMMUNICATION

The second communication is addressed to all insurance undertakings whose head offices are in an EU or EEA member State which pursue business in Italy under the freedom to provide services regime, which are required to annually submit information on insurance activities carried out in Italy to IVASS, in order to allow the latter to assess the risks of money laundering and terrorist financing inherent to the insurance distribution.

The aforementioned undertakings, therefore, have been required to provide to IVASS, by **30 June 2022**, the information mentioned in the Letter to the Market of 16 July 2021 (available, both in Italian and English, at the following link: *https://www.ivass.it/normativa/nazionale/secondaria-ivass/lettere/2021/lm-16-07-144842_lps/144842_LPS.pdf?language_id=3)*

The Annex to the Letter to the Market can be found at the following link: *https://www.ivass.it/media/avviso/anti-money-laundering-foreign-enterprises-2022/?com.dotmarketing.htmlpage.language=3*

B. IVASS clarifies rationale of the upcoming reforms of life and insurance based investment products

IVASS has recently published a series of slides illustrating the rationale of the upcoming reform of insurance investment products.

The slides, only in Italian and which can be viewed at the following link (*https://www.ivass.it/pubblicazioni-estatistiche/pubblicazioni/att-sem-conv/2022/consumatori-11-05 – 2022/Incontro_Associazioni_Consumatori_12052022.pdf)*, summarize the main points of the documents (no. 1 and 3/2022) put in consultation by the Italian insurance regulatory authority on, respectively, life and insurance investment products, whose consultation ended on 9 June.

With regard to unit linked products, IVASS clarifies that the main points of the document put in consultation (Document no. 3/2022, Document 3) are the following:

- Addressees of the Document: IVASS specifies that EU companies (both under the right of establishment and the freedom to provide services regimes) are included and therefore subject to the contents of the Document, in order to assure the same level playing field for Italian consumers;
- Investments: the Italian Authority clarifies that a reform in the classes of assets in which unit linked policies can be invested was necessary. With Document 3, the aim is to align the regulation of the underlying assets of unit linked policies to the discipline in matter of sale of OICVM to retail clients in the financial sector. Therefore, policyholders should not be allowed to have their policies invested in OICVM whose risk is higher than the risk borne by the retail purchasers

of OICVM. More in detail, investments for internal funds will be allowed, among others and in particular, only in listed financial instruments, monetary financial instruments and financial instruments which are highly liquid. Investment in non-listed financial instruments will be possible up to 10%, whereas investment in raw materials, metals or precious metals or financial instruments representing them will not be allowed. Investment in external funds shall follow the same rules established by the Bank of Italy and applicable to the funds eligible for collective investment management;

- Costs: Document 3 aims at illustrating costs related to unit linked policies with major clarity. In particular, management commissions will have to be more transparent, whereas overperformance commissions will be subject to the same rules applied by ESMA in this respect. More generally, costs applied to the assets of the internal fund shall have to guarantee that the value for money is in any case complied with, whereas for linked OICR ("OICR collegati", in Italian), the Authority requires that management fees can be applied, provided that the overall remuneration perceived by the fund manager is previously deducted;
- Demographic risk: IVASS clarifies that the level of the demographic risk should be indicated autonomously by the undertakings. The decision regarding the demographic risk level applied to the policy should be the outcome of an internal process of the fundamental functions of the insurer, with a relevant role exercised by the Compliance function. Lacking any indication, also at case law level, on the level of demographic risk that may be considered sufficient, IVASS states to have indicated in Document 3 two possible alternatives:
  - Insurers can provide a guarantee of capital to be paid in case of death, to be benchmarked to a significant portion of the premium paid; or
  - Insurers can liquidate a death benefit which is at least equal to the higher of the capital assured and the investment value of the policy increased by a percentage which must be indicated in the policy.

With respect to index linked products, IVASS clarifies that Document 3 aims at providing new rules for indexes, which must be adequately diversified, must be based on benchmarks adequate to the market to which they refer, must have an adequate frequency of calculation and be based on suitable methodologies. Indexes must also be subject to an adequate regime of publication.

Finally, as for with profit products (so called "Gestioni Separate", in Italian), with Document no. 1/2022 IVASS is thinking of extending the discipline in matter of fondo utili to the insurance policies already in force. As anticipated, Documents 1 and 3 remained in consultation until 9 June 2022. Comments may be submitted to regolamentazionelinked@ivass it (for unit and index linked products) and to prodottivita@ivass.it (as for life insurance products, in general and, in particular, Gestioni Separate).

C. IVASS publishes Regulation 50/2022 on transmission of data on premium collection in Italy by general insurers

On 4 May, Italian Insurance Regulatory Authority (IVASS) published Regulation no. 50/2022 regarding communication to the Authority of data on premiums collected through intermediaries or through the agencies at the undertaking's premises (attività direzionale).

Based on the said Regulation, which will enter into force the day following its publication in the Italian Official Gazette, all insurance companies transacting non-life insurance business in Italy – including domestic ones and foreign, both EU and Extra-EU, running business under the right of establishment or the freedom to provide services regimes – are requested to send IVASS information regarding the activity carried out in Italy by 30 June each year.

In particular, undertakings transacting classes 10 (MTPL), 13 (General liability) and 15 (Suretyship) are requested to communicate data regarding premiums collected through intermediaries and through "attività direzionale", with evidence of the premium collection and of the policies distributed, by filling in the section named "Intermediaries" which can be found in the document provided for by article 28-sexies of the Regulation issued with the aim of implementing the legislative decree dated 21 November 2007, no. 231.

Data will be transmitted based on the instructions that IVASS will release by 30 November each year, except for the data related to year 2021, in respect of which undertakings are requested to refer to the relevant Letter to the Market already published by IVASS.

For groups, the ultimate controlling company shall send the relevant data to IVASS referring to both the group and each of the companies.

Undertakings operating in freedom of services regime shall be allowed to send data by making use of the electronic certified mail: in particular, they shall be allowed to use the electronic certified email address used with the Sistema Interscambio Flusso Dati ("SID") in place with the Italian Tax Authority or they shall be allowed to delegate an intermediary to send such data via its certified email address. Also use of the ordinary email address is allowed, where the undertaking has no electronic email address.

For companies doing business in Italy under the right of establishment regime, use of the certified electronic address of the branch is allowed.

D. IVASS invites insurers to consult the FAQs of the European Commission concerning the sanctions adopted following Russia's military invasion against Ukraine

On 5 April 2022, the Italian Insurance Authority (IVASS) published on its website an invitation to all insurers to consult the FAQs of the European Commission concerning the sanctions adopted following Russia's military invasion against Ukraine.

The European Commission has divided all sanctions in place as of today in the following fields:

- Horizontal:
  - General Question; and
  - Circumvention and due diligence.
- Individual financial measures;
- Finance and banking:
  - Central banks;
  - Crypto assets;
  - Deposits;
  - Euro-denominated banknotes;
  - Euro-denominated securities;
  - Trading;
  - SWIFT;
  - Insurance and reinsurance; and
  - Refinancing restrictions.
- Trade and customs:
  - Export-related restrictions;
  - Luxury Goods;
  - Custom related matters;
  - Financial Assistance; and
  - Donetsk and Luhansk oblasts.
- Other fields:
  - Aviation;
  - Restriction on Russian State-owned media; and
  - Intellectual property rights.

Such FAQs, divided in the aforementioned fields, can be viewed at the following link. *https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-invasion-against-ukraine_en#finance*

In particular, the FAQs related to Insurance and Reinsurance are available at the following link. *https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/faqs-sanctions-russia-insurance_en.pdf*

E. EIOPA issues recommendations from EIOPA's Insurance Stress Test

EIOPA, on 21 March 2022, issued its recommendations to supervisors and insurers based on the learnings and experience of EIOPA's 2021 Insurance Stress Test.

The recommendations fall into three categories:

- Regarding vulnerabilities identified during the stress test, EIOPA emphasizes the need to decrease undertakings' dependence on transitional measures. To address other vulnerabilities, national competent authorities (NCAs) should assess whether the risks that caused a sizeable drop in (re)insurers' SCR ratios are adequately managed. NCA's should also verify that undertakings allocate sufficient resources to properly assess risk not covered in the Solvency II reporting framework;
- EIOPA recommends that NCAs investigate why certain entities chose not to assess potential management actions, while for those insurers that did assess them, EIOPA suggests closer analysis of the viability and reported impact of the management actions applied. NCAs should also evaluate how the decision-making processes, the ability to gather relevant information and the models used would allow them to rapidly respond to adverse developments; and
- EIOPA included an individual undertaking-specific recommendation inviting the NCA concerned to take supervisory actions, including on-site inspections if needed, to further improve the validation process and the quality of data received from the participant.

F. IVASS Consultation Paper no. 5/2022

From an Italian point of view, on 17 March 2022 IVASS published Consultation Paper no. 5/2022 on a draft regulation (Draft Regulation) laying down provisions concerning the setting up of an online comparison system, called PREVENTIVASS, between insurance undertakings operating in Italy in the motor liability insurance class, pursuant to in Articles 132-bis and 136, para. 3-bis of the Code of Private Insurances (Code).

The Draft Regulation consists of twenty one articles, it is divided into 3 Parts and it has one Annex.

Part I outlines that the Draft Regulation applies to:

- insurance undertakings having legal seat in Italy and carrying out motor liability business;
- branches of non-EU insurance undertakings carrying out motor liability business in Italy;
- insurance undertakings having legal seat in an EEA country carrying out motor liability business in Italy under the freedom to provide services or right of establishment regimes;
- insurance intermediaries registered in section A, D and F of the Register of Insurance and Reinsurance Intermediaries (RUI) who distribute motor liability insurance contracts;
- EEA insurance intermediaries distributing motor liability insurance contracts.

The Draft Regulation specifies also in Part I that the estimate for the motor liability insurance contract that is available through PREVENTIVASS refers only to the base contract.

Part II describes the scope of PREVENTIVASS. In fact, through PREVENTIVASS:

- the intermediary acquires for the consumer the estimates of the base contract of all insurance companies for which he/she distributes; and
- the consumer can compare the premium relating to the base contract of all insurance companies operating in Italy.

Consumers and intermediaries can access PREVENTIVASS either through the website ***www.PREVENTIVASS.com*** (which provides the estimates of all insurance companies) or through the insurance companies websites (in which case the consumer/ intermediary can access only that specific insurance company's base contract estimate).

To access PREVENTIVASS, consumers are not required to register, while insurance companies must register following the instructions provided in Annex 1.

If the consumer or the intermediary requires it, the insurance company shall provide, other than the estimate, further additional clauses applicable to the base contract.

In order to comply with Article 132-bis of the Code, the insurance company shall, among others:

- guarantee an online response to PREVENTIVASS within 30 seconds from the intermediary/consumer's request;
- provide PREVENTIVASS with a single offer for the cover of the risks of the base contract, with the additional covers if requested by the consumer;
- communicate to PREVENTIVASS of any change to the additional clauses; and
- provide the hyperlink to its website to access to the precontractual documentation and to the General Conditions of insurance.

On the other hand, intermediaries shall:

- access PREVENTIVASS and insert the necessary information required for the estimates;
- access PREVENTIVASS and insert the required information for the estimates in the case in which the consumer has already utilized PREVENTIVASS by himself/herself, but has requested the intermediaries' help to conclude the contract; and
- collect and store the customer's declaration in which he/she declares that he/she has received the information on the premiums of the base contracts, in a case in which the customer has purchased a motor liability insurance contract.

Furthermore, the Draft Regulation regulates all the characteristics and validity of the estimates, and the terms and modalities in which such estimates shall be provided to PREVENTIVASS.

Part III regulates the modification that will occur to ISVAP Regulation no. 23/2008 once the Draft Regulation comes into force, as well as its entry into force, once ended the consultation phase, the day following its publication on the Italian Official Gazette.

G. ESAs warning on crypto-assets

On 17 March 2022 the European Supervisory Authorities (EBA, ESMA and EIOPA – the ESAs) issued a warning advising consumers on the risks of crypto-assets. In particular, the ESAs warned consumers that many crypto-assets are highly risky and speculative, and they are not are suited for most retail consumers as an investment or as a means of payment or exchange.

In fact, the ESAs underlined the possibility for consumers losing all the invested money because of the following risks:

- extreme price movements;
- misleading information;
- absence of protection;
- product complexity;
- fraud and malicious activities;
- market manipulation, lack of price transparency and low liquidity; and
- hacks, operational risks and security issues.

Furthermore, consumers should be aware of the lack of recourse or protection available to them, as crypto-assets and related products and services typically fall outside existing protection under current EU financial services rules.

In addition, since there is a growing consumer activity and interest incrypto-assets (including the so-called virtual currencies and the new types of crypto-assets and related products and services, such as non-fungible tokens (NFTs), derivatives with underlying crypto-assets, ***unit-linked*** life insurance policies with underlying crypto assets and decentralised finance (DeFi) applications, that claim to generate high and/or fast returns), the ESAs are particularly concerned that an increasing number of consumers are buying those assets with the expectation that they will earn a good return without realizing the high risks involved.

Please note that in September 2020, the European Commission presented a legislative proposal for a regulation on markets in crypto-assets, however consumers will not currently benefit from any of the safeguards foreseen in that proposal until it is adopted and applies to all member states.

Therefore, since there is no protection at an EU level for consumers, ESAs advise to be careful and attentive.

H. Consultation Paper no. 4/2022

On 16 March 2022, the Italian Insurance Supervisory Authority (IVASS) published Consultation Paper no. 4/2022 for a draft regulation on the use of external agents for mystery shopping activities in order to ensure consumers protection (DraftRegulation).

The Draft Regulation implements article 144-bis of the Italian Code of Consumers and Regulation (EU) 2017/2394, which gives all European supervisory authorities specific investigation powers to carry out anonymous purchases to verify whether consumers are duly protected and if regulation infringements occur.

The Draft Regulation contains 8 articles and it is divided into 3 Parts.

Part I defines *mystery shopping* as the activities, pursuant to article 9, paragraph. 3(d) of Regulation (EU) 2017/2394 of the European Parliament and of the Council, conducted in *incognito* by IVASS or by an external agent appointed by IVASS to purchase insurance products and services, also online or via telematic channels (so-called *mystery surfing*).

Furthermore, the individuals who carry out mystery shopping activities are:

- the "mystery shopper"; or
- the "external agent" appointed by IVASS.

Mystery shopping activities are carried out towards:

- insurance undertakings having their legal seat in Italy;
- EU undertakings carrying out their business in Italy under the freedom to provide services and right of establishment regimes;
- branches of non-EU undertakings operating in Italy;
- insurance intermediaries registered in the Register of Insurance and Reinsurance Intermediary ("RUI") and EU intermediaries registered in the List Attached to the RUI; or
- individuals, entities and organizations that carry out activities partially connected to the operating cycle of insurance undertakings as provided by article 6, paragraph 1(c) of the Italian Code of Private Insurances.

Part II regulates the methods in which mystery shopping activities are carried out.

In particular, IVASS, as stated above, may appoint external agents to carry out specific mystery shopping activities, which are defined at the moment of the appointment. All information gathered by the external agent and by the mystery shoppers are privileged and confidential.

IVASS requires the external agents appointing the *mystery shopper* to possess specific characteristics of professionalism, experience and independence, as well as a structured organization that allows them to carry out the mystery shopping activities.

Moreover, in carrying out mystery shopping, the external agent must, among others, comply with IVASS guidelines and instructions.

Part III finally states that the Regulation, once the consultation phase has ended, will enter into force the day following its publication on the Italian Official Gazette.

I. Consultation Paper no. 3/2022

On 11 March 2022 the Italian Insurance Supervisory Authority (IVASS) launched Consultation Paper no. 3/2022 on a draft Regulation (Draft Regulation) laying down provisions relating to linked contracts according to article 41, paragraphs 1 and 2 of the Code of Private Insurances (Code).

The Draft Regulation applies to:

- insurance undertakings having their legal seat in Italy;
- EU undertakings carrying out their business in Italy under the freedom to provide services and right of establishment regimes;
- branches of non-EU undertakings operating in Italy; and
- the ultimate Italian controlling companies of insurance groups.

The Draft Regulation contains 40 articles, and it is divided into four parts and two annexes.

Part I contains, in particular, certain indication on the demographic risk, in respect to which no minimum threshold is provided. However, article 5 of the Draft

Regulation indicates that insurance undertakings must assume an actual commitment to determine and liquidate benefits, whose value must depend from the demographic risk. Moreover, consistency between the demographic risk and the features of the product as well as the target market must be assured.

Part II is divided into 6 Sections regarding *unit-linked* policies:

- Section I, apart from defining unit-linked policies as insurance policies which are linked to either internal funds or external ones, lists a number of provisions regarding the regulation of the internal fund for the unit-linked policies linked to such an internal fund. In particular, the administrative body of the insurance undertaking (including the one of foreign insurance companies) shall approve the creation of the internal fund together with the relevant internal regulation, which must be drafted in compliance with the following principles:
  - clarity;
  - completeness;
  - synthesis; and
  - consistency.
- Section II covers the internal fund regulation, which becomes an integral part of the terms and conditions of policy and as such is delivered to the policyholder, must have the minimum content provided for by Article 8 of the Draft Regulation, which includes, among others, ***(i)*** the criteria used for the evaluation of the assets underlying the internal fund (letter f) of Article 8) and ***(ii)*** the types and the qualitative and quantitative limits of the assets in which the internal fund is invested (letter g) of the aforementioned article).

As per article 9, the unit evaluation must take place at intervals not exceeding one week for funds regarding insurance policies with no social security finalities ("*fondi collegati a prestazioni non previdenziali*") and one month for the funds linked to policies having social security purposes ("*fondi collegati a prestazioni previdenziali*").

Expenses shall be applicable to the extent that they are strictly linked to the fund or strictly functional to the fund's activities or when provided by legislative or regulatory provisions.

Management fees shall be applied on condition that the fund includes "*significant units of external funds*" and provided that the insurance company runs a systematic management service. Overperformance commissions shall be applied consistently with EU guidelines and Bank of Italy regulations in matter of performance fees applicable to UCITS.

- Section III covers the types of investment assets, applicable also to EU companies doing business in Italy under the right of establishment and freedom to provide services regimes, which are divided based on macro categories of assets (listed financial instruments, non-listed monetary instruments, listed and non-listed derivatives, non-listed financial instruments, AIFS, UCITS and other permissible assets). For each of the above macro categories the Draft Regulation refers to the Regulation on collective asset management released by the Bank of Italy or to the Annexes of the Consolidate Financial Act, as regards the features of such financial instruments.

In this case, it would seem that the Draft Regulation does not take into account the *home country authority principle*, based on which it is the regulatory authority of the country where the company is established that sets the rules of investment.

- Section IV: Articles from 23 to 31 contain a series of investment limits.

  In addition to the general limits (no short-selling, no investment in raw materials, metals, etc. or relevant representative certificates), investment in financial instruments issued by the same issuer cannot exceed 5% of the overall assets of the internal fund, apart from specific exceptions. Investments in bank deposits cannot exceed 20% of the overall assets deposited with one bank, while investments in OTC derivatives cannot trigger an overall exposure vis à vis the same issuer higher than 10%, if the counterparty is a bank, and 5% in all other cases. Investments in financial instruments issued by the same issuers or by subjects belonging to the same group cannot be higher than 20% of the overall fund's assets.

  Finally, investments in open AIFS or UCITS, non-reserved, listed or non-listed, cannot exceed 10% of the internal fund's assets; investment in part of the same UCITS shall not be higher than 20%, while in case of non-reserved open AIFS, investment cannot be higher than 10%. Exposures vis à vis derivates shall not exceed the overall net value of the internal fund.

- Section V regulates the investments of insurance contracts whose benefits are directly linked to the value of UCITS shares, in particular by stating that they shall have the characteristics contained in the Regulation on collective asset management issued by the Bank of Italy.

  Where the policy is linked to more than one UCITS, the general terms and conditions of the policy shall define with clarity the composition of the basket of funds and the type of risk arising from that basket. Management fees shall be applied only where the insurance company operates an actual management service, which includes at least monitoring activity based on an investment strategy consistent with the risk/performance goals identified in the general terms and conditions. In this case, management fees shall be levied through a reduction of the number of units attributed to the contract.

- Section VI provides for the regime of asset and accounting separation activities of each internal fund or external UCITS.

Part III regulates *index linked* policies, by providing a clear indication of the indexes to which the policy can be linked (such indexes being only those related to shares, other financial indexes or inflation indexes) and an exhaustive list of the features that such indexes shouldhave (see article 35).

Part IV contains the final provisions, which expressly states that the Draft Regulation applies only to linked contracts concluded after the entry into force of the Draft Regulation.

Insurance companies are nonetheless requested to adopt measures in order to align the internal fund's regulations to the provisions contained in the Draft Regulation in six months from the entry into force of the regulation.

Starting from the entry into force of the regulation, following the end of the consultation phase of the Draft Regulation, ISVAP Circular no. 474/2002 shall be abrogated.

Finally, **Annexes 1 and 2** to the Draft Regulation contain the scheme for reporting the financial and income situation of the internal funds.

The Draft Regulation is available, only in Italian, at the following link: *https://www.ivass.it/normativa/nazionale/secondaria-ivass/pubb-cons/2022/03-pc/index.html?com.dotmarketing.htmlpage.language=3*

Case law updates

ANGELO BORSELLI, GIORGIO BARONCHELLI, ELISA CUCCURULLO,
LEOMARINO DANIELE MORO, ALESSANDRA PLOCCO

Italian Supreme Court, February 10, 2022, n. 4357

Late payment of the premium instalment and indemnification of the claim occurred during the suspension of the policy

The acceptance by the insurer of the premium paid late does not constitute a tacit waiver of the suspension of the insurance contract provided for by Article 1901 of the Italian Civil Code and does not imply that the insurer agrees to indemnify claims occurred during the period of suspension of coverage.

Italian Supreme Court, September 23, 2021, n. 25849

Insurance contract interpretation

The insurance contract needs be drafted in a clear manner. If the contract is drafted unilaterally by the insurer and a contract clause is unclear, its meaning must be established applying the contra proferentem principle set by Article 1370 Italian Civil Code, since the insurer, as the drafting party, should be considered responsible for the lack of clarity of the text, while the insured's reliance on her interpretation of the contract should be protected.

Italian Supreme Court, April 2, 2021, n. 9205

Accident insurance and burden of proof

While in life insurance contracts the beneficiary meets her burden of proof showing the existence of the contract and the death of the insured, in accident insurance the beneficiary must prove not only the death of the insured (and the existence of the contract) but also that the death was due to an accident.

Court of Monza, January 31, 2022

Limitation of coverage in the case of joint and several liability

The clause of a medical malpractice insurance policy that, in the case of joint and several liability of the insured, limits coverage to the share of the insured's liability, is null and void because it invalidates the insurance contract's function of holding the insured harmless.

Court of Turin, January 19, 2022, n. 184

COVID-19 infection and accident insurance

COVID-19 infection qualifies as a "fortuitous, violent and external" accident that is covered under the policy in the absence of specific exclusions.

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