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#DeRisk

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DLA PIPER

Contents

Claims based on breach of Sustainability and ESG hard and soft laws: New areas of risk to be monitored by C-Suite

MARTA CENINI

The spread of the pandemic and the following economic crisis have again brought attention to – and even boosted – the debate on sustainable development.

For many years, institutions have been raising the issue of "sustainable globalization" and of multinational companies' respect for human rights and the environment, but only recently have these issues come to the fore in national and international governmental agendas. Even the world of finance, which by its very nature is reluctant to accept these limits, has recently taken up a position in favor of sustainable development and a new normal that takes into account **ESG (Environment, Social and Governance) criteria**.

The EU has recently carried forward several initiatives on this topic and last April the European Parliament expressly stated that to prevent and mitigate future analogous economic and sanitary crisis, it is necessary to invest in sustainability. In January 2020 the European Commission published a *Study on due diligence requirements through the supply chain* and on this basis has started consultations on the renewed sustainable finance strategy, which also included **a possible legislative initiative to make human rights and environmental due diligence in international supply chain mandatory for EU enterprises**.

The Commission 2021 work program includes a legislative proposal for a directive on sustainable corporate governance, which could contain the provision about the abovementioned mandatory due diligence. In parallel to this, European regulations are increasingly requiring disclosure on policies, processes and performance/impacts relating to ESG issues: the EU non-financial reporting Directive (Directive 2014/95/EU) is the most significant example.

From a business point of view, the word **"sustainability" is often meant as a company's ability to create value over the long term with reference to the ESG dimensions of its operations, investments and value chain.**

This implies something more than simple compliance with the current mandatory legislations and considers the international dimension of multinationals, where subsidiaries may be subject to different (and possibly less strict) legislations or may be in an environment where corruption and other criminal offences to public officers are very common.

For this reason, on the one hand, decisions regarding compliance with higher standards with regard to ESG are often left up to each enterprise. On the other hand, we are witnessing a **global trend of litigation in which plaintiffs (usually groups of plaintiffs) bring parent companies (rather than subsidiaries) and companies at the top of large supply chains to court** and try to hinge the legal action in countries where the due process is supposedly granted.

What is the legal basis for these claims?

First of all, there is a number of mandatory provisions (so-called hard law) which requires compliance but, due to the general principle of sovereignty, these legislations are not always applicable where the issues occur. For this reason, there is a general trend towards considering not only the domestic and local law but also the international standards and the so-called soft law. Regarding this, the **UN *Guiding Principles on Business and Human Rights* and the OECD *Guidelines on multinational Enterprises*** have a pre-eminent role but being non-mandatory legislation, it is necessary to find different legal ground in order to file a lawsuit.

In the UK the *Vedanta* case has opened the door to **claims against parent companies and companies at the top of large supply chains for having made statements in public reports** – including human rights and sustainability reports – **about what organizations mandate and/or achieve for their group, supply chain and/or companies invested in**. In this case, the action is in tort since, pursuant to common law, tortious liability can enable a **duty of care** to arise between a company and third party affected by operations of its subsidiaries, suppliers and business partners.

On the same basis, liability may arise in relation to **framework policies or codes of conduct**, including supplier codes of conduct, and/or if the parent company or the company at the top of the supply chain delivered training on compliance with such codes; it has also been argued that a duty of care exists when the parent company or the company at the top sets the way in which another legal entity must carry out specific work (eg manufacturing a product using a specific method of working).

Other claims have been constructed on an innovative interpretation of competition and consumer law, advertising law, environmental law, and labor law.

The breach of legislation (whether mandatory or not) and policies imply not only legal risks but also **reputational risks**, with the consequences of loss of customers and investors. Indeed, any local issues related to health and safety, environmental damage, waste and carbon emission, political violence, gender discrimination, just to name a few, can have a huge impact on public opinion.

In order to consider sustainability and ESG an opportunity rather than a risk, it is necessary to take in account the existing legislation (hard and soft law), the upcoming regulation and also the consumers' and investors' demands and expectations. Businesses must review and update their approach and policy frameworks relating to human rights, environment and governance risks across the group as well as across sourcing and supply chain activities, and it is advisable to adopt for remediation procedures even if not required by the law.

"Building Back Better": Managing ESG risks through sustainable insurance

BRUNO GIUFFRÈ, ANGELO BORSELLI

"Building back better" implies that the response to a disaster should not simply involve a return to the pre-existing status, but should promote resilience and long-lasting sustainable changes, preventing possible future risks. In the context of the economic and social recovery from COVID-19, corporate and investor focus on sustainability and ESG is growing and issues such as climate change, supply chain sustainability, diversity, employee wellbeing are in the spotlight.

As the world faces increasing ESG risks and challenges, the insurance industry plays a central role in promoting social and environmental sustainability.

The recommendations of the Principles of Sustainable Insurance (PSI)

The Principles of Sustainable Insurance (PSI) were launched by the United Nations Environment Programme Finance Initiative in 2012, emphasizing the role of insurance in enabling a resilient, safe and sustainable society and raising awareness of the potential benefits of integrating ESG in the insurance business model.

The PSI recommend that insurance companies embed in their decision-making environmental, social and governmental issues relevant to the insurance business, thereby considering ESG issues in risk management, underwriting and capital adequacy decision-making processes and developing products which have a positive impact on ESG and foster better risk management.

Moreover, insurance companies are invited to work with their client and business partners as well as with governments, regulators and other key stakeholders to promote widespread action on environmental, social and governance issues.

Sustainable insurance implies a strategic approach that aims at identifying, assessing and managing risks related to environmental, social and governance issues, developing innovative solutions that promote sustainability in the long term.

Insurers should integrate ESG factors in **product design**. Innovative insurance products have already been developed addressing climate and disaster risks, while technological innovation can provide insurers with effective tools to address ESG risks. Sustainability factors and preferences need also to be taken into account in product testing and monitoring.

When it comes to **investments**, the role of insurance in promoting sustainability appears clear. As insurance companies hold a significant amount of capital to invest, they have the ability to direct investments to address sustainability challenges and meet ESG goals. For example, some insurance companies have announced decarbonization investment strategies and invested in renewable energy projects.

Sustainability and ESG are among **2021 board priorities** for insurance companies and insurers are expected to increasingly take effective actions to address sustainability. As today sustainability goals are even more crucial, the insurance sector is presented with an extraordinary opportunity to **drive change** and promote responsible and sustainable development.

Class actions: The Italian legislative framework and the Collective Redress Directive

MARCO DIMOLA, GIORGIO BARONCHELLI

Italy does have a class action legislation – the procedural rules are currently set out in Articles 139, 140 and 140-*bis* of Legislative Decree no. 206 of September 6, 2005 (the Consumer Code) – but this mechanism has been the success that many initially expected. Introduced in the Italian legal system by the 2008 Finance Act, it has been profoundly revised over the years (in 2009 and 2012) but the results have not been satisfactory. Although there are no official statistics, it is estimated that only one case out of two is brought to trial and that only one out of seven is successful.

The legislative developments

The legislator passed a **new reform** in 2019 (by Law no. 31 of April 12, 2019, which introduced Articles 840-*bis* – 840-*sexiesdecies* in the Code of Civil Procedure), which provides for the repeal of the rules contained in the Consumer Code on class actions. Law 31/2019 was initially scheduled to enter into force on April 19, 2020, but, due to the COVID-19 pandemic, the date was first postponed to November 19, 2020, and then to May 19, 2021, unless further extensions are granted.

This is the background to Directive (EU) 2020/1828 (the Collective Redress Directive), which was approved by the European Parliament on November 25, 2020, and came into force one month later. The purpose of the Directive is to **protect consumers and the functioning of the EU internal market by preventing distortions** that might arise from non-compliance with the regulations laid down with reference to the specific sectors identified in Annex I (for example, in addition to general consumer law, regulations on data protection, financial services, travel, tourism, energy and telecommunications). Member States will have 24 months from entry into force to transpose the Directive into national law and a further 6 months to implement it.

A key point of the **Collective Redress Directive** is the obligation for the Member States to provide at least one procedural mechanism in accordance with the Directive **that grants "qualified entities" to bring representative actions to obtain both injunctive and compensatory relief**. This will in no way prevent the maintenance or implementation of further and different procedural means (therefore, the Collective Redress Directive should not be in conflict with Law 31/2019).

If such qualified entities wish to bring cross-border representative actions, they will be subject to compliance with certain requirements (ie having been active for at least 12 months in the protection of consumer interests before the request for designation, being non-profit making, not being subject to insolvency procedures or not having been declared insolvent and further requirements guaranteeing their independence) whereas, in the case of entities qualified to bring only national representative actions, this may not be necessary (the choice being left to individual Member States).

The definition of a **cross-border or domestic representative action** does not depend on the place where the parties are domiciled but depends on the relationship between the qualified entity and the state in which the action is brought. Indeed, if a qualified entity brings an action in the state in which it has been designated, that action shall be deemed to be a domestic representative action, whereas if the qualified entity brings an action in any other Member State, the action shall be deemed to be of a cross-border nature.

The consumers' place of residence, on the other hand, is relevant with regard to the representative action regime. In fact, if the consumers reside in the country where the action is brought, the choice between the adoption of an opt-in or opt-out regime is left to the individual Member State, whereas if the consumers' country of residence is different from the country where the action is brought, the only possible regime will be the opt-in one.

The Directive adopts the **"loser pays" principle** in relation to the allocation of costs to help safeguard businesses against abusive lawsuits. **Member States must ensure the unsuccessful party in a representative action is required to pay the successful party's costs of the proceedings** (subject to the conditions and exceptions provided for in national law). However, individual consumers covered by a representative action for redress measures shall not be required to pay the costs of the proceedings, except in exceptional circumstances (cases of negligent and/or intentional conduct of an individual consumer).

Furthermore, **the Directive encourages transparency regarding the use of third-party funding** (insofar as allowed in accordance with national law) and provides that funding cannot be made to qualified entities by third parties that have a conflicting interest from the consumers' interests.

Around half of the Member States currently do not have any mechanism in place for collective redress. The Directive only provides a baseline for the collective redress opportunities to be implemented in Member States, and it will be interesting to see whether, in implementing the Directive into national law, Member States will choose to go beyond the Directive.

As far as Italy is concerned, it will be interesting to see whether the Italian legislator will take the opportunity to further amend Law 31/2019 and postpone its entry into force.

In all events, it seems unlikely that class actions may achieve in Italy the diffusion seen overseas, especially in the US. This is essentially due to a different socio-cultural context (also the forensic class), the lack of significant economic incentives for lawyers, the absence of punitive damages provisions and the development of litigation funding still being in its infancy.

Brexit transition period ended: UK undertakings' duties and policyholders' rights. What to expect for pending proceedings?

BRUNO GIUFFRÈ, KARIN TAYEL

Italy's latest rules

The Brexit transition period ended on December 31, 2020, and on the same date the Italian government issued Law Decree No. 183 (the so-called *Milleproroghe* for 2021).

Article 22 paragraphs 6-9 deals with the activity carried on in Italy by UK-registered insurance undertakings under the passporting regime.

What happens next to UK undertakings authorized to carry out insurance business in Italy under the passporting regime?

According to the Decree *Milleproroghe*, on January 1, 2021, IVASS (Italy's insurance regulator) removed UK undertakings from the Register of insurers licensed in Italy. As a consequence, they are no longer permitted to subscribe to new contracts nor to renew existing ones.

As such, UK undertakings are only allowed to handle contracts existing as of December 31, 2020, and, by March 31, 2021, they must submit to IVASS a plan on how they will properly perform the insurance contracts in force as of December 31, 2020, including the payment of claims. Going forward, they shall also provide IVASS with an annual report on the progress on the implementation of the plan.

According to the Guidelines IVASS issued on November 10, 2020, "UK undertakings are in any case required to ensure, even after the aforementioned date of 1 January, the correct execution of existing insurance contracts, guaranteeing the fulfillment of contractual obligations, including the management of claims, payments, redemptions and withdrawals."

What are policyholders' rights after December 31, 2020?

- Policyholders may withdraw from insurance contracts with no charges by just notifying the insurer.
- Policyholders may rely on any other termination provisions set out in the relevant contract.
- Tacit renewal clauses shall no longer be enforceable.

What happened of the Italian businesses of UK undertakings?

Toward the end of Brexit transition period, **UK insurance undertakings transferred their business to EU companies which had been specifically set up between 2019 and 2020 to ensure business continuity.**

For example, Lloyd's of London transferred their business to Lloyd's Insurance Company S.A. (a Belgian company). Arch Insurance (UK) Limited transferred their business to Arch Insurance (EU) DAC (an Irish company) and so on. These newcos inherited all rights and obligations of UK undertakings and – like EU companies – are entitled to do business in Italy.

What about pending proceedings involving UK undertakings?

According to the *Insurance Business Transfer Schemes* authorized by the High Court of Justice of England and Wales:

- any proceedings which had been commenced before December 31, 2020, or which are commenced on or after such date shall be continued or commenced by the transferee of the business and the transferee shall be entitled to all defenses, claims, counterclaims, settlements, rights of set-off, rights of subrogation and any other rights that would have been available to the transferor in such proceedings;

- any judgment, settlement, order or award obtained by or against the transferor whether before or after December 31, 2020, will be enforceable by or against the transferee;
- on and effective from December 31, 2020, any proceedings that are commenced in error against the transferor shall be deemed to have been commenced and shall continue against the transferee without the need for further order, whether for substitution of the parties or otherwise;
- any judgment, order or award obtained by or against the transferor, which is not fully satisfied before December 31, 2020, on and from that date, will be enforceable by or against the transferee without the need for further order.

What are Italy's applicable procedural rules?

In the Decree *Milleproroghe* there are no specific provisions relating to pending proceedings involving UK undertakings.

According to Section 111 of the Italian Code of Civil Procedure, in case of transfer of a right in litigation:

- proceedings continue with the transferor;
- the transferee may join the proceeding or may be joined as a party to it and in these cases the transferor can be excluded from it;
- in any case the decision is binding on both the transferor and the transferee.

So, Italian law leaves the door open to two options (ie that the transferee becomes a party to proceedings or not), but in any case, the transferor shall not be freed from their obligations, even if after Brexit they are not permitted to do business in Italy. As a consequence, there is no certainty that they will be allowed to leave the proceedings.

On the other hand, the *Insurance Business Transfer Schemes* do not match Italy's applicable procedural rules so that a transferee's appearance in Italian proceedings will not imply the automatic replacement of the transferor.

What happens in Italian Courts in proceedings involving UK undertakings?

During the first couple of months which followed Brexit two main trends have emerged in Italian Courts:

- UK undertakings are continuing proceedings that are close to the end in the interest of the transferees (ie the newly established EU companies) as per Section 111 of the Italian Code of Civil Procedure;
- transferees join the proceedings which are at an early stage as per the Insurance Business Transfer Schemes;
- in any case, insureds and policyholders are duly notified of the business transfer from UK undertakings to EU newcos and the Insurance Business Transfer Schemes are normally exhibited in courts.

As a matter of fact, the joining of the transferees to proceedings does not appear to be the best solution for pending proceedings as there is the risk that:

- the joining party could be required to pay the court fee (ie the contributo unificato);
- the transferors will not be freed from obligations and, as mentioned above, there is no certainty that they will be allowed to leave proceedings;
- the final ruling will be binding on both the transferor and the transferee and also the transferee will be entitled to appeal against it.

What's next?

By March 31, 2021, UK undertakings must submit to IVASS a plan with regard to the performance of the insurance contracts in force as of December 31, 2020.

Whatever the plan, it seems unlikely that UK undertakings will easily disentangle from legal proceedings in Italy in that there is no real incentive for their adverse parties and for courts to let them go, so the long tail of Italian litigations will continue to wrap around them for quite some time (possibly, the end of proceedings).

The implementation of the Insurance Distribution Directive in Italy

DAVID MARIA MARINO, VALENTINA GRANDE

The **national regulatory framework** on insurance distribution was once again modified by the issuance of a new provision which came into force on February 9, 2021.

In the Official Gazette no. 19 of January 25, 2021, was published on d. lgs. December 30, 2020, n. 187, containing supplementary and corrective provisions to d. lgs. May 21, 2018, No. 68, implementing Directive 2016/97 relating to insurance distribution (IDD).

A new legislative framework

Among the changes made to the previous legislation, **a new definition of "insurance distribution"** referred to in art. 106 of the Cap.

In fact, the decree establishes that by "insurance distribution" we mean all those activities which consist in: (i) **providing advice on insurance contracts; (ii) proposing insurance contracts or carrying out preparatory acts relating to their conclusion; (iii) concluding such contracts or to collaborate, especially in the event of claims, in their management and execution.**

In particular, the provision of information relating to one or more insurance contracts on the basis of criteria chosen by the customer through a website or other means and the preparation of a ranking of insurance products, including comparison between prices and between products or the premium discount of an insurance contract, if the customer is able to take out the policy directly or indirectly.

At a first reading, it seems that the **purpose of the change is precisely to better describe what the distribution activity consists of**, especially with respect to the increasingly widespread use of "comparative" sites for orientation and purchase of products insurance, a phenomenon that in the past has already been the subject of further investigation by IVASS.[1]

Rather than a further expansion of the already broad notion of distribution, it seems legitimate to affirm that this is an intervention aimed at delimiting its borders with greater precision.

Even with respect to the definition of reinsurance activity, the intervention seems to be aimed at better describing its **boundaries**. The new decree specified that it should be considered as such even if the related companies operate without the involvement of a reinsurance intermediary.

Further innovations concern the subjects who carry out the distribution activity.

In particular, the obligation to register in the Single Register of Intermediaries was also introduced for employees and collaborators of intermediaries on an ancillary basis registered in sections e) and f) pursuant to art. 109 of the Insurance Code which until now were exempt from this obligation.

In addition, it was expected that those struck off the register can subscribe again if they have been rehabilitated or have failed personal incapacity resulting from the declaration of bankruptcy.

The Legislative decree 187/2020, in the wake of the news of the IVASS 97/2020 regulation,[2] introduced a new information obligation regarding the combined sale of an insurance product together with an accessory product or service pursuant to Article 120 *quinquies* of the Italian Insurance Code.

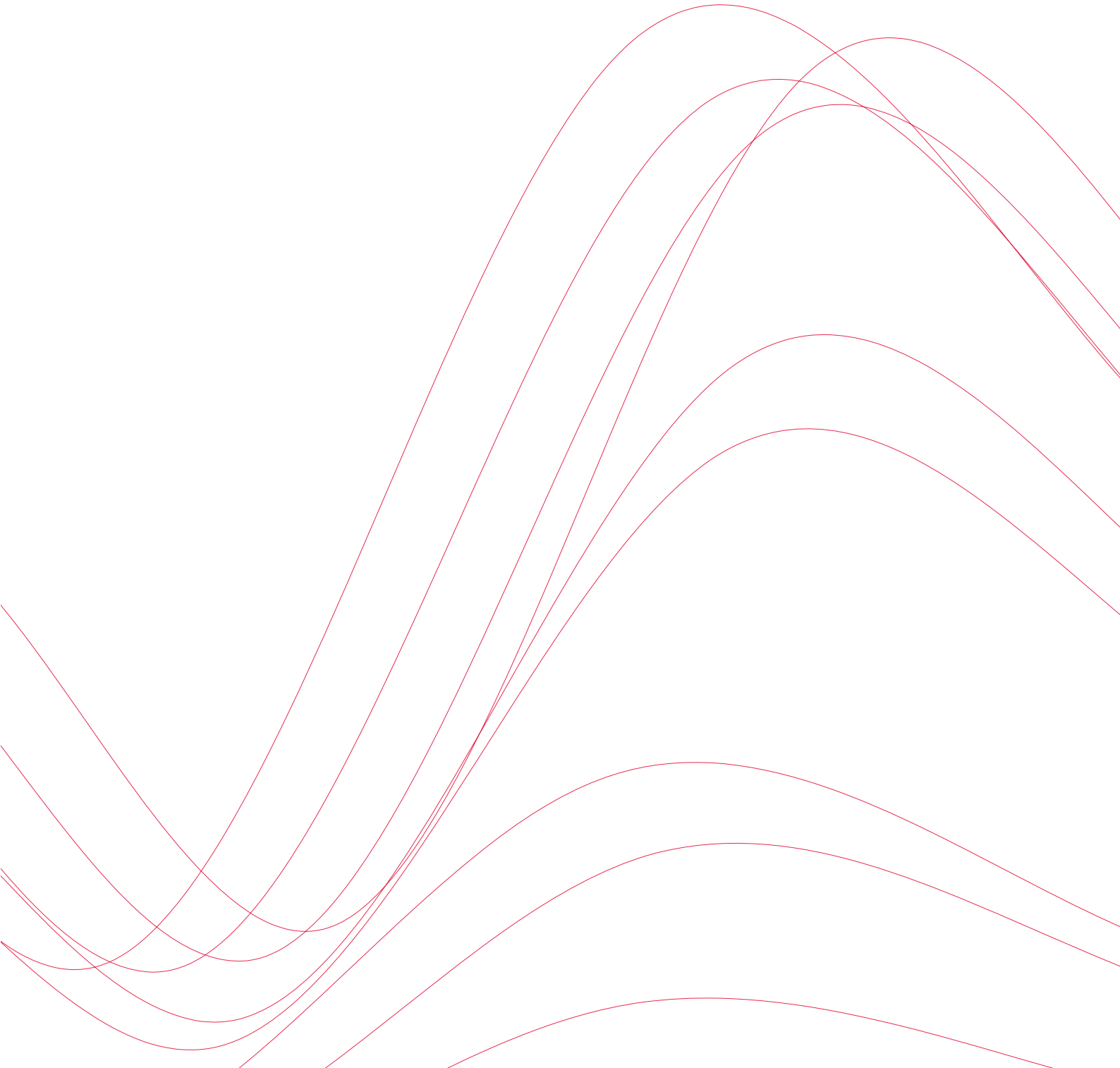
The distributor shall adequately inform the contractor of the different components of the package by providing separate evidence of the costs and charges of each component regardless of the contractor's purchasing choice.

[1] See Survey on comparative sites in the Italian insurance market published by IVASS in November 2014.

[2] With the 97/2020 Provision of IVASS was introduced, in Reg. IVASS 40/2018, the new art. 59 *bis* on "sale combined" which provides for the obligation of the distributor to provide the contractor "the adequate description of the various components of the agreement or of the package and the separate indication of the costs and charges of each component, as well as of the way in whose composition changes the risks or insurance coverage."

The decree also ordered that IVASS will apply precautionary and prohibitory measures, including the power to ban the sale of insurance together with an ancillary service or product which is not insurance, as part of a package or the same agreement, when such practice is detrimental to consumers.

The last news worthy of attention is the repeal of art. 187 *ter* of the Cap and the introduction of art. 187.1 regarding out-of-court dispute resolution. The new regulation provides for the adhesion, by companies and intermediaries, to out-of-court resolution systems for disputes with customers relating to insurance benefits deriving from any contract. These systems will be alternatives to the mediation and assisted negotiation procedures already provided for by law. Therefore, all that remains is to wait for the institution of the insurance arbitrator which, as foreseen by the new regulation, must take place by ministerial decree on the proposal of IVASS.



Is Open Insurance at a turning point? EIOPA launches public consultation on data access and sharing

GIACOMO LUSARDI, ALESSANDRO FERRARI, FILIPPO GRONDONA

On January 28, 2021, the European Insurance and Occupational Pensions Authority (EIOPA) launched a public consultation on data access and sharing in the insurance industry

Data is a key industry asset, available in quantity and widely used – from risk identification to pricing. The increase of partnerships with technology vendors and new data "sources" such as social media and Internet of Things (IoT) devices are further driving the industry's race toward innovation, bringing improvements in terms of efficiency and customer experience.

The question is whether and to what extent insurance value chains should be "opened," ie whether and to what extent insurance related data should be shared with other insurance or non-insurance operators. Open insurance means access to and sharing of data, both personal and non-personal, generally through Application Programming Interfaces (APIs), which are sets of functions and protocols allowing interaction and integration between different applications.

The relationship between insurers and technology operators

Existing examples of data sharing between insurance operators include **risk statistics, data on claims settlement as well as access to meteorological data**. Moreover, recent programmatic (eg the EU Commission's communications on "European Data Strategy" and "EU Digital Finance Strategy") and legal (eg the General Data Protection Regulation (GDPR) and the Payment Services Directive in the Internal Market (PSD2)) EU initiatives laid the groundwork for data-centric innovation and data sharing. According to EIOPA, **proper use of data** has huge potential for consumers, companies, regulators and the insurance industry in general, provided that the right balance is ensured with privacy/personal data protection as well as insurance and competition law.

With specific reference to the insurance sector, a harmonized regulatory framework and acceptable levels of standardization and interoperability are still lacking. Pending any measures aimed at facilitating the creation of a data-sharing ecosystem, insurance operators looking to exploit the potential of data must resort to bilateral or plurilateral negotiations and agreements.

Joint ventures and outsourcing agreements between traditional operators and technology vendors are becoming increasingly frequent.

On the one hand, technological solutions are often aimed at offering a richer and customized insurance experience to end users. On the other hand, they can provide companies with valuable information to adjust their offering. For example, wearable devices allow the collection of data on health status and physical activity. According to recent statistics, the use of these devices has more than tripled over the last four years and more than 80% of consumers say they are willing to wear them. Another growing trend is the use of digital platforms to provide advanced and easily usable services to both business customers and consumers.

These projects require careful prior analysis in terms of compliance, particularly as to industry regulations and privacy/personal data protection, paying extra attention to the use of artificial intelligence tools. Where the project is being launched in different

countries and jurisdictions to benefit from economies of scale and take greater advantage of processing larger data sets, the analysis will also need to take into account local rules and specificities.

From a contractual perspective, insurance operators and technology vendors must carefully regulate multiple aspects. First and foremost, the scope of the data exploitation and the flows between the parties involved must be precisely defined, especially if – as is often the case – services are to be provided via cloud and Software-as-a-Service (SaaS). It is then essential, among other things, to clearly set out the obligations and responsibilities of the technology vendor, also with reference to the project pilot phase, the service levels to be met, the audit tools available to the customer and the contractual rules governing termination and the consequent internalization of the service or replacement with a new provider. In addition, contracts should include sound contractual mechanisms for the protection of data, both personal and non-personal, and obligations of return or destruction at the end of the relationship.

The EIOPA consultation is open for comments until April 28, 2021, and hopefully its outcome will contribute to fostering the process of data valorization and data sharing within the insurance industry.

Navigating corporate (criminal) liability towards a new regulation on agri-food crimes: The quiet before the storm?

IRENE GASPARINI

2020 has been a crucial year for corporate liability, in so many ways. With the momentum generated by the implementation of Directive (EU) 2017/1371 on the fight against fraud to the financial interests of the EU by means of criminal law (the PIF Directive), Italian corporations have once more witnessed a substantial expansion of the predicate criminal offences that may trigger their administrative (though essentially criminal) liability for crimes committed by their managers and employees under Italian Decree 231/2001 (the Decree).

Some additions to the Decree have effectively seen the light – tax criminal offences above all – while others are yet to pass the final stages of legislative approval, as new regulations are on the horizon. This is the case, for instance, for agri-food crimes and related corporate (criminal) liability, currently in a draft law under the scrutiny of Parliament.

In other words, businesses have recently been called on to reshape their internal systems of control to adapt to a new tax criminal framework and may soon have to take into account new risk scenarios, including those associated with the commission of criminal offences connected to the food sector and supply chain, potentially putting public health, the industry and commerce at risk.

A new draft regulation on agri-food crimes: Where we are

A project regulation of criminal offences in the food sector has been on the table of the Italian government since 2015; however, it is only in March 2020 that a draft bill of law (*Disegno di legge A.C. 2427*) has landed in Parliament and, after the scrutiny of the competent Commission in the Chamber of Deputees, a Dossier on its contents was recently published in November 2020.

What's new? Key takeaways

In line with the pattern of the latest amendments to the Decree, the draft bill intends to expand corporate liability to a large array of (serious) criminal offences, including – for instance – **fraud in foodstuffs, counterfeiting of food stuffs, health disaster and many others**.

Most importantly, it aims at introducing a new *Article 6-bis* in the Decree that establishes for food businesses an innovative and "dedicated" organizational model, whose adoption and effective implementation has an exempting or mitigating effect on the company's liability for crimes committed by its managers and employees in its interest or to its advantage.

This additional model would include specific self-regulation (national and supranational) obligations such as:

- compliance with the standards relating to the provision of food information;
- surveillance activities on the traceability of the path of a food product along the supply chain (from production to distribution);
- control on the quality, security and integrity of food products;
- verification activities on the contents of advertising communications to ensure consistency with the characteristics of the product; and
- procedures for recalling or withdrawing food products that do not comply with food safety requirements.

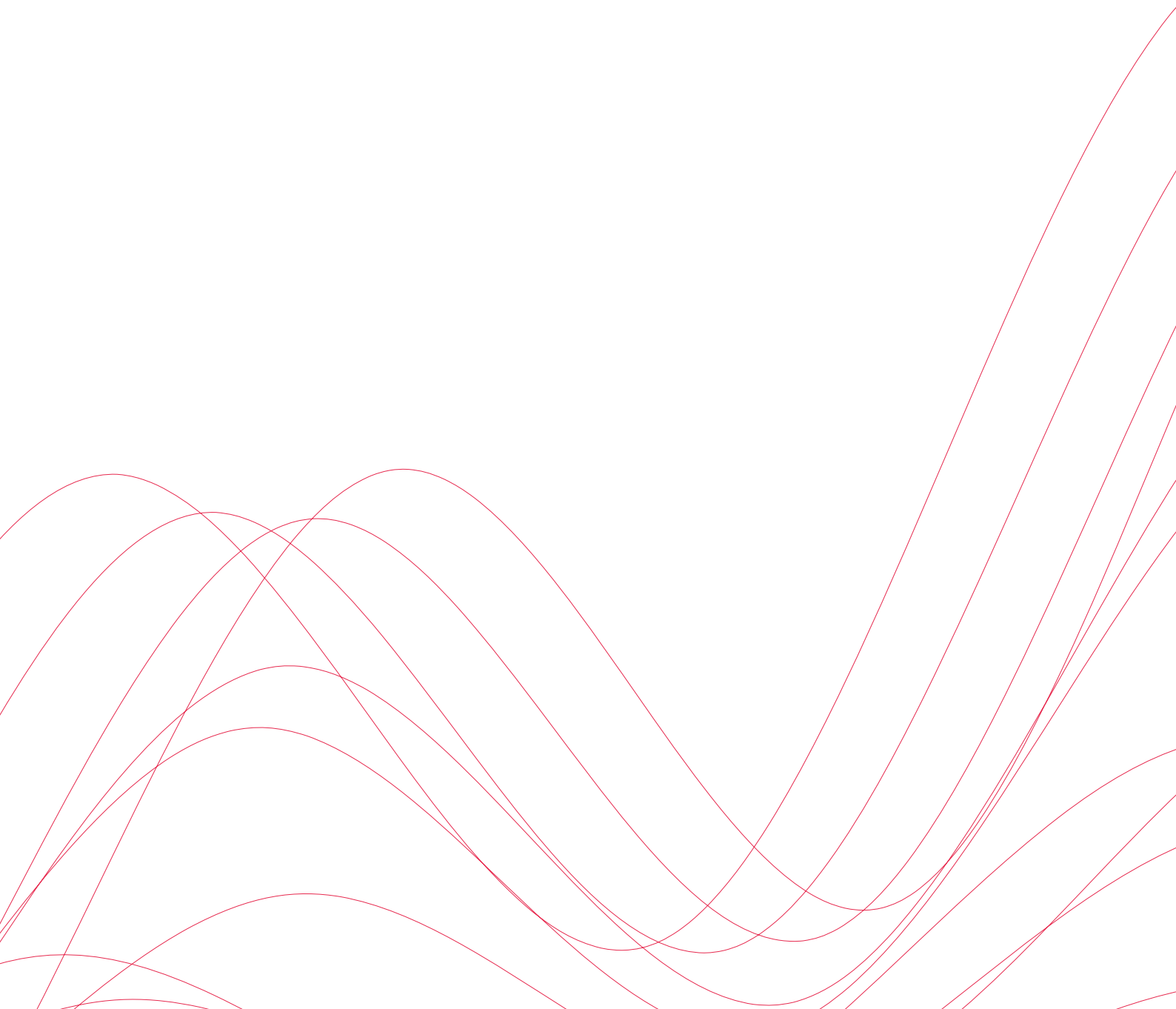
Moreover, depending on the size of the organization and the nature and type of activity, the model shall also provide, inter alia, for:

- adequate systems of recording the completion of the activities above; and
- an articulation of internal functions within the company ensuring the necessary technical expertise and the powers necessary for the verification, assessment, management and control of the risk.

Why is it relevant for businesses?

This draft reform represents **an unprecedented move in criminal policy**, one that could profoundly reshape the boundaries of corporate criminal liability in the "food economy" and potentially pave the way for new "special" organizational models, required of corporations on the basis of the specific sector where they operate.

Should the draft law be adopted, new risk scenarios will have to be taken into account and food businesses will be encouraged to adjust their internal systems of control accordingly, by clearly identifying the applicable relevant technical standards and potentially revising their internal organization to put in place the necessary control structure tasked to verify, evaluate and manage specific risks connected to the production, processing and distribution of food.



Ready for DAC6 obligations? Insights on the insurance industry

CHRISTIAN MONTINARI, ALBERTO SANDALO

DAC6 disclosure obligations are now "live" in Italy and the first reporting was due before February 28, 2021. The new compliance rules could affect almost any economic industry. The insurance sector is also affected. Large multinational players are required to reconsider the way they monitor and assess international tax risks and adapt their internal risk management system. Tax control framework may be the key.

EU mandatory disclosure rules – Main goals and Italian implementation

By DAC6 reference is made to EU Directive 2018/822 of May 25, 2018.

The purpose of the Directive is to enable the tax administrations of EU Member States to obtain comprehensive and relevant information about potentially aggressive tax arrangements, to fill in the information gap towards the rapid market evolution.

The goal is to track tax-planning schemes since their development phase and possibly even before they are actually implemented.

The Directive has been implemented in Italy by Legislative Decree No. 100 of July 30, 2020. Additional rules have been introduced by the Ministerial Decree of November 17, 2020, and by the Order of the Italian Revenue Agency of November 26, 2020. The national regulatory framework is unclear yet, since many crucial aspects still appear as open to interpretation. International players are facing an uncertain landscape, also considering that the DAC6 implementation at EU level seems to show limited convergency.

DAC6 obligations – What to report

In essence, the Directive sets out **new reporting obligations** that cover a set of information related to certain cross-border arrangements. The range of players potentially affected appears as extremely wide. The obligation is designed to primarily address the advisory and consultancy industry as well as financial institutions (so-called intermediaries). However, there may be a number of cases where the intermediary may not fulfill its disclosure obligation. In all such situations the responsibility shifts on the taxpayers.

Not any cross-border arrangement needs to be reported. The DAC6-framework includes a list of features and elements conceived as indications of potential tax avoidance or abuse. Those indications are referred to as "hallmarks" and are divided in five categories. To be reportable, a transaction should meet at least one hallmark.

The situation gets complicated considering that many hallmarks come into relevance only if the arrangement at stake fulfils the so-called main benefit test (MBT). This means that one of the main benefits which, with regard to all relevant facts and circumstances, a participant to the arrangement may reasonably expect to derive from that arrangement is a tax advantage – this may well be an entirely tax-legitimate one.

The Italian position on the MBT is peculiar and different from the majority of other EU MSs. Intermediaries and taxpayers are required to undertake a comparison between (a) the amount of the reasonably expected tax advantage and (b) the amount of any expected non-tax advantaged. If (a) accounts for more than 50% of the overall monetary value of the expected advantaged – tax and non-tax, ie (a) + (b) – then the MBT is satisfied. As per the preliminary guidance released by the Italian Revenue Agency, companies are required to carry out difficult prospective estimations that should be supported by adequate documentation.

Insights on the insurance industry

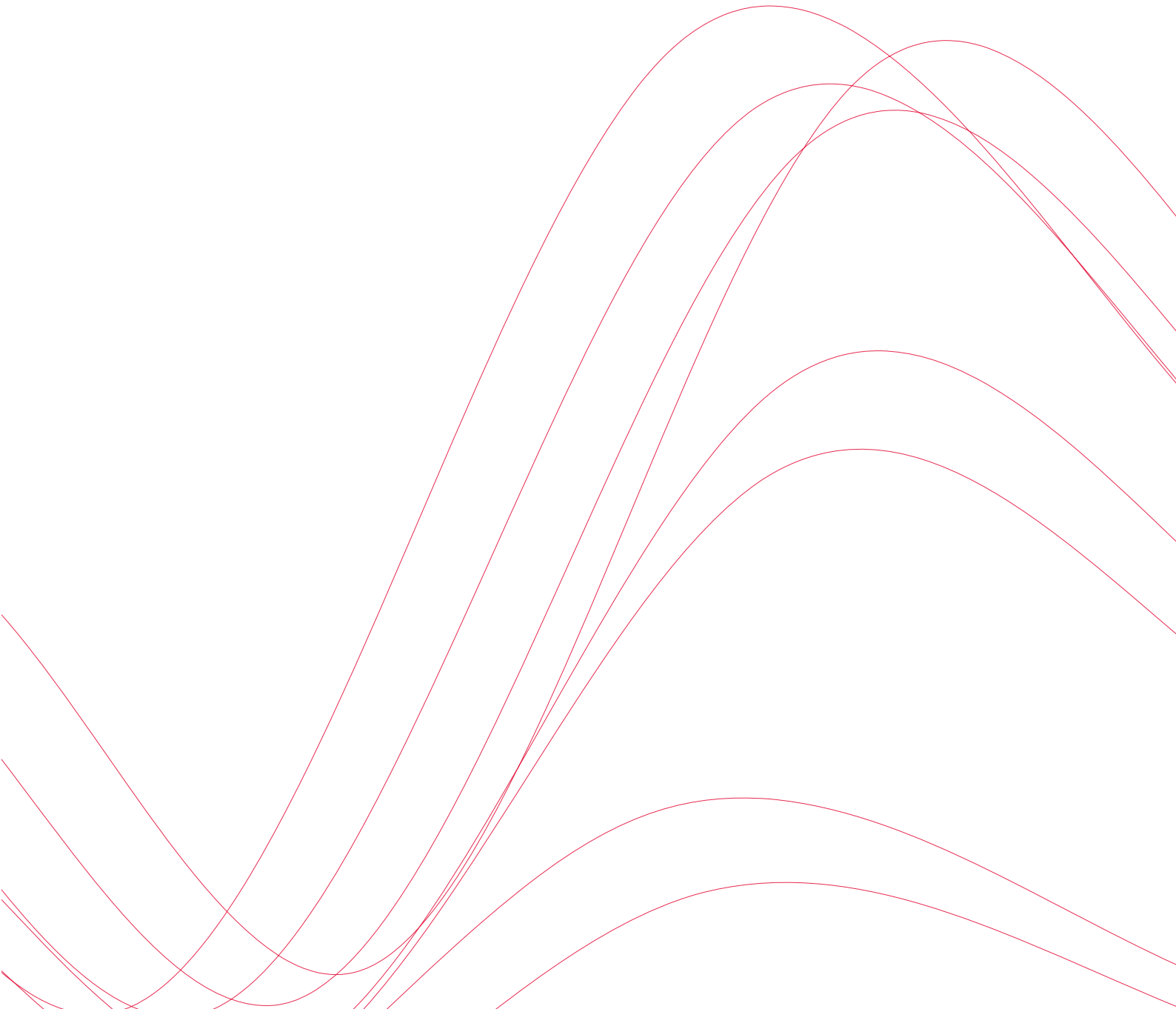
DAC6 mandatory disclosure rules can also have an impact on the insurance industry. Attention should be paid to hallmarks included in category D. Category D addresses arrangements (a) capable of undermining the effectiveness of the automatic exchange of information on financial accounts (CRS framework), or (b) involving that use of "opaque offshore vehicles" that determine

a non-transparent legal or beneficial ownership chain. Notably, hallmarks in category D do not need the MBT to be fulfilled.

In this respect it should be considered that insurance enterprises are already qualified as "reporting financial institutions" for the purposes of the common reporting standard (CRS) framework, especially with reference to financial insurance products. The risk of triggering hallmarks included in category D could arise in situations where a product that has a substantially financial nature is legally qualified in a way that enables to avoid the CRS reporting obligation. The risk should be rare in practice considering that insurance enterprises operate within the limits imposed by EU legislation and national surveillance authorities.

The hallmark listed in category D.1(b) includes the transfer of Financial Accounts or assets to jurisdictions that are not bound to automatically exchange the information related to the financial account with Italy. Relevant stakeholders (including the Association of Italian Insurance Companies) raised the issued whether the hallmark should include the FATCA agreements concluded with the US – also considering the limited reciprocity of the exchanged information. The latest guidance released by the Revenue Agency makes exclusive reference to the exchange of information under the CRS framework. It seems the US would be considered as "non-participant" jurisdiction.

While some further guidance is expected from the Italian Tax Administration, the DAC6-related compliance obligations represent an issue that all the players in the insurance industry need to take into account.



Insurance demerger and transfer of tax credits: How tax assets can affect economics in the Insurance sector

ANTONIO LONGO, MARIA TERESA MADERA

According to recent clarifications issued by the Italian Tax Authorities in the ruling No. 50 of January 20, 2021, in a demerger transaction, **the tax credit arising from the annual settlement of insurance premium tax may be transferred from the demerged company to the beneficiary**.

The case at stake involves an international insurance group operating in Italy under the freedom to provide services regime. The group undertook a reorganization process through the demerger of one of the insurance company authorized to operate in Italy in favor of four beneficiaries. The demerged company transferred its entire portfolio to the beneficiaries and deregistered itself from the IVASS Italian Register.

As a consequence, as from January 1, 2019, the demerged company no longer carries on insurance activities in Italy.

Pursuant to Article 9, par. 1 bis, Law No. 1216/61, by November 16 of each year, insurers shall pay an advance payment of the insurance premiums tax due for the following year. The advance payment amount is calculated based on the insurance premium tax due for the preceding year. The advance payment may be deducted from the following February from the monthly payments related to the insurance premiums tax.

Moreover, by May 31 of each year, the insurers shall submit to the **Tax Authority** an (annual) insurance declaration of the total amount of insurance premiums and accessories received during the preceding year.

Based on the (annual) insurance declaration, by 15 June, the Tax Authorities make a final settlement of the insurance premium tax due for the for the preceding year. The amount of the residual tax debt or surplus, if any, resulting from this final settlement, can be offset in the first monthly payment.

During 2020, the demerged company submitted the (annual) insurance declaration for FY 2019, showing a credit amount. However, considering that from January 1, 2019, the company Gamma no longer carries on insurance business in Italy, no insurance premiums were collected. Therefore such credit could not be offset from the following monthly payments.

In order not to lose the tax surplus, according to the Italian Tax Authorities' ruling, the demerged company can transfer its credit, together with the transfer of the going concern, to the beneficiary. As a matter of fact, the advance payment is closely linked to the insurance premiums collected. Therefore, the beneficiary, to whom the insurance portfolio is transferred, may offset the credit in the following monthly insurance premium tax payments.

From a procedural perspective, the credit may be transferred to the beneficiary with effect vis-à-vis the Italian Tax Authorities following a specific communication. Such communication includes the credit amount to be transferred and details of the payments made.

The principles here summarized are relevant for the insurance industry and notably in the context of reorganization process. It is once again clear that tax credits are more and more corporate "assets" to be duly managed by all the stakeholders involved in M&A and demerger transactions in the Insurance industry.

Claims Made Clauses: An interesting new decision from the Supreme Court

DAVID MARIA MARINO, LEILA BIANCHI

When a claims made clause is ruled to be invalid, the policy cannot automatically be requalified under the loss occurrence scheme.

By judgment no. 4705/2019 published on February 25, 2021, the Third Division of the Court of Cassation clarified that, if a claims made clause is held invalid in accordance with the principles set forth by the Joint Divisions by judgments no. 9140/2016 and 22437/2018, the relevant policy cannot be simply converted into a loss occurrence insurance contract but the parties' interest should be duly investigated and the contractual balance reassessed by adopting one of the claims made models ("pure" or "mixed") elaborated under Italian case law.

The Court of Cassation also confirmed that the damaged party has no direct action against the insurer but only the insured is entitled to claim indemnification by the latter based on the policy.

a) Claims made clause declared invalid by the Court of Appeal of Rome

The Court of Appeal of Rome had declared invalid a claims made clause contained in a PI policy entered into by a hospital providing coverage to "claims made for the first time during the policy period, as long as such claims are based on negligent actions made during the validity of the policy and not before the inception date. Coverage is, in addition, granted for damages caused by negligent action committed during the insurance period and notified to the insurer within 12 months from the expiration of the policy."

The Court of Appeal of Rome based their decision on the following reasoning:

- In the matter of health professional negligence, the damages suffered by the patients (and so the relevant claims) are often discovered quite some time after that the wrongful action/omission was committed.
- Therefore, the fact that the policy requires that both the claim for damages and the negligent act/omission need to fall under the one-year insurance period means that coverage is not adequate.
- The duty of the insured to notify a claim within 12 months after the policy expiry results in an additional limit to their right of indemnification.
- The insurer's right to terminate the contract without cause after that the first notification of claim by the insured is made implies an obvious (further) imbalance of the insured's rights in favor of the insurer's ones.

Consequently, the Court of Appeal deemed the "loss occurrence scheme" under art. 1917, cp. 1, ICC to be applicable to the policy.

b) Findings of the Supreme Court

The Court of Cassation found that the reasoning of the Court of Appeal in assessing the invalidity of the claims made clause was correct as compliant with the principles laid down by the Join Divisions in the judgments recalled above, according to which:

- in principle, claims made clauses are not invalid/vexatious;
- they might be declared so if they result in an arbitrary imbalance among the interests of the parties; and
- such interests should be investigated in light of various aspects, including the pre-contractual information obligations and the insurer's right to terminate the contract, in fact duly considered by the Court of Appeal.

Yet, according to the Supreme Court, the Court of Appeal was wrong in automatically converting the policy into a loss occurrence insurance contract.

In doing so, the Court of Appeal basically ignored the will of the parties to enter into a policy operating on a claims made basis and ended up creating a new contract "based on a non-existing agreement."

The goal that the Court of Appeal should instead have been that of "protecting the cause of the contract in light of the parties' intention to agree for an insurance contract covering a risk characterized by both the verification of the event and the existence of a claim for damages by the damaged party."

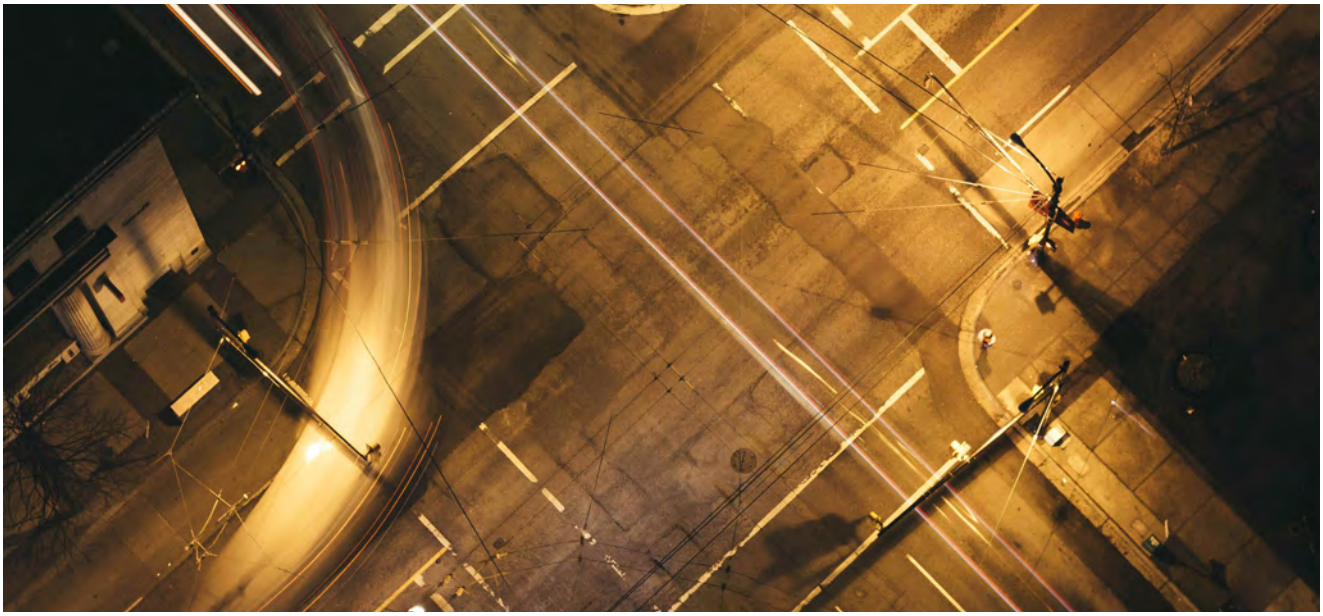
Indeed, the Court of Appeal should have "investigated amid the different 'claims made' models existing in the legal system and identified the more suitable one to pursue a balanced arrangement of the interests of the parties, in so adjusting the policy conditions based on the concrete cause, considering also all the other elements," eg general conditions of the policy, premium-calculation criteria; duration of the insurance contract; existence of previous claims; existence of other insurance contracts.

The Supreme Court then invited the Court of Appeal to reconsider their judgment on the basis of an investigation/assessment of the actual contractual intention of the parties in light of the above principle.

c) Lack of standing by the damaged party against the insurer

Under a different aspect, the Court of Cassation confirmed the general principle that (save in cases where the laws does provide that, for instance mandatory motor liability insurance) the insurer has no obligation under the policy towards the damaged party, nor in terms of contractual liability nor in tort, and confirmed that "only the insured is entitled… to bring action against the insured."

Based on this, the Supreme Court (also) assessed the lack of standing of the damaged party against the insurer.



Legal and regulatory updates

CONTRIBUTED BY CHIARA CIMARELLI, INA DOCI

1. Third survey on collective health insurance policies

On February 2, the Italian insurance regulatory authority launched the third **survey on collective health insurance policies**.

The survey is addressed to insurance companies with legal seat in Italy which have collected at least EUR10 million in 2020 in the relevant class of insurance business.

A series of information should be provided to IVASS (such as premiums collected for 2020, payments of accidents for the same year, etc) for the following two categories of policyholders:

1) health funds, institutions, funds and mutual aid societies; and

2) other bodies.

The transmission of the required data is to be carried out by April 23, 2021, for the group referred to in point 1), and by May 21, 2021, for the group indicated under no. 2).

The data must be sent to FONDI@ivass.it.

Clarifications on the above can be sked to leandro.daurizio@ivass.it.

2. IVASS clarifications on the Report on the sale distribution network and on CPD requirements

On January 22 IVASS published on its website clarifications regarding the report to be submitted to IVASS on the distribution network, as per article 46 of IVASS Regulation no. 40/2018, and on the Continued Professional Development requirements for intermediaries (CPD).

With respect to the first item, IVASS clarified that the insurance companies must draft the report on the distribution network for 2020, by following the same modalities as those already adopted for 2019.

As for the second, IVASS clarified that report on CPD shall be transmitted to IVASS by April 30, 2021, considering that term for complying with the CPD requirements was extended to IVASS until March 31, 2021.

The report must be drafted by the compliance function, as per the above mentioned article 46, as modified by IVASS Provision no. 97/2020, in force form the coming March 31, 2021.

3. Update on Brexit

On January 25, the Italian Insurance regulatory authority (IVASS) updated its web page regarding Brexit, based on the provisions of the law decree no. 183/2020, with which the Italian government introduced transitional measures for financial institutions, including insurance companies, with registered offices in UK.

As it is known, at the end of the transition period (December 31, 2020), the UK exit process from the EU was officially completed.

From January 1, 2021, British insurance companies are no longer subject to the European regulation.

Under the above law decree, **insurance companies with registered office in the UK** that until December 31, 2020, were authorized to carry out insurance business in Italy under right of establishment and/or under the freedom of services regimes **have been officially cancelled from the registry kept by IVASS**.

Nevertheless, insurance companies are allowed to continue their activity in Italy until the expiration of the policies placed in the country, but they cannot underwrite new contracts or renew existing ones.

Insurance companies therefore shall:

- inform policyholders, insured persons and others entitled to insurance benefits within 15 days of the transition process period;
- submit to IVASS, within 90 days of the abovementioned period, a plan containing measures for the implementation of the existing contracts and for policy coverage, including claims payments; and
- submit to IVASS, on an annual basis, a report containing the status of such plan.

Policyholders, insureds and others entitled to insurance benefits shall receive information on how the insurance companies will continue to operate in Italy.

Furthermore, from January 1, 2021, they can terminate the contracts which have a policy period over one year without paying any additional charges.

4. Publication of IVASS provision no. 107/2021 on transfer of portfolios in run off

On January 13, 2021, IVASS published provision no. 107/2021, containing amendments of ISVAP Regulation no. 14/2008 regarding, among others, the transfer of insurance portfolios in run-off.

Based on the Provision, which will be effective the day following its publication on the Italian Official gazette, the previous ban existing regarding the impossibility of transferring portfolios in run-off made of sole claims, will no longer be effective.

5. Consultation Document no. 1/2021 in matter of restoration plans and financings

Finally, on the same January 13, IVASS published also the Consultation Document no. 1/2021, which contains provisions regarding restoration plans and financings.

The Consultation phase will end on February 26; any comment may be submitted to pianodirisanamento@ivass.it.

The document in consultation, which consists of 12 articles divided into 3 chapters, implements article 223 ter of the Code of Private Insurances by disciplining the drafting and the authorization of the restoration plans and applies to domestic insurance and reinsurance companies, as well as to branches of extra EU insurance and reinsurance companies established in Italy and to controlling parent companies with legal seats in Italy.

In essence, based on said document, companies will have two months to submit to IVASS a restoration plan aimed at fixing the Solvency Capital Requirement and one month to submit a financing to fix the Minimum Capital Requirement.

Case law updates

CONTRIBUTED BY ANGELO BORSELLI, VALENTINA GRANDE

Italian Supreme Court, February 9, 2021, No. 3011

Third-party liability insurance and legal expenses insurance

If the policy includes both third-party liability insurance and legal expenses insurance, defense costs incurred by the insured in the proceedings brought by the injured third party fall within the liability insurance coverage and not within the legal expenses insurance coverage, up to 25% of the policy limits, pursuant to Article 1917, par. 3 Italian Civil Code (ICC). It follows that any limitation on coverage under the legal expenses insurance does not apply when the insured seeks coverage for defense costs under the liability insurance coverage.

Italian Supreme Court, January 14, 2021, No. 511

Insurer's legal costs

If the action of the plaintiff against the defendant is rejected, the legal expenses borne by the insurer joined to the proceedings by the defendant are to be charged on the plaintiff, even if the latter has not made any claim against the insurer.

Italian Supreme Court, November 11, 2020, No. 25298

Failure to pay the premium

A policy clause providing that, in the event of non-payment of the insurance premium, the insurer has the right to request the payment while the insured loses their right to be indemnified under the policy, is null and void pursuant to Article 1932 ICC. According to Articles 1901, in fact, failure to pay subsequent premiums results in the suspension of the insurance contract for the period to which the unpaid premiums refer, without prejudice to the insurer's obligation to indemnify claims occurred before.

Italian Supreme Court, April 8, 2020, No. 7749

All-risks insurance

In the case of all-risk insurance contracts, the insured bears the burden of proving that the claim falls within the risks covered by the policy, while the insurer shall prove that coverage of the claim is excluded.

Court of Bologna, November 30, 2020

Insurer's recovery action and joint and several debtors

An insurer who paid the entire sum due according to a judgment that became final and binding has the right to bring recovery action towards the joint debtor in a percentage of 50% according to Article 1298 ICC.

Court of Brescia, May 27, 2020, No. 1002

Insurance broker's liability

An insurance broker that fails to inform the insured, at the time of renewal of the policy, of a new clause limiting the insured risk, can be held liable against the insured.

DLA Piper's Global Guide to Directors' Duties

DLA Piper's new Global Guide to Directors' Duties is now available: https://www.dlapiperintelligence.com/directorsduties

The Guide provides a broad overview of directors' duties, liabilities and obligations in 26 jurisdictions around the world, answering questions about the key duties, obligations and potential liabilities faced by directors in each jurisdiction. The Guide also allows you to compare several jurisdictions easily and quickly.

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