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DeRisk Newsletter

DLA PIPER

Contents

Insurtech

The Insurability of AI risk: A broker's perspective

Giacomo Lusardi and Karin Tayel

In the previous issue of DeRisk, we examined the complexities of AI risk and discussed how companies can get insurance coverage in this area. This time, we spoke with leading insurance brokers to get further industry insights. Alessandra Corsi and Rossella Bollini from Marsh gave their perspective on the nuances of AI risk coverage and the evolving role of insurance in mitigating AI-related liabilities.

1. From the broker's perspective, how is the insurance market responding to the coverage of AI risk?

The insurance market, especially since the GenAI explosion, has started to monitor the rise of new risks related to the development and use of AI solutions, both to anticipate the demands of insureds and to start to efficiently manage exposure across existing portfolios. The insurance market is still in an "observatory" stage. Other than for a very few cases, specific ad hoc AI solutions are not yet available.

Based on Marsh's global perspective, in the US and in selected European countries there's more attention around the topic: insureds see the challenge that AI solutions bring, wondering how to transfer their AI residual risk to the insurance market and pushing insurers to deliver answers and propose solutions. So far, the Italian market – both from a supply and demand angle – hasn't developed any meaningful initiatives. But we expect this to change in the near future with carriers looking at finding value-added solutions for their clients.

2. How is AI risk exposure transferred? Is it possible to rely on traditional products?

Currently, there's only one ad hoc insurance product for AI risk, distributed by a leading player in the reinsurance market. Beyond this, clients looking for coverage can explore other established product lines such as Cyber, Professional Indemnity, Crime, Intellectual Property and Product Liability where typically claims and/or circumstances related to AI are not yet specifically excluded. Cover seems to be afforded on a "silent" basis: not affirmatively covered and not explicitly excluded. To give a few examples, if training data and input data can be captured by the model and leaked in the model outputs causing a data breach, the cyber policy could cover it; again, if a fraud is conducted using deepfake, the crime policy could cover it. Aiming to curb the level of uncertainty, AI affirmative endorsements on cyber and crime policies are very slowly being released. But at the moment this isn't the norm.

3. What risks do you think are potentially insurable with an AI policy?

Insurability is a complex topic, as it depends on the exposure, on the business conducted and on the insured's risk appetite. Depending on the situation, you could decide to cover first party damages – insuring the performance of self-built AI – or potential third-party liability profiles, either contractual or non-contractual. Depending on the business conducted by the insured, it might be relevant to cover risks from hallucination and false information, privacy infringement, intellectual property violations or unfair or biased output.

It goes without saying that a certain degree of tailoring is required to shape a product that fits the insured's needs.

4. Are traditional underwriting methods still relevant and applicable in the AI world?

They are still relevant, but in a partial way. We can compare it with the cyber risk underwriting process. Although it's a complex and nuanced risk, the insurance market has settled on the use of questionnaires, sometimes combined with perimetral scanning or risk dialogues: as of now, it is a linear path. For AI risk, it may not be as straightforward. To quantify the risk, it will be necessary to identify the underwriting information on a case-by-case basis (deployer, user, type of AI involved) to be evaluated with data on model training and post-deployment controls.

The topic of quantifying damage in the event of a claim is also very complex: consider the case of an AI product provided to banks to recognize legitimate transactions from frauds. In this case, the provider would want to buy a policy to cover situations of underperformance of the product. To avoid difficulty in quantifying the loss, it may be necessary to set a threshold eg guarantee that the tool model will catch at least 99% of all fraudulent transactions, and if the AI fails to deliver as promised, the insurance company will pay.

5. Have you experienced the notification of any claims under AI policies or, anyway, related to damages caused by AI? If yes, which type of claims?

At Marsh, most of the claims we've seen involving the use of GenAI are in the domain of fraud. This refers to fraudulent transfer of funds obtained by creating the false belief in employees that they're complying with legitimate requests from internal parties in the company. As of now, claims that fall in this category are generally notified under crime policies. GenAI is also used to refine phishing attacks (currently, one of the main vectors of ransomware), making them more credible and increasing the success rate.

6. What are your predictions for the near future?

The path will likely be the same as for cyber risk: eventually, insurers will need to quantify and monitor AI exposure in traditional insurance policies to the extent that it could represent a significant unexpected risk to their portfolios. To do so, the reinsurance markets and Lloyds of London might start imposing AI exclusions on cyber, professional indemnity, crime and other traditional products, creating a gap that will need to be filled. By that time, we expect AI-specific insurance products to be ready to perform, supported by a defined and replicable underwriting process and a consistently predictable loss quantification mechanism.

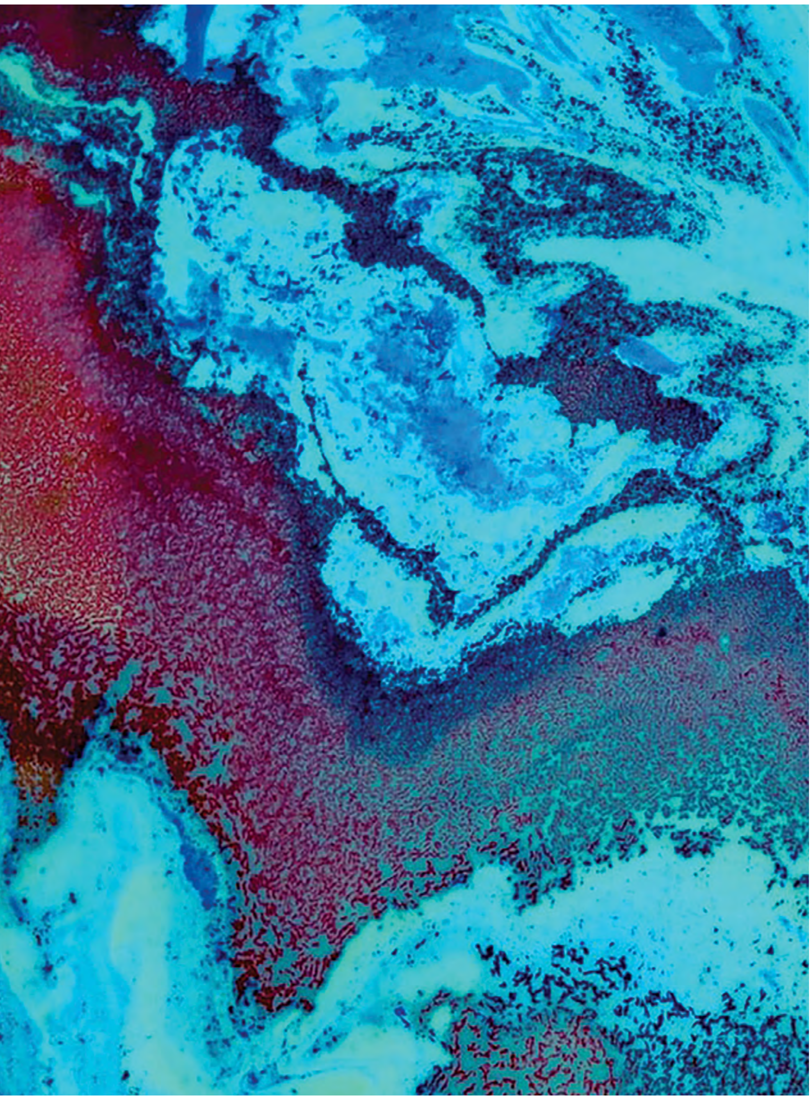
ESG

New EU Directive on the protection of the environment increases offenses under criminal law

By Alice Villari and Edoardo Maestri

Introduction

With the exponential increase in crimes damaging the environment, the EU has stepped up to the plate and approved the new Directive (EU) 2024/1203. It repeals Directives 2008/99/EC and 2009/123/EC and was formally adopted by the Council of the European Union on 26 March 2024. It was published in the Official Journal of the European Union on 30 April 2024.[1]



The legislation is deemed essential because of the catastrophic consequences caused by unscrupulous conduct that's rarely effectively addressed by the justice systems of Member States. The new directive aims to confront profit-driven activities in Europe that harm the environment.

The new legislation:

- provides a definition of an ecosystem;
- lists new environmental offences;
- identifies special qualified offences;
- establishes aggravating and mitigating circumstances;
- provides tailor-made penalties (including ancillary penalties binding also legal entities); and
- provides for a prescription period aimed at optimizing the prosecution of environmental crimes.

As is clear from Article 1, the Directive has a minimum harmonization intent by leaving wide implementation options to Member States. This may provide for more stringent provisions in tackling environmental crimes in transposing the Directive.

[1] The legislative process unfolded as follows: on 15 December 2021, the European Commission put forward a proposal to amend the 2008/99/EC Directive. Subsequently, on 16 November 2023, the European Parliament and the Council came to a political agreement regarding the Commission's proposal. The Parliament approved at a large majority the new Directive on 27 February 2024, and the Council officially adopted it on 26 March 2024.

Defining an ecosystem

Article 2 of Directive (UE) 2024/1203 reports an all-encompassing definition of an ecosystem from a criminal law standpoint. According to the Directive, an ecosystem is a dynamic complex of communities of plants, animals, fungi and microorganisms and their nonliving environment that, through their interaction, form a functional unit, and includes habitat types, species habitats and species populations.

Recital 13 of the Directive states that an ecosystem should also include both ecosystem services, through which an ecosystem contributes directly or indirectly to human well-being, and ecosystem functions, which refer to the natural processes of an ecosystem.

The fact that there's a definition of ecosystem and frequent references to it in the criminal offenses punished by the new Directive is a great innovative feature. It's no longer only the depletion of individual environmental resources that's considered harmful to the environment, but also how environmental resources interact with each other. For example, reckless and unregulated withdrawal of surface water can harm the animal and plant species that live on the bordering land.

This means it's possible to punish not only individual harmful actions but also actions that, although apparently referring to a single environmental resource, have much broader repercussions because of the interrelationships between living species and the environment.

New environmental offences

The essential element of the legislation is that it identifies a whole new set of environmental crimes, often linked to other specific European regulations. The list of environmental offences has doubled under European criminal law, from 9 to 18 compared to the former Directive 2008/99/EC.

Among the offences provided for by Article 3 of the new Directive, the following stand out in terms of relevance and probable frequency of applicability:

- Discharging, emitting, or introducing (including through the placing on the market of a product) of a quantity of matter, substance, energy, or radiation into the air, soil or water.[2]
- Placing on the market of chemicals banned or restricted by the REACH Regulation[3] or in a manner that does not comply with the CLP Regulation[4] or the Persistent Organic Pollutants Regulation.[5]
- Realising projects without the required environmental authorisation (ie an Environmental Impact Assessment (EIA)), including evaluation of all the aspects potentially affecting the environment.
- Unauthorized or non-compliant management of waste if it's in large quantities of hazardous waste or, being non-hazardous waste, could cause death or serious injury to persons or significant damage to the environment or the ecosystems.
- Unauthorized or non-compliant transnational shipment of waste with reference to the new Regulation (EU) 2024/1157.[6]
- Illegal timber trafficking and placing products or raw materials associated with deforestation or forest degradation on the European market within the meaning of Regulation (EU) 2023/1115.[7]
- Discharging pollutants into the sea by ships outside the cases permitted by law (eg discharge of wastewater that has been comminuted and disinfected in accordance with a system approved by the authority at a distance of more than three miles from the coast or even in the absence of comminution and disinfection if more than 12 miles from the coast, subject to the requirements of proper storage, discharge while underway, and the use of a certified wastewater treatment system).
- Unauthorized or substandard extraction of surface water or groundwater, if it causes or could cause significant damage to the ecological status of surface water bodies or the quantitative status of groundwater bodies.
- Poaching, possession or commercialization of protected wildlife and plant species.
- Deterioration of a protected site habitat and any significant disturbance of protected species in protected habitats.

The Directive allows Member States to provide for specific offences other than those regulated under the Directive itself.

[2] This provision has been referred by the Rapporteur of the European Parliament to the phenomenon of PFAS pollution of soil and groundwater as an example, specifically mentioning the situation in the Veneto Region.

[3] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH).

[4] Regulation (EC) 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures.

[5] Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants.

[6] Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste.

[7] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, which covers a wide range of products, including wood, paper, beef, cocoa, coffee, soy, palm oil and rubber).

Almost all the stipulated offences, with the important exception of setting up facilities without the necessary environmental permit, can be integrated even if the relevant conduct occurred due to gross negligence, increasing the range of punishment.

According to Article 4 of Directive (EU) 2024/1203, these crimes can also be punished as attempts (with the exception of the implementation of a project without an EIA) and instigation, aiding and abetting.

Qualified offences

Article 3 (3) of Directive (EU) 2024/120, identifying specific instances aggravated by the extensive harm caused, provides for the special case of qualified offences. They're when the abovementioned offences factually:

- cause destruction to a large or valuable ecosystem (eg ecosystems capable of providing relevant ecosystem services useful for the replenishment of resources for humans or for their essentiality to natural balance, such as wetlands) or habitat of a protected site; or
- cause substantial damage, which is irreversible and/or lasting (eg damage that has long-lasting consequences to the point that the environmental resource cannot be restored even by anthropogenic remedial activities, such as environmental clean-up), to the abovementioned ecosystems or habitats.

This provision was adopted because environmental damage is often irreversible. And, while the damage may occur in a particular area, it can cause widespread damage to the ecosystem, harming the ecosystem and how it functions.

These qualified offences can be applied to each of the offences provided for in Article 3 of the Directive depending on the harm caused. They're comparable to so-called ecocide, a criminal figure that's already regulated by law in some Member States (eg France and Belgium) and is being discussed in international fora. In this sense, EU has become the first supranational regional body to criminalize cases of large-scale and serious destruction of the environment, comparable to ecocide.

Aggravating and mitigating circumstances related to the new offences

The new Directive provides for specific aggravating and specific mitigating circumstances.

For example, under Article 8 of new Directive, aggravating circumstances are provided whenever the offences:

- cause irreversible destruction or damage to an ecosystem;
- are committed in the context of a criminal organisation (so-called ecomafia); or
- cause substantial financial benefits or significant reduction in costs or expenses.

Mitigating circumstances are less peculiar with regard to the environmental law standpoint inasmuch as they concern phenomena of industrious repentance. According to Article 9 of Directive (EU) 2024/1203, a mitigating circumstance is when the offender restores the state of the environment (eg by remediation or environmental restoration) without being obligated to do so (eg by an authority's order compelling remediation) and before the beginning of a criminal investigation.

Penalties related to the new offences

Main penalties

Generally speaking, for natural persons (including business legal representatives and corporate executives), a minimum sentence of three to five years imprisonment will be imposed by transposing Member States for the environmental offences provided for by Directive (EU) 2024/1203.

There are very severe penalties for crimes characterized as particularly serious because of the consequences they've caused. If an environmental offence results in the death of a person, a maximum penalty of at least ten years is applied. For the qualified crimes as identified above, a maximum penalty of at least eight years is provided.

For legal entities (whenever the environmental crime is committed for the benefit and interest of the entity itself), pursuant to Article 6 of Directive (EU) 2024/1203, Member States must implement penalties that refer either to a percentage of worldwide turnover or to a fixed percentage:

- For certain offences (eg illegally releasing chemicals, implementing a project without an EIA, illegal waste management), the maximum fine cannot be less than 5% of the worldwide turnover or, alternatively, EUR40 million.
- For other offences (eg those related to wildlife trafficking and deterioration of a protected habitat or disturbance of a protected species), the edict ceiling cannot be less than 3% of the world turnover or EUR24 million.

Such large penalties for causing environmental crimes relates to the European "polluter pays" principle. According to this principle, the person responsible for the environmental damage has to remedy or pay compensation. Criminal law principles also state that a fine must be proportional to the offender's economic capacity.

Ancillary penalties

Directive (EU) 2024/1203 covers a whole range of ancillary sanctions, which Member States can impose along with the main sanctions.

Member States can impose ancillary penalties of restoring the environment (eg through remediation operations under Title IV, Part V of Legislative Decree 152/2006), if the damage is reversible, or of compensation for damage to the environment (pursuant to Part V-*bis* of Legislative Decree 152/2006), for irreversible damage.

Member States can also impose other ancillary sanctions, including:

- exclusion from access to public funding, administrative tenders and concessions;
- disqualification from holding an apical position in a legal entity (for natural persons);
- withdrawal of permits and authorisations;
- subjection to judicial supervision; and
- publication of the judgment of conviction.

Legal persons can also be subject to:

- temporary or permanent disqualification from engaging in a particular business activity;
- judicial orders of dissolution;
- closure of the premises used to commit the offence; and
- the obligation to establish due diligence systems to strengthen compliance with environmental standards (the latter provision must be read in light of the requirements in the new CS3D Directive).[8]

The instrumental assets and proceeds of the environmental offence can also be frozen or confiscated.

Prescription period

According to Article 11 of Directive (EU) 2024/1203 the prescription period for the prosecution of crimes is:

- **at least ten years** from when the offence was committed (or from when the authority discovers the offence) for offences punishable by a maximum sentence of at least ten years' imprisonment;
- **at least five years** from when the offence was committed (or from when the authority discovers the offence) for offences punishable by a maximum sentence of at least five years' imprisonment.

Conclusions

Member States have until 21 May 2026 to transpose the new Directive.

With specific reference to Italy, the Italian government has already provided for the transposition of Directive (EU) 2024/1203 within the European Delegation Law (*Legge di Delegazione Europea*), the draft law of which was approved by the Council of Ministers on May 24, 2024. At this stage, the bill will be submitted in the near future to the Parliament, which must approve it first in the House of Representatives (*Camera dei Deputati*) and then in the Senate. Following parliamentary approval, the government will have the delegated legislative power to issue a regulatory act that will substantively transpose the new Directive and provide for the relevant sanctions.

The environmental offenses referred to in the new Directive will almost certainly be transposed into Legislative Decree No. 231/2001. This will increase the cases where liability of legal persons can be triggered for causing damage to the environment from the perspective of the entity's economic benefit and advantage, through imposing administrative sanctions (that are substantially criminal).

[8] Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.

European Directive on mandatory due diligence on human rights and the environment

By Alice Villari and Edoardo Maestri

On 24 May 2024, the Council of the European Union formally adopted Directive 2022/0051, referred to as the Corporate Sustainability Due Diligence Directive (the CS3D).

CS3D introduces due diligence requirements for large EU and non-EU companies to account for the negative impacts of their activities on human rights and the environment.

The new regulation affects not only large enterprises but also the activities of their subsidiaries and business partners along the value chain.

Foreword

CS3D builds on a Commission proposal dating back to 23 February 2022, as part of the European Green Deal and the UN Sustainable Development Goals. The legislative path was marked by a long trialogue, which lasted throughout 2023, leading to the 14 December 2023 draft version. But the text of the draft was rejected by the Council on 28 February 2024 (as some Member States had "second thoughts," including Italy, France, and Germany).

The new version of the Directive, which was revised to ensure a narrowing of the scope of application in acceptance of the concerns raised in the first rejection of the text, was approved by the Council on 15 March 2024, and by the Parliament in plenary session on 24 April 2024, and then formally adopted by the Council a month later on 24 May 2024.

The Directive will have to be implemented by Member States within two years of its entry into force (ie 20 days after its publication in the EU Official Journal, which is already expected in the coming days).

The scope of application

The final version of CS3D saw a significant narrowing (almost 70%) of its scope compared to the draft version. The regulation only covers EU companies with at least 1,000 employees and a worldwide turnover of more than EUR450 million and non-EU companies with a net turnover of more than EUR450 million generated in the EU. Parent companies of groups reaching this size are also included. This contradicts what was envisaged in the proposed Directive, where companies with more than 500 employees and a worldwide net turnover of over EUR150 million were included.

The size thresholds are also relevant for the purpose of the time frame of applicability of the new Directive, which will be mandatory within:

- **Three years** after entry into force for EU companies with more than 5,000 employees and EUR1,500 million in worldwide net sales and non-EU companies with more than EUR1,500 million in net sales in the EU.
- **Four years** for EU companies with more than 3,000 employees and EUR900 million net worldwide turnover and for non-EU companies with more than EUR900 million net turnover in the EU.
- **Five years** for EU companies with more than 1,000 employees and EUR450 million net worldwide turnover and for non-EU companies with more than EUR450 million net turnover in the EU.

Compared to the late December 2023 version, the exceptions with reference to so-called high-risk operating sectors (eg oil, mining, agriculture, textiles and fishing) have also not been reintroduced. These sectors were covered in previous versions of the Directive so the latter could also apply to companies that, although below the size requirements, operated in sectors particularly at risk of social and environmental impacts.

As a result of these changes, the scope of the Directive includes only very large companies (representing about 0.5% of companies operating in the EU). However, CS3D will apply not only to large European companies but also to their subsidiaries and, in general, to the value chain, thus potentially also involving non-EU companies.

Obligations

CS3D consists of multiple human rights due diligence obligations, including:

- **identifying and assessing potential adverse impacts** on human rights and the environment (including mapping of its own operations, those of subsidiaries and business partners);
- **preventing and mitigating negative externalities** and minimising their effects (including by refraining from entering into business relationships with companies that have caused negative impacts as well as suspending and/or terminating existing business relationships);
- **integrating due diligence** into company policies and risk management systems (including providing a code of conduct describing the principles to be followed by the company and its subsidiaries);
- **stopping any negative impact generated** and the resulting remedial activity (restorative and/or compensatory) to be implemented;
- **monitoring** the effectiveness of implemented activities, including those implemented by subsidiaries and business partners;
- **providing intra-company complaint mechanisms** for aggrieved individuals;
- **external communication** of identified impacts and implemented measures (including through the sustainability report); and
- **aligning corporate policies with the Paris Agreement goals** of limiting global warming to 1.5°C by adopting annual transition plans for climate change mitigation, possibly to be included in the sustainability report.

To facilitate the implementation of complex due diligence activities, it is planned in the near future for the European Commission to implement: guidelines on best practices for conducting due diligence; helpdesks, through which companies can request information and support on how to fulfil due diligence obligations; and model contractual clauses to be included on a voluntary basis in business partners' contracts to adhere to parent company codes of conduct.

Sanctions and supervisory authorities

The Directive requires Member States to provide for appropriate administrative sanctions with reference to the violation of due diligence obligations. Specifically, there must be financial penalties of not less in the maximum edictal amount than 5% of the company's worldwide net turnover. The penalty should be applied taking into account:

- the severity of the violation and the impact
- any remedial and repentance activities;
- any investments undertaken *ex ante*; and
- any benefits gained or economic losses avoided as a result of the violation.

As an ancillary sanction, there's also the possibility of ordering the publication of the measure imposing the sanction with both the name of the responsible company and the nature of the violation made explicit.

To this end, the Directive requires states to establish supervisory authorities (to be included in a European network coordinated by the Commission) and suggests that national authorities already in charge of supervising financial intermediaries be designated for this purpose. The authorities are endowed with powers of investigation, reporting, documentary acquisition, inspection, and injunction as well as the ability to impose remedial obligations and impose sanctions.

Civil liability

Compensatory liability is provided for the case of a violation, whether intentional or negligent, of the due diligence obligations under CS3D, if actual damage to a natural or legal person results from the violation. If the violation was caused jointly by a company and its subsidiaries or business partners, liability is joint and several. In contrast, the liability of the target company is excluded if the damage was caused solely by business partners.

In this sense, having due diligence measures in place (even if they've been certified by independent third parties and/or are supported by contractual clauses) does not automatically exempt the company from liability.

In addition, states must provide statutes of limitations that don't prevent injured parties from bringing legal actions and in any case not less than five years.

Effects within the European ESG regulation

The new CS3D aims to significantly increase awareness of the social and environmental impacts of the (few) regulated companies. To this end, this legislation represents the completion of a series of European regulations on social corporate responsibility.

Specifically, CS3D establishes the substantive obligations that must be disclosed through sustainability reporting under Directive (EU) 2022/2464, referred to as the Corporate Sustainability Reporting Directive (which prescribes sustainability disclosure requirements to be included in the notes to the financial statements). It also allows companies to accurately account for their commitment to sustainability, curbing unfair competition phenomena based on greenwashing practices (in light of the Green Transition Directive and the proposed Green Claims Directive).

This all comes in the context of improving competition in the market in terms of comparability of non-financial information. CS3D establishes a clear reference on human rights due diligence requirements in the EU market, counteracting the proliferation of state regulations that could distort competition and so-called forum shopping phenomena.

Non-life insurance

Quantum of statutory auditors' liability – Proposed changes

Karin Tayel

On 29 May 2024 *Camera dei Deputati* of the Italian Parliament unanimously approved law proposal No. A.C. 1276 to amend Section 2407 of the Civil Code in the matter of statutory auditors' liability. The Senate's review of the proposal is expected in the next few months.

The scope of the proposal is to:

- **limit *quantum* of statutory auditors' liability** by anchoring it to the level of fees (except in case of fraud);
- **change the starting date of the five-year limitation period** for bringing liability actions against statutory auditors.

If the proposal is approved, Section 2407 of the Civil Code would be amended as follows.

CURRENT WORDINGS	PROPOSED WORDINGS
Para. 1. Statutory auditors must discharge their duties with the professionalism and diligence required by the nature of the office; they are responsible for the truthfulness of their attestations and must keep the facts and documents of which they have knowledge by reason of their office confidential.	Unchanged
Para. 2. They are jointly and severally liable with the directors for the latter's actions or omissions, when the damage would not have occurred if they had supervised in accordance with the obligations of their office.	Para 2. **Except where they acted with fraud …the liability of statutory auditors towards the company, shareholders, creditors and third parties is limited to a multiple of the annual fees, as follows:** • **up to EUR10,000, 15 times;** • **from EUR10,000 to EUR50,000, 12 times;** • **over EUR50,000, 10 times.**
Para. 3. The provisions of Articles 2393, 2393-bis, 2394-bis and 2395 apply to liability actions against statutory auditors.	Unchanged
	Para. 4. **The statute of limitations applicable to liability actions against statutory auditors is five years running from the date of the filing of the report under Article 2429 (ie the statutory auditors' report attached to the financial statements) relating to the year in which the damage occurred.**

Limits to the *quantum* of statutory auditors' liability

In recent years, the National Council of Accountants insisted for law measures aimed at limiting *quantum* of liability of the statutory auditors.

In fact, joint and several liability of statutory auditors along with the directors has always been a debated issue. Statutory auditors have a supervisory role, but they cannot interfere with management. In addition, directors' remuneration is typically far higher than that of statutory auditors. Despite this, the applicable law provides for unlimited liability of both the directors and statutory auditors, with no distinctions. Certain court decisions tried to mitigate this by ruling that, considering their different roles and responsibilities, *quantum* of liability between directors and statutory auditors should (internally) be split as follows: two-thirds to directors and one-third to statutory auditors.

This issue is not new in Europe. In Poland, Estonia, Slovakia and the Netherlands, the applicable laws provide limits that are similar to those now proposed by Italy. In Germany, Austria and Belgium a threshold on *quantum* is predetermined by law.

On the other hand, EU Directive No. 2006/43 and the EU Recommendation 2008/473 in the matter of external auditors already provide for mitigants of the *quantum* of liability, and apparently the Italian Parliament made reference to these for the purpose of the law reform.

Statute of limitation

As mentioned, the proposal under examination provides that the five-year limitation period applicable to the liability action against statutory auditors start running from the date of the issue of the annual report regarding the financial statement and not from the moment damage is perceived as it is now in case of third parties' claims.

The same rule is set forth by Article 15(3) of Legislative Decree No. 39/2010 in case of external auditors' liability, which is currently under the severe scrutiny of the Constitutional Court.

The Corporate Division of the Civil Court of Milan recently referred a case to the Constitutional Court. In their opinion, based on Article 15(3), the statute of limitation starts running even when the third damaged party is not in a position to perceive the damages suffered and the derogation form the general applicable rule (i.e. the statute of limitations start running from the date when the third damaged party is in a position to perceive that they have suffered damages) is unreasonable.

The decision of the Constitutional Court will probably influence the final decision on the proposed changes to Article 2407 of the Civil Code.

We will be monitoring developments and keep you posted.

Tax

Italian Insurance Tax and Warranty Services: Italian Tax Authorities give preliminary remarks in ruling No. 110/2024

By Antonio Longo and Angela Dulcetti

The Italian Tax Authorities, in ruling No. 110/2024, have analysed the applicability of the Insurance Tax under Law No. 1261/1961(IT) in relation to a leading company in the automotive sector (the Applicant).

The Applicant provided its dealers with a warranty service to cover costs related to potential "mechanical and/or electrical failures" in used vehicles sold to customers. The dealer offered this service to customers based on specific technical conditions of the vehicle and pre-agreed conditions in the group. For providing these warranty services to the dealers, the Applicant received a fee from the dealer.

In connection with this warranty service, the Applicant entered an insurance contract with a foreign insurance company, authorized to operate in Italy. The contract covered the financial losses related to the repair work for suitable vehicles covered by the warranty plans.

The Applicant asked the Italian Revenue Agency to clarify whether the warranty could qualify as an insurance contract subject to the IT.

Regarding the insurance contract entered into between the Applicant and the foreign insurance company, Article 1 of Law No. 1216 of 1961 states that non-life insurance policies (with some exceptions) are subject to the IT if the territoriality condition is satisfied. This is the case "when the policyholder has their domicile in the Italian territory, or, in the case of a legal entity, the registered office or establishment to which the contract refers or to which the insured persons are assigned." This means the insurance contract between the Applicant and the foreign insurance company wouldn't be subject to the IT as the territoriality requirement hadn't been fulfilled.

With reference to the services offered by the Applicant to the dealers in connection with the sale of used vehicles, the ruling also states that the service qualifies as a warranty and not as an insurance service. So the conditions for the applicability of the IT wouldn't be met. The conditions for applying the IT are the existence of an insurance contract and that the policyholder is an insurance company, in accordance with civil and insurance law.

Regulatory

IVASS amends regulations to simplify pre-contractual information

Written by: David Maria Marino, Valentina Grande, Erica Simone

On 20 June 2024, IVASS issued Order no. 147/2024, revising the provisions concerning pre-contractual information outlined in IVASS Regulation No. 40/2018 and 41/2018.

The new provisions aim to enhance the effectiveness of information provided to policyholders by simplifying documents, ensuring they're clear, comprehensive and concise. They should also better protect policyholders throughout their relationship with distributors.

These measures emphasize the need for contracts and documents to be clear and complete. They also try to ensure consistency between pre-contractual information and general contract terms, especially regarding key clauses. The new rules also aim to reduce organizational burdens on distributors and ensure alignment with evolving European and national regulations on sustainable finance.

Let's look at the most relevant amendments.

Amendments to IVASS Regulation no. 40/2018: New templates for intermediaries

- **Unified Pre-Contractual Model** (*Modello Unico Precontrattuale – MUP*): all pre-contractual information from the distributor has to be provided in a unified format, differentiated based on the type of product distributed (IBIP and non-IBIP), replacing Annexes 3, 4, 4-*bis* and 4-*ter*.
- **Frequency of updating pre-contractual documents:** during renewal or when concluding a new contract, distributors have to provide or send the information specified in the MUP only in the event of significant changes.
- **Direct distribution:** insurers can now directly deliver the required pre-contractual documents in the event of direct distribution.

Amendments to IVASS Regulation no. 41/2018: Changes to the Additional IPID

- **Simplification of Additional IPID:** three new formats (life, non-life, motor liability, and multi-risk insurance) have been introduced, focusing on insurance covers, exclusions and limitations, target clients, costs, mandatory information pursuant to Article 185 of the Insurance Code (solvency, claims, applicable law), and the tax regime.
- **Coordination among policy documents:** the new Additional IPID for IBIPs will now be coordinated with the KID, promoting a synergistic reading of the two documents and facilitating the comparability of IBIPs with other products.
- **Page Limit:** there's now a maximum page limit of three pages for the Additional IPID.

Sustainable finance

The measure completes the adjustments needed to comply with European regulations on sustainable finance in IVASS's regulatory provisions, continuing the effort that began with Measure No. 2023/131.

Specifically, it aims to:

- incorporate updates introduced by the Regulatory Technical Standards (RTS) specified in Delegated Regulation (EU) No. 2022/1288, and further detailed in subsequent Delegated Regulation (EU) 2023/363; and
- ensure alignment with distributor disclosure requirements (Regulation No. 40/2018) and achieve similar alignment with manufacturer disclosure requirements (Regulation No. 41/2018).

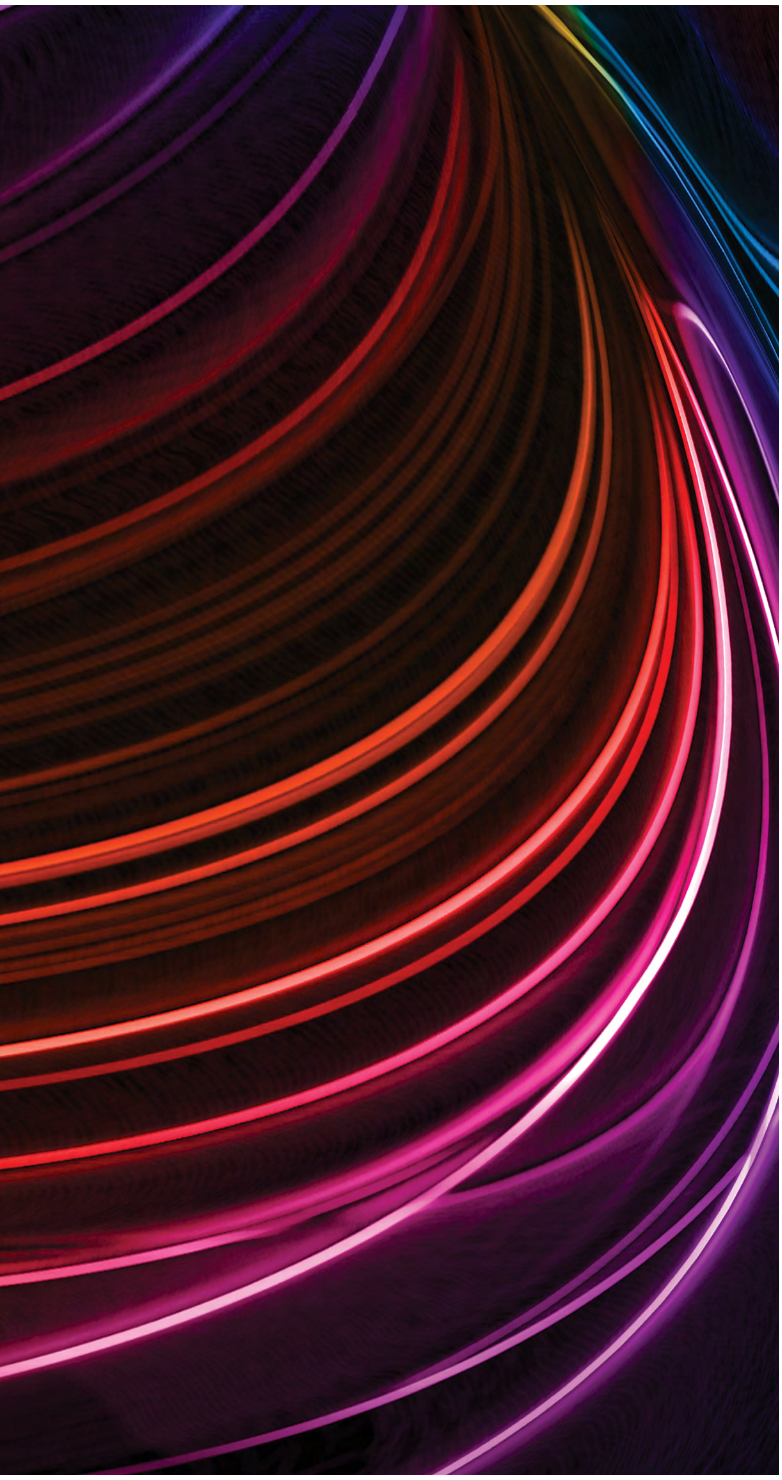
Timeframe

Within 12 months, companies and distributors must prepare the Unified Pre-contractual Module (MUP) for IBIP and non-IBIP products, as well as Additional IPID for life, non-life, motor liability, IBIP and multi-risk insurance products.

Unit linked insurance products – New IVASS rules

Written by: Chiara Cimarelli

On 27 May, the second public consultation ended for IVASS Document No. 2/2024 containing "Provisions on insurance contracts referred to in Article 41 paragraph 1 and paragraph 2 of the Private Insurance Code" (the Document).



The high number of comments the Supervisory Authority received for the first consultation (which opened in March 2022 and ended in June of the same year) led IVASS to launch a second public consultation on the Document. This second consultation also included comments from operators in relation to Discussion Paper No. 1/2022. It was submitted for consultation at the same time as the first consultation of the Document and contained some "Preliminary considerations for future regulatory interventions by IVASS on life products" (the Discussion Paper).

The reforming intervention that, through the Document, the Institute intends to carry out, was long overdue. The current rules on life insurance policies linked to internal funds or UCITS date back to 2002.[9] Since then, they haven't undergone any changes of a substantial nature, despite the developments that have taken place in financial and market legislation and regulation.

At the heart of the initiative is the Supervisory Authority's intention to implement Article 41 paragraph 5 of Legislative Decree No. 209 of 7 September 2005 (Private Insurance Code, the Code). The Code was introduced as a result of the transposition in Italy of Directive No. 2009/138/EC (Solvency II) through Legislative Decree No. 74 of 12 May 2015. The aim is also to identify a level playing field valid for all operators, both Italian and foreign, who market class III life insurance products in Italy.

[9] ISVAP Circular No. 474/2002 on insurance products linked to internal funds or UCIS is still in force. It will be repealed, pursuant to Article 39 of the Document, upon its entry into force. This repeal, however, should not affect class III life insurance policies, which, at the date of entry into force of the Document, are part of a closed portfolio of policies (i.e. no longer marketed by the insurance company), for which the aforementioned Circular will continue to apply.

Article 41 paragraph 5 of the Code states that "IVASS may, by regulation, limit the types of assets or reference values to which benefits may be linked, where the investment risk is borne by the policyholder who is a natural person. For insurance contracts whose benefits are directly linked to the value of units of a collective investment undertaking, the provisions established by IVASS are consistent with the provisions of Legislative Decree No 47 of 16 April 2012."[10]

It's clear from the wording of the rule (which reproduces the text of Article 133 paragraph 3 of Solvency II[11]) that IVASS's regulatory power to limit the assets or reference values of linked policies only concerns policies in which there's an investment risk, which is borne by the policyholder, and if the policyholder is a natural person.

These three conditions must be met cumulatively for IVASS to exercise the regulatory powers referred to in paragraph 5 of Article 41 of the Code. As a result, unit-linked insurance policies that are entered into by legal persons or entities or that provide for a guarantee of investment performance or any other guaranteed benefit are left *de facto* unregulated. Or at least they're not covered by the rules set forth in the Document. In fact, they would end up falling within the scope of application of paragraph 4 of the aforementioned Article 41.[12]

The Document wouldn't be applicable, as indicated by IVASS itself,[13] to unit-linked policies that provide for a dedicated internal fund (ie a fund in which the premium of a single policyholder is invested). This is because the reference made by Article 133 paragraph 3 of Solvency II and Article 41 paragraph 5 of the Code to mutual funds in which the management of resources is collective.

This seems to restrict the future scope of application of the Document (which, in fact, would mainly apply to linked policies aimed at clients seeking collective management of the premium invested, ie without any customization). But this shouldn't overshadow certain passages of the Document, undoubtedly innovative and in contrast with the practice established in other European countries, which are raising some concerns.[14]

First of all, IVASS's intervention would be based on a reading of the concept of general interest in the insurance sector (that's not entirely shared at Community level), as represented in the European Commission's Interpretative Communication on the freedom to provide services.[15] Based on this reading, IVASS would feel entitled to intervene in a sector (that of linked policies with the above-mentioned features) that, according to the Authority, is not harmonised.

By virtue of this conclusion, IVASS would intend to attribute to the Document, once it has been published in the form of a regulation, the nature of a rule of general interest, as such applicable to all life insurance undertakings authorized to carry on class III business in Italy. That would include European insurance undertakings operating under freedom of establishment or freedom to provide services regime. This would entail, including for the latter, the obligation to comply with the indications of the Italian insurance supervisory authority as to the assets that may be used as underlying of such policies and the relevant concentration and investment limits.

The latter argument would be in stark contrast with the practice established to date, under ISVAP Circular No. 474/2002, and with the provisions of Article 193 paragraph 1 of the Code.[16] According to the Article, the regulatory power and financial supervision over the underlying assets of unit-linked policies is the responsibility of the undertaking's home state (ie the state that issued the authorization to operate in class III), rather than the host state, where the operator's policies are marketed.

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[10] Implementation of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[11] Article 133 of Solvency II (Freedom of investment) establishes the principle of freedom of investment for insurance undertakings, providing that "1. Member States shall not require insurance and reinsurance undertakings to invest in particular categories of assets. 2. Member States shall not subject the investment decisions of an insurance and reinsurance undertaking or its investment manager to any kind of prior approval or systematic notification requirements." However, paragraph 3 of the same Article further states the following: "3. This Article shall be without prejudice to requirements established by Member States in order to limit the types of assets or reference values to which benefits may be linked. **All such rules shall apply only where the investment risk is borne by a policyholder who is a natural person and shall not be more restrictive than those laid down in Directive 85/611/EEC."**

[12] Article 41 paragraph 4 of the Code states that "4. In respect of assets held to cover technical provisions in respect of the contracts referred to in paragraphs 1 and 2 that include a guarantee of investment performance or any other guaranteed benefit, Articles 37 ter and 38 shall apply," ie the articles providing for the "prudent person principle" and the "coverage of technical provisions and location of assets."

[13] See the answer to question No. 10 provided by IVASS in the Outcome of the first consultation of the Document, available at the link below only in Italian Esiti_Pubblica_Consultazione_documento_n._3_2022.pdf (ivass.it).

[14] In recent days, there has been an initial reaction from a trade association representing insurance companies from another EU country, which intends to request the intervention of its supervisory authority, the European Parliament and the European Commission, as well as EIOPA to review the contents of the Document.

[15] Available at the following link EUR-Lex - 32000Y0216(01) - EN - EUR-Lex (europa.eu).

[16] Article 193 paragraph 1 of the Code ("Insurance undertakings from other Member States") provides as follows: "1. Insurance undertakings having their head office in other member states shall be subject to prudential supervision by the authority of their home member state also for the business carried on, under the freedom of establishment or the freedom to provide services, in the territory of the Republic."

But there's more. Again, based on the assumption that the sector would not be harmonized, IVASS would also qualify as a rule of general interest Article 5 paragraph 1 of the Document, concerning the demographic risk.[17] The presence of demographic risk "[...] appropriately calibrated on the basis of the policyholder's need for insurance cover [...]" would be necessary to quantify the insurance performance by the company.

The provision, in its current form and qualification as a rule of general interest, would seem to be in line with the most recent case law.[18] So only those linked policies that provide for the assumption of a demographic risk by the insurance company would qualify as life insurance policies.

This would be based on an oriented reading of Article 41 of the Code, which, in fact, doesn't provide for the demographic risk among the elements qualifying a linked policy as a life insurance policy.[19] Nor would this element be provided for by the Solvency II provisions or be referred to in the relevant EU case law.

In light of the above, IVASS's position seems even more peculiar.

The Institute would like to qualify the provision as a rule of general interest. As such, it would apply to all operators present in the unit-linked policy market in Italy. But the actual presence in the policy of the demographic risk would depend on evaluating the policyholder's concrete coverage needs. These elements alone (the policyholder's need for cover and the undertaking's assessment) are sufficiently uncertain, as to their presence, not to allow the demographic risk to be considered as key with respect to a provision that one would like to qualify as being of general interest.

Not to mention the provisions in paragraphs 2 to 4 of Article 5 of the Document. They would indicate, only for domestic companies and not for Community companies, the criteria on the basis of which to carry out an assessment of the appropriateness of the demographic risk with respect to the features of the product and the reference market. And this would make the provisions discriminatory with respect to Italian life insurance companies, in clear contrast with the intent allegedly achieved by the Institute to create a *level playing field* valid for all operators in this area as well.

The initiatives that, also in other European countries, are being taken to highlight the various inconsistencies of the Document, including with respect to the European regulatory framework of reference, are to be welcomed.

17 "[...] Unit-linked and index-linked contracts, other than pension-type contracts, provide for the undertaking to make an effective commitment to establish and pay benefits, whether for survival, death or both, the value of which depends on an assessment of demographic risk appropriately calibrated to the policyholder's need for insurance coverage."

18 See, in particular, the recent Supreme Court Order No. 3785 of 12 February 2024.

19 Article 41 ("Contracts directly linked to indices or units of undertakings for collective investment"), paragraph 1, of the Code in fact provides as follows "1. Where the benefits provided for in a contract are directly linked to the value of units in an undertaking for collective investment or to the value of assets contained in an internal fund held by the insurance undertaking, the technical provisions in respect of those contracts shall be represented as closely as possible by the units in the undertaking for collective investment or by the units in the internal fund, if it is divided into defined units, or by the assets contained in that fund.[...]"

Legal and regulatory updates

By Chiara Cimarelli, Ina Doci, Francesca Santovito

1. IVASS RIGA portal – 16 April 2024

On 12 April 2024, the Italian Insurance Regulatory Authority (IVASS) published Regulation No. 55/2024 (Regulation) laying down provisions on the digital transmission of information regarding both the single companies and insurance groups in a web portal (RIGA).

The Regulation applies to:

- insurance and reinsurance companies with legal seat in Italy
- Italian branches of extra EU insurance and reinsurance companies
- reinsurance companies with legal seat in Italy
- ultimate Italian controlling companies

These entities will have to notify RIGA with certain data and information, for example:

- information regarding the subjects who hold a corporate position within the company, including their appointment, the expiry date, the renewal and any change of the administrative bodies
- the subjects responsible of the fundamental functions and, in case of outsourcing, those responsible of the outsourcing
- the shareholders, the shareholders' agreements and the participations
- the providers of fundamental or essential or important functions in case of outsourcing

For all the above information, the Regulation details the information that needs to be provided.

For companies operating in Italy under the right of establishment or the freedom to provide services, the above information will be transmitted by the competent home country authority to IVASS.

The information will need to be transmitted to IVASS by the companies indicated above according to the timelines provided for by the law, but, in any case promptly and not later than 30 days.

Each company will have to register to the web portal, according to certain technical instructions, and will have to appoint:

- a subject (*utente gestore*), responsible for sending information to IVASS; the information will have to be complete, up to date and prompt; and
- another subject (*utente operatore*), delegated by the above subject, in charge of sending the information to IVASS.

The companies that were not previously registered with the *Anagrafe Soggetti*, held by Bank of Italy, will have to send a request of registration by using the certified email address and the forms indicated in the technical instructions. The Bank of Italy will process the request and revert back to IVASS, which, in turn, will notify the requesting company.

With the entry into force of the Regulation (the day following its publication in the Italian Official Gazette), the operational parallel phase initiated with the letters to the market of 19 February 2020 and 4 November 2020, now repealed, will come to an end. On first application, the companies will comply with the provisions of the Regulation by the deadline of 30 June 2024, verifying that their personal and corporate information is correct and complete.

2. Italian Budget Law on mandatory insurance against catastrophic events raises several questions – 6 May 2024

Law No. 213 of 30 December 2023 (the Budget Law) has introduced a new obligation for companies with registered offices in Italy and for companies with registered offices abroad with a permanent establishment in Italy. As of 31 December 2024, these companies will have to take out insurance to cover damage to assets caused by natural disasters and catastrophic events occurring on national territory.

These provisions, which are totally new in the legal framework of compulsory insurance cover, are supplemented by a series of implementing decrees aimed at defining further implementation and operating procedures. The Italian Insurance Regulatory Authority (IVASS) might further clarify the scope of application of the provisions, especially with reference to the characteristics of the insurance cover, including deductibles and uncovered amounts.

Who has to take out insurance and on which property?

Companies with a registered office in Italy and the branch offices of foreign companies required to be registered in the Italian commercial register have to take out insurance cover, pursuant to Article 2188 of the Civil Code.

The assets subject to compulsory coverage include land and buildings, facilities and machinery and industrial and commercial equipment. The insurance obligation doesn't apply to those buildings encumbered by building abuse or constructed without the required authorisations or burdened by abuse arising after the date of construction.

On 27 February 2024, Law No. 17/2024 converting Law-Decree No. 212 of 29 December 2023 was published in the Italian Official Gazette. The law stipulates that those who have taken advantage of the "superbonus" tax benefits in relation to expenses for works started after 30 December 2023, also have to take out insurance to cover damages caused to their properties by natural disasters and catastrophic events. This includes residential properties. They have to take out insurance within one year from the conclusion of the works benefiting from the "superbonus."

Beneficiaries of the "superbonus" may find themselves in a delicate position. While they're entitled to special tax benefits, they will now have to take out additional insurance policies, an additional financial burden for them.

We're still waiting for the Minister of the Economy and Finance and the Minister of Enterprise and Made in Italy to issue decrees to establish the detailed terms and conditions for implementing the provision.

Defining calamitous and catastrophic events

Paragraph 101 of Article 1 of the Budget Law defines calamitous and catastrophic events as those caused by earthquakes, floods, landslides, and inundations. However, paragraph 105 of Article 1 of the Law doesn't exclude that the procedures for identifying calamitous and catastrophic events eligible for compensation may also be referred to in the implementing decrees to be issued by the Ministries of Economy and Finance and of Business and Made in Italy. Currently there are no indications in this regard.

The parties required to provide insurance cover and the cover offered by SACE

Insurance undertakings will be able to offer insurance cover by directly assuming the entire risk or in co-insurance, including through consortia, which must be registered and approved by IVASS. Paragraph 104 of the Budget Law states that the insurance cover can provide for a possible overdraft or deductible of no more than 15% of the loss. But IVASS could revise this figure later.

Insurance companies will not be able to refuse to underwrite the risk or circumvent the obligation to underwrite. Doing so will be punishable with a fine from EUR100,000 to EUR500,000.

SACE will guarantee the insurance coverage offered by insurance undertakings. SACE is authorised to grant, at market conditions, private insurers and reinsurers, a reinsurance coverage of up to 50% of the indemnities paid, for an amount not exceeding EUR5,000 million for 2024. On the cover offered by SACE, a first demand state guarantee is granted as of right.

Real Estate

These provisions raise a number of questions. How will insurance companies manage and assess requests for coverage in relation to real estate located in earthquake-prone areas or frequently affected by natural disasters? And will the obligation to take out the insurance policies in question affect – and to what extent – the investment choices of national and international operators in the real estate sector in Italy?

It's not clear whether the insurance cover, like with civil motor liability insurance, will have to take into account the natural greater predisposition of certain areas compared to others to catastrophic events (ie earthquake zones), which could affect the risk pricing and the premium.

Another element the legislator or the competent Ministries need to clarify when issuing the expected implementing decrees pertains to real estate property "encumbered by building abuse or constructed in the absence of the required authorisations or burdened by abuse arising after the date of construction." The provisions specify that the insurance obligations don't apply to this type of real estate. This leaves room for uncertainty as to the terms and procedures for demonstrating whether or not the properties are up to standards or as to any action to be taken, by the owner, once the building abuse has been ascertained.

So will owners of real estate have to carry out preventive inspections on the properties they own – at their own care and expense – to get sworn building conformity certification? Pending the implementing decrees, it's not clear whether owners of the properties in question will have to submit building compliance certifications to insurance companies to get relevant insurance coverage. At the moment this is only a theoretical hypothesis, but if the provision relating to the non-applicability of the rule in question to buildings with building abuses is to be given full meaning, it will be necessary to provide for a complete and rational discipline, hopefully without burdening property owners with further obligations and expenses. Otherwise, the rules in question could have a negative impact on property investment valuations, also in terms of cost allocation between sellers/buyers and landlords/tenants.

The legislator, through specific interventions on the provisions, or the competent Ministries when issuing the implementing decrees, should provide clear guidelines on insurance coverage for real estate affected by building abuses. The lack of clarification could open the way to litigation and legal uncertainty, potentially affecting the real estate market and the insurance industry.

3. Constitutional Court rules on statute barred period for life insurance contracts – 6 May 2024

In a recent judgment (number 32 of 2024), the Constitutional Court ruled on the illegitimacy of article 2952, paragraph 2, of the Civil Code, specifically of the text version introduced by article 3, paragraph 2-ter, of Law-Decree No. 134 of 28 August 2008 (Urgent provisions on the restructuring of large companies in crisis).

The law was introduced by article 3, paragraph 2-ter, of Law-Decree No. 134 of 28 August 2008 (Urgent provisions on the restructuring of large companies in crisis). It was converted, with amendments, into Law No. 166 of 27 October 2008 and, before that, replaced by article 22, paragraph 14, of Law-Decree No. 179 of 18 October 2012 (Further Urgent Measures for the Country's Growth). It was then converted again, with amendments, into Law No. 221 of 17 December 2012.

The facts

The case related to the stipulation of an index-linked policy in 2002. The policyholder, who died in 2009, had designated his son as beneficiary, who requested the liquidation of the death benefit in 2015. The insurance company rejected the claim, using the expiry of the statute barred term in force at the time (two years from the day the right was founded). The insurance company devolved the sums payable to the Dormant Policy Fund.

The beneficiary brought an action before the ordinary Court of Lucca, requesting the nullity of the policy. He said it was a financial product, which would have required a framework contract or general investment contract, pursuant to article 23 of the Financial Consolidated Act (TUF). The beneficiary also requested the payment of the policy amounts, considering the ten-year statute barred period, starting from the beneficiary's actual knowledge of the policy underwritten by his father.

The Court of Lucca declared the contract null and void, deeming it to be a financial instrument, making no further ruling and ordering the insurance company to refund the premium.

The insurance company appealed against the ruling. The Court of Appeal of Florence ruled out the nullity of the policy (which was qualified as a life insurance policy, falling within class III of life insurance business). It also raised *ex officio* the issue of the constitutional legitimacy of Article 2952, paragraph 2, in the version before the amendment introduced by Article 22, paragraph 14, of Legislative Decree No. 179 of 18 October 2012, for violation of Articles 3 and 47 of the Constitution, which stipulates "Other rights arising from the insurance contract [...] shall be time-barred in two years from the day on which the event on which the right is based occurred."

The judge argued that the questions on the constitutionality of the censured provision were not manifestly unfounded. The judge mentioned the historical evolution of the 2008 amendment, followed by the 2012 amendment, and recalled how, before the first amendment, the statute barred period (at that time only annual) had been considered unreasonable by the Insurance Supervisory Authority (at the time, ISVAP). In circular No. 403/D of 16 March 2000, ISVAP had invited insurance companies to pay death benefits, even for late claims (the Authority had already noted at the time that beneficiaries were not necessarily aware of the existence of policies concluded for their own benefit).

The Court of Appeal also noted the unreasonableness of the time limits for the devolution of unclaimed death benefits to the Dormant Policy Fund due to the short statute barred period. The court considered that, for other contractual relationships, article 3 of Presidential Decree No. 116/2007 (Implementing Regulation on Dormant Deposits) provides for the prior sending, by registered letter, of an invitation to the beneficiaries containing instructions within the term of 180 days from receiving the letter.

The considerations of the Constitutional Court

The Supreme Judge held that the questions raised by the court were well founded. In fact, although it acknowledged that the legislator has wide discretion in applying the statute barred period, it considered that this discretion is limited by the actual exercise of the right to which the statute barred period refers. This is especially where the calculation of the *dies a quo* is identified with events (death or survival at the expiry of the contract), not necessarily known in time by the beneficiary and on which the acquisition of the right depends. This, in the context of life policies, has features of manifest unreasonableness, according to the court.

With respect to life insurance, which, according to the Supreme Judge, does not perform "(…) an indemnity function with respect to the occurrence of an accident, but (…) a prevalent function of social security, related to the risk of human life. (…)," as testified by the fact that "(…) the sums owed by the insurer cannot be subjected to executive or precautionary action (article 1923, first paragraph, of the Civil Code) (…)," a short statute barred term is manifestly unreasonable. It makes it excessively difficult or impossible to enforce it, aggravated by the obligation for the insurance undertakings to devolve the sums owed to the Dormant Policy Fund, once the statute barred period has expired.

The Constitutional Court declared the constitutional illegitimacy of the second paragraph of Article 2952 of the Civil Code, in the wording before the 2012 amendment, opening the way to the revival of rights that the insurance companies considered statute barred at the time.

4. IVASS reminds of the upcoming entry into force of the new RUI webportal – 16 May 2024

On 15 May 2024 the Italian Insurance Regulatory Authority (IVASS) published a notice on its website concerning the new RUI portal, which became operational on 4 June 2024.

Specifically, IVASS clarifies that, to access the new RUI, it is necessary for the following parties to gain prior access to the Delegation Portal via SPID, CIE or CNS:

- the legal representatives of intermediaries registered in Sections A, B and D of the RUI
- the legal representatives of insurance companies
- the general representatives of the branch offices of intermediaries registered in the EU List attached to the RUI

As for natural persons intermediaries, even if they operate through a sole proprietorship/individual enterprise, they don't have to proceed with prior accreditation on the Delegation Portal, as they can access the new RUI portal directly.

Finally, IVASS states that, before starting the accreditation procedure on the new portal, it is necessary to obtain the company search extracted from the relevant chamber of commerce or other appropriate documentation attesting the representation on behalf of the company. Once they've been accredited, these representatives may, in turn, delegate one or more parties to access the New RUI.

5. New RUI online webportal and launch of joint mystery shopping by EIOPA and IVASS in Italy – 5 June 2024

On 4 June 2024 the Italian Insurance Supervisory Authority (**IVASS**) announced that the new Single Register of (Re)insurance Intermediaries (**RUI**) is online.

As of 4 June 2024, the following are online:

- **The new RUI web portal for consultation** of intermediaries registered on it and carrying out their activity in the Italian territory. From the portal users can view and download all the information on the intermediaries registered in the RUI and in the list attached to the RUI, as well as all the information on the persons responsible for the distribution activities of insurance undertakings.

IVASS has published a User's Manual on how to consult and use the new RUI portal.

- **The new RUI portal dedicated to operators**, which allows intermediaries and insurance undertakings to send requests and communications directly to IVASS.

In the new RUI portal:

- **Intermediaries registered in sections A, B, D and F of the RUI** can fill in and submit to IVASS all applications (registration, reinstatement, cancellation, collaborations, change of section in the RUI, extension of distribution activities to another EEA state) and communications (start of activity or inactivity period, changes of appointments in companies registered in Sections A, B or F of the RUI, appointment or termination of the person responsible for the distribution activities of intermediaries registered in section D of the RUI, websites used for the distribution of insurance policies);
- **canvassers registered in Section C of the RUI and intermediaries registered in section E of the RUI** can only submit an application for change of section in the RUI;
- **EU intermediaries registered in the list attached to the RUI and carrying out business in Italy under the right of establishment regime** can submit applications for change of a collaboration relation and report the website used for the distribution of insurance policies;
- **Italian insurance undertakings** can communicate the appointment or termination of agency mandates or distribution agreements, registration/cancellation of canvassers registered in section C of the RUI, communicate the identity of the person responsible for the distribution activity if they carry out distribution activities;
- **EU insurance undertakings carrying out business in Italy under the right of establishment regime** can communicate the appointment or termination of agency mandates or distribution agreements.

As you might already know, insurance intermediaries and undertakings can access the RUI, via SPID, CNS, CIE, eIDAS. To be able to access the RUI, operators must have correctly completed the required accreditation.

On the same day, IVASS published a press release informing operators that it is about to undertake, with the European Insurance and Occupational Pensions Authority (EIOPA), the first joint mystery shopping exercise across the state.

The trained mystery shoppers will act as potential customers and will visit distributors' premises (in particular IVASS appears to have chosen specific banks, post offices and agencies) to verify how insurance policies are offered to the public.

6. IVASS order No. 144/2024 On AML and CTF – 10 June 2024

On 4 June 2024, the Italian Insurance Regulatory Authority (IVASS) published Order No. 144/2024 (the Order), amending and implementing IVASS Regulation No. 44/2019 (Regulation 44) in matter of anti-money laundering (AML) and counter terrorist financing (CTF).

As you might be aware, on June 2022, EBA (the European Banking Authority) published a set of Guidelines giving indications on the role, tasks and responsibilities of the AML/CTF compliance officer and the management body, as well as information on the modalities of outsourcing methods, policies, controls and procedures at a group level.

IVASS underlines that the provision contained in Regulation 44 are already compliant with EBA's Guidelines, but to completely implement the Guidelines in Italy, it was necessary to slightly integrate Regulation 44 with the Order.

The Order introduces a definition of "body with management function," which is the body which replaces the top management (*alta direzione*), and indicates the role of this new body.

Furthermore, the definitions of "administrative body," "guidelines" and "corporate governance system" have been modified.

The Order also introduces these important novelties:

1. Director responsible for anti-money laundering.

All credit institutions and financial institutions subject to anti-money laundering regulations have to identify a member of the management body who will be responsible for the overall compliance with the regulations on the prevention of money laundering and terrorism financing.

The director will be responsible for ensuring that the management body is fully aware of the money laundering and terrorist financing risks to which the company is exposed. They will also be responsible for providing the necessary guidance to the relevant corporate functions.

The appointment of the director responsible for anti-money laundering must be made no later than the first renewal of the corporate bodies following the publication of the Order and, in any case, by 30 April 2026.

2. AML function

Regulation 44 is already compliant with EBA's Guidelines, but it's necessary to modify several provisions to regulate the relations between the AML function and the newly introduced AML Director.

The Order also introduces the obligation to consult the AML function where starting or continuing a relationship with a high-risk client requires by law the approval of a top manager.

3. Outsourcing

Outsourcing is allowed only for the functions/obligation of the AML function, while it is not allowed to outsource the responsibilities of the AML function.

Furthermore, in any case, the holder of the AML function must always be appointed, and they have to monitor and control all the outsourced activities.

4. Groups

At a group level, the Order requires:

- the appointment of a director responsible for the group's AML;
- the appointment of the holder of the AML function for the group. They will be responsible for coordinating between all the AML functions of each company of the group, for drafting a self-assessment of the risks at a group level, and for developing procedures, standards and methodologies at a group level.

The Order will enter into force the day after its publication in the Italian Official Gazette.

Case Law

Late payment of premium – Supreme Court's latest decision

By: Karin Tayel

Over the years, the Supreme Court has expressed contrasting views on the consequences of the late payment of premium.

Legal framework

Pursuant to Article 1901 of the Civil Code:

- If the policyholder doesn't pay the premium or the first instalment of the premium agreed in the contract, the insurance cover is held in abeyance. The cover restarts at midnight from the day the policyholder pays the premium.
- If the policyholder fails to pay the subsequent premiums on the agreed due dates, the insurance is held in abeyance from midnight of the 15th day after the due date.

According to some decisions, the insurer's acceptance of the late payment should be interpreted as an implied waiver by the insurer of their right to deny coverage of claims made/losses occurred during the suspension period set forth in Article 1901 of the Civil Code (Supreme Court, 26 January 2006, decision No. 1698; Supreme Court, 19 July 2004, decision No. 13344, Supreme Court, 2 December 2000, decision No. 15407).

According to more recent rulings, accepting late payment, on the contrary, cannot entail any waiver by the insurer, in the absence of an express and unequivocal declaration in this respect by the insurer (see Supreme Court, 10 February 2022, decision No. 4357; Supreme Court, 14 March 2014, decision No. 5944; Supreme Court, 30 November 2012, decision No. 21571; Supreme Court, 1 July 2002, decision No. 9554).

By decision No. 6623 of 12 March 2024, the Supreme Court recently confirmed this second view.

The case at issue

An insurer issued a policy but the insured (via the broker) paid the premium after several months from issue. The day before the (late) payment of premium, an accident occurred and the insurer denied coverage under Section 1901 because the accident occurred at the time when the premium had not been paid.

The insured challenged the denial on the basis that the insurer had accepted to issue the policy providing coverage since the very date of issue.

The Supreme Court decision

According to the Supreme Court, the insurer lawfully denied coverage since:

- Coverage becomes effective only upon payment of the premium.
- The parties can agree that coverage is effective before the payment of the premium. But the agreement must be express.
- The insurer can waive the remedy under Section 1901. However, waiver must be unequivocal (see Court of Cassation, 14 March 2014, decision No. 5944; Court of Cassation, 1 July 2002, decision No. 9554, Court of Cassation, decision No. 21571/2012).
- Acceptance of the late payment of premium with no objections by the insurer is not to be considered as a waiver of the remedy under Section 1901 because mere acceptance of late payment cannot be construed as an indication that the insurer intended not to rely on Section 1901 (see Court of Cassation, 10 February 2022, decision No. 4357).

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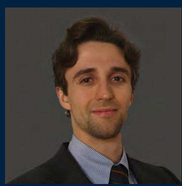

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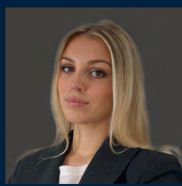

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