MARCH-APRIL 2024

#DeRisk Newsletter

Contents

Cyber and InsurTech

Navigating compliance waters – How will DORA affect insurance and financial companies?

WRITTEN BY: GIULIA ZAPPATERRA AND MARIA CHIARA MENEGHETTI

What is DORA?

On 17 January 2025, Regulation (EU) 2022/2554, commonly referred to as DORA (Digital Operational Resilience Act), will finally come into effect.

DORA is a cornerstone of the EU's digital finance legislative package. It stands alongside MiCAR, which focuses on markets in crypto-assets, and the DLT pilot regime, a regulation on distributed ledger technology.

DORA focuses on cybersecurity. It aims to enhance "operational resilience" in the European financial sector.

It's a groundbreaking regulation in the financial landscape, aiming to harmonize and standardize cybersecurity requirements for financial entities operating across Europe.

The overarching objective is to strengthen these entities against cyber threats, fostering a capacity to prevent, withstand, and respond effectively to such challenges. These requirements are currently fragmented across various European and national provisions (eg NIS1 Directive, PSD2, Italian Cybersecurity Perimeter, scattered provisions from IVASS and Bank of Italy), resulting in inconsistent application and compliance challenges. By consolidating and streamlining these requirements, DORA seeks to enhance the overall cybersecurity posture of the financial industry while facilitating greater regulatory clarity and compliance efficiency.

This industry-specific regulation primarily targets financial entities and takes precedence (*lex specialis*) over concurrent and broader cybersecurity regulations, like the NIS2 Directive, which have been implemented concurrently.

Which financial entities does DORA cover?

DORA has an exceptionally broad scope, applying to virtually all operators in the financial sector, with few exceptions. The detailed list of entities subject to DORA's provisions is provided in Article 3 of the regulation, and it's crucial for the relevant operators to determine their category of operation. Essentially, DORA will affect:

- **Traditional financial entities** (banks, investment firms, and insurance companies); and
- **Emerging market players** (electronic money institutions and crypto-asset services).

DORA also introduces specific monitoring obligations directly targeting critical providers of ICT services (eg cloud service providers), who offer their services to financial entities.

The key pillars of DORA

The DORA provisions can be condensed into four fundamental pillars, each representing a cornerstone of the regulation's framework. These pillars, when applied together, are designed to give financial entities the tools to recognize and manage ICT risks, whether inherent or stemming from third parties:

- **Governance and internal organization** – Financial entities have to establish an internal cybersecurity governance and control framework to effectively and prudently manage all ICT risks. DORA aims to elevate ICT risks as a significant component of the operational and financial risks already addressed by financial entities. Consequently, a defined set of responsibilities must be delegated to the financial entity's management body, which has primary accountability for the overall ICT risk management.
- **Risk management framework** – Financial entities have to maintain a robust, comprehensive, and well-documented cyber risk management framework as part of their overall risk management system. Operators must:
  - identify all sources of ICT risk and implement mechanisms for detecting abnormal activities;
  - deploy strategies, policies, procedures and ICT protocols to ensure continuous monitoring and prevention of ICT related risks, as well as prompt response and recovery from incidents; and
  - deploy resilient ICT tools and systems to minimize the impact of related risks, and to adequately protect all information and ICT assets, including computer software, hardware, servers, as well as to protect all relevant physical components and infrastructure.

DORA introduces some simplifications for companies exempt from enhanced obligations (eg small non-interconnected investment firms), but this does not exclude the implementation of basic ICT risk mapping and management measures.

- **Incident management and reporting** – DORA introduces several provisions regarding the management of incidents related to ICT services. Financial entities will have to:
  - establish and implement operational continuity policies and disaster recovery plans in the event of ICT-related disasters, such as cyberattacks;
  - acquire the necessary capabilities and personnel to detect vulnerabilities, threats, incidents, and cyberattacks, and assess their potential impact on digital operational resilience; and
  - develop communication plans for various stakeholders.

When it comes to incident reporting, financial entities have to establish and implement a management process for monitoring and documenting ICT-related incidents. This includes classifying incidents, evaluating their impact, and reporting serious incidents to the relevant authorities.

- **ICT third-party management** – To mitigate risks arising from financial entities' reliance on third-party service providers, specific provisions have been introduced to ensure the proper assessment of third-party providers of ICT services and the inclusion of mandatory clauses in service agreements, to manage the impacts of their operations.

As part of this effort, the regulation establishes a European-level oversight framework for critical third-party ICT service providers. Each critical third-party ICT service provider will be subject to oversight by a designated lead supervisory authority.

Regulatory technical and implementing technical standards specifying DORA

In addition to the regulatory framework of DORA, the regulation provides that certain provisions will be further detailed through regulatory technical and implementing standards (RTS and ITS) by European supervisory authorities, namely the EBA, EIOPA, ESMA, and the ESAs.

To date, two different sets of RTS and ITS have been released (see first batch RTS and second batch RTS), delving into topics such as classification, timelines and contents of ICT incidents notification; details on the ICT risk management framework; subcontracting of critical functions and threat-led penetration testing (TLPT).

These RTS and ITS are expected to complement the framework for ICT risk management for financial entities.

The practical impact of DORA on financial entities

The ramifications of DORA on financial institutions will be profound. While it's likely that many larger and well-established entities already comply with several of DORA's requirements and technical measures, the regulation sets forth a new standard of awareness and standardization for all operators, unprecedented in previous regulatory framework.

It's essential for financial entities to adopt a proactive and informed approach by engaging in preparatory activities to assess the true impact of DORA on their operations.

Operators should:

- **Conduct a gap analysis of their ICT risk management framework**, reviewing the internal governance structure and existing ICT risk and incident management protocols. This assessment aims to gauge organizational awareness of the new regulatory framework and determine whether current resources, strategies, and response plans align with regulatory expectations. If shortcomings are identified, updating and adjusting plans will be necessary.
- **Assessing critical ICT service providers**, namely mapping contracts with third-party providers and assessing their criticality to business operations. Identifying vulnerabilities and documenting them facilitates risk containment strategy planning. Lastly, renegotiating party obligations aims to align contracts with regulatory requirements.
- **Revising incident reporting mechanisms**, which entails assessing the company's capabilities and responsiveness in terms of reporting. Subsequently, implementing new procedures or adjusting existing ones ensures alignment with the new regulatory requirements.

While 17 January may appear to be in the distant future, all financial entities have to begin preparing now to ensure they can comply with DORA within the planned deadline.

Insuring the unpredictable: The challenges of AI risk insurability

BY KARIN TAYEL, GIACOMO LUSARDI AND ANDREA OLIVIERI

AI is all around us and it's here to stay

AI is rapidly permeating various economic sectors. From financial services and insurance to life sciences and encompassing industries as diverse as retail, industrials, real estate, media and sports. AI is reshaping traditional paradigms and marking a shift in how enterprises operate and innovate.

In financial services, AI technologies are being deployed to boost customer service capabilities, streamline credit assessments, and strengthen fraud detection mechanisms. Similarly, AI models are transforming insurance operations in claims processing, underwriting, customer service, and risk assessment, and enhancing decision-making and resource management. In life sciences, AI enables groundbreaking advances in research and development, facilitating personalized patient care and innovating diagnostic and treatment methods. Industrials are also harnessing the power of AI to optimize operational efficiency and improve organizational resilience against market fluctuations and disruptions.

According to DLA Piper's Global AI Governance Report from last September, large and medium-sized business are rapidly embracing AI, with 96% of organizations rolling out AI in some way and at least four projects live in each company. The report also reveals that 83% of companies have a defined AI strategy, and 86% of those have incorporated guidelines to steer their AI initiatives. This indicates a strong commitment to responsible AI adoption. But the report also suggests that while companies are taking steps towards compliant and ethical AI use, it will take more than these measures to address the scale of issues raised by AI.

Benefits and risks

Despite the transformative potential of AI to change business practices and drive unprecedented value creation, the path to AI integration is full of potential pitfalls. The EU AI Act has yet to be finally adopted and companies will have 24 months (with a few exceptions) after it's entered into force to comply. But the existing legislation and sector regulations already pose several challenges on the route to AI corporate implementation, and the risk of issues, fines, investigations, and legal actions is significant.

One serious challenge is the lack of transparency, especially in complex deep learning models, such as LLMs (Large Language Models). This opacity makes it difficult for users to understand how AI systems make decisions, fostering distrust and resistance to adoption. It may also hinder efforts to identify and rectify biases in AI algorithms, as stakeholders might have problems in scrutinizing the underlying decision-making processes. Additionally, the absence of transparency poses challenges to regulatory compliance and ethical oversight, as it becomes more challenging to assess whether AI systems abide by laws, regulations and standards.

AI systems have the potential to propagate societal biases, resulting in discriminatory outcomes. This occurs when the data used for training AI models mirrors societal prejudices, including those rooted in race, gender or socioeconomic status. If the training data exhibits bias, the AI system might internalize and perpetuate these biases in its decision-making processes. For instance, in the insurance sector, if historical data used to train an AI-based risk assessment tool demonstrates a bias against certain demographic groups, the AI system could unconsciously perpetuate this bias by unfairly pricing policies or denying coverage to individuals from those groups, exacerbating existing disparities in access to insurance.

Further issues regard data privacy and cybersecurity. AI systems rely on extensive datasets to train their algorithms and enhance performance. These datasets encompass a wide array of information, and may include personal data such as names, addresses, financial information, and sensitive information like medical records and social security numbers. The collection and processing of such data raise significant concerns, such as the risk of data breaches and unauthorized access to personal information. In addition to the data privacy risks, implementing AI systems may entail specific vulnerabilities and threats, including potential breaches, data manipulation, adversarial attacks, and the exploitation of AI models for malicious purposes.

AI also brings about some challenges related to intellectual property (IP), particularly regarding training AI algorithms on third-party datasets and protecting AI-generated outputs. Training AI algorithms using proprietary datasets owned by third parties carries the risk of infringing their IP rights, potentially leading to legal disputes involving copyright, trade secrets, or other IP rights. Questions can also arise concerning the protectability of AI-generated outputs, such as software code, text, images, or other content. Determining whether the AI output can be protected through IP and defining the boundaries of such protection can be complex, especially when it involves combining and transforming existing works.

All these risks may expose companies adopting AI to severe liability towards their customers, partners and stakeholders. To mitigate these risks – aside from the requirements and obligations that will apply under the AI Act – companies should implement robust internal policies and guidelines to govern AI systems' development, deployment and usage. They should also incorporate contractual safeguards into agreements with third-party providers and stakeholders to outline responsibilities and liabilities related to AI usage. Technical measures, such as encryption, access controls, and anomaly detection, should be employed to protect data and AI systems from breaches and unauthorized access. Regular security audits and vulnerability assessments can help identify and mitigate potential weaknesses in AI systems and infrastructure. Furthermore, implementing organizational measures, such as regular employee training and awareness programs, can create a culture of accountability and compliance with regulatory requirements and ethical standards in AI deployment.

Insuring the unpredictable

On top of these measures, companies from various industries are assessing with their brokers whether the risks stemming from using AI systems can be considered part of their existing insurance coverage or if they have to get new policies.

Although certain existing policies (such as PL/PI insurance, cyber and third-party liability) may cover some AI risks, there are significant gaps that require rethinking of existing policies and possible creation of new solutions depending on specific situations.

Risk assessment is the basis of the insurance contract. A risk can be insured if:

- it causes **definitive loss** taking place at a specific time, in a specific place, and arising from certain specific causes;
- the loss caused is **accidental**;
- losses are predictable (predictability allows evaluating frequency and severability); and
- underwriters can provide affordable premiums.

Carrying out an accurate risk assessment is fundamental both for underwriters and for insureds. In fact, underwriters can exclude or limit certain specific risks, and insureds can shape the best cover for them against specific claims.

In case of AI liability, risk assessment is a new frontier to be explored. In such case, insurance is not a static concept: it could be very difficult to appraise the aggravation or reduction of the risks, since risks can change rapidly.

The first policies currently available on the market granting coverage against third-party risks for AI provide a range of solutions to adapt existing insurance to AI challenges such as:

- specific exclusions
- consistent deductibles
- co-insurance risk-taking
- specific coverage limits/sub-limits which can transform unquantifiable underlying risks into known maximum exposures.

In the next future, some risks currently covered could be no longer be insurable, at least not without a higher premium.

At the same time, some risks currently left without cover might become better understood and become affordably insurable. More risks than previously could be eligible for coverage on reasonable terms, based on tailor-made evaluations.

The EU could provide more precise indications. The EU has intervened with a proposal for a Directive (the AI Directive), with the aim of harmonizing the liability regime in case of damages caused by AI systems; and a proposal for a Regulation (the AI Act), which mainly aims at preventing damages.

Article 6 of the AI Directive states that the EU will consider imposing compulsory insurance cover. But it doesn't clarify who would be subject to this obligation: companies that use AI? Companies that produce AI systems? The companies that sell AI systems? All of them?

The use of AI by carriers

The use of AI by insurance companies themselves will also contribute:

- to the implementation of the risk assessment. In this evolution, it's likely that insurance will shift from its current state of "asses and indemnify" to "predict and prevent," transforming every aspect of the insurance industry;
- to the differentiation of risks more precisely;
- to deeper and faster detection of insurance fraud;
- to accelerate claims handling and management;
- to require affordable premiums.

As a consequence of the implementation of the risk assessment, according to various operators, the use of AI also by insurance companies will allow the expansion of the services in the following sectors:

- cybersecurity insurance
- blockchain integration
- climate risk assessment

In Italy the legislator has recently introduced mandatory insurance against catastrophic events. An accurate and prompt assessment of the risk with AI will be essential to respond efficiently to the demand of the insureds.

Nowadays the use of AI in claims handling is a concrete reality in motor and property insurance. Insureds can notify a claim providing all photos of the damages to be indemnified with a simple click from their phone and obtain immediate assistance for repairing them.

AI is already also used to manage claims: various insurtech companies recently created software providing summaries of judicial pleadings and a quick analysis of the claim, speeding up the relevant management for claims handlers.

Keys takeaways

- AI has benefits and risks
- **Insurability depends on understanding the risk**
- Using AI could imply new risks to be insured
- New insurance products are expected to cover risks which could have been considered uninsurable in the past
- The use of AI by insurance companies will allow:
  - differentiation of risks
  - creation of more tailor-made insurance solutions
  - detection of insurance fraud
  - affordable premiums
  - faster claims handling processes
  - implementation of cybersecurity insurance, blockchain integration and climate risk assessment

Regulatory

EIOPA consumer trends report 2023

WRITTEN BY: DAVID MARINO, VALENTINA GRANDE, ERICA SIMONE

On January 23, EIOPA published its annual report on consumer trends in the insurance sector.[1] The report provides valuable insights into consumers' financial well-being in the context of the cost of living crisis and examines fairness across different consumer treatment practices. It addresses hot topics such as value for money, discriminatory practices and the impact of digitalization, backed up by a Eurobarometer survey. This comprehensive analysis makes the report a compelling resource to help understand current financial dynamics and ensure fair treatment for all consumers.

In this article we look at the main findings.

Inflation affecting consumers

Following the COVID-19 pandemic (2020) in 2021, the continued supply chain disruptions, and the invasion of Ukraine by Russian forces (2022), the global and European economic macro-environment changed. After an extended period of low inflation and low/negative interest rates, the economy shifted to high inflation, prompting central banks globally and in the European Economic Area (EEA) to increase interest rates. This new economic reality directly affects insurance and pensions consumers in several ways.

Impact on insurance and pension investments

EIOPA's 2023[2] Eurobarometer surveys show that the percentage of European consumers that are confident in their ability to live comfortably throughout their retirement decreased by 3 percentage points from June 2022 to July 2023. Beyond the direct impact of inflation on consumers' real returns, consumers have less disposable income to allocate to insurance or pensions investments, hindering their long-term financial health.

Impact on non-life insurance consumers

The general increase in the cost of goods and services has led to higher premiums and deductibles for policyholders.

Diversity, equity and inclusion (DEI)

EIOPA's 2023 Eurobarometer survey confirms that, like in 2022, there's a clear and evident gender gap in terms of access to insurance and pensions. The attention towards financially vulnerable consumers (those who are vulnerable because of personal characteristics such as age, immigration status, income) is growing.

Value for money in insurance

The value for money of insurance products plays a central role as it is closely correlates with consumer trust in the insurance sector.

EIOPA's Eurobarometer Survey, as of July 2023, shows that the percentage of consumers who believe their products don't offer them value for money is the highest for IBIPs (Insurance Based Investment Products) (27%) when compared with household (20%) and motor insurance (22%). The ranges of consumers who believe that their IBIP offers them value for money ranges from below 60% in countries like Belgium, Italy, Malta, Sweden and Lithuania to close to 90% in Cyprus, and almost 80% in Greece and Romania.

The report also highlights high and unjustified costs and complex product characteristics. Beyond value in product design terms, there are continued concerns about the quality of advice and possible conflicts of interests in the sale of IBIPs and in particular in the sale of unit-linked products.

1 Cf.: https://www.eiopa.europa.eu/publications/consumer-trends-report-2023_en?prefLang=it
2 Cf.: https://europa.eu/eurobarometer/surveys/detail/3053

EIOPA's 2023 Eurobarometer backs up concerns in relation to conflicts of interests and poor advice: 60% of EU consumers believe it's difficult to get unbiased advice on the optimal coverage for their need. And 29% of EU consumers believe the commissions and fees paid to insurance intermediaries and advisors are transparent and clear.

Digital distribution trends in insurance

Recent years have seen a growth in digital distribution in the insurance sector.

Increasing digitalization provides significant benefits both to consumers (faster and more convenient purchasing experience, and informed decision-making through comparison websites) and to businesses (reduction in distribution costs).

Some 65% of consumers find it easier to gather information and compare products online rather than in person or over the phone. But for more complex products, remote distribution still lacks in terms of advice, and the majority of consumers (about 69%) still prefer to receive personalized advice over the phone or in person.

Digitalization also presents risks, including particularly poor accessibility of information and the spread of unfair commercial practices. EIOPA's survey shows that a significant percentage of consumers reported encountering deceptive sales techniques when buying insurance online (for example, 13% of consumers encountered misleading statements, such as the claim that many other people have already purchased the policy, while 18% reported price indications that vary over time).

Sustainability claims

EIOPA's Eurobarometer survey shows an increase in EU consumers that have heard about sustainable or "green" products. But it's important to ensure that the sustainability claims made at product-level and entity level are accurate, substantiated, accessible and don't lead to greenwashing.

EIOPA's Eurobarometer surveys show that consumers are sceptical of providers' sustainability claims, with 51% of EU consumers not trusting providers' sustainability claims. Moreover, 44% of EU consumers find product's sustainability related documentation complex (32% find it easy to understand, 24% don't know).

NAT CAT protection gap

Amid a rising frequency of natural disasters in Member States, some NCAs report issues related to the Nat Cat protection gap causing additional consumer detriment when systemic events materialize.

In some cases, there's a lack of clarity regarding coverage terms and related exclusions, a discrepancy between consumer expectations and the actual protection offered, and a general slowness in claims processing.

Cross selling

In past Consumer Trends Reports, EIOPA highlighted the risks that can emerge for consumers from cross-selling practices when they're not implemented in their best interest.

EIOPA's warning on the sale of credit protection insurance products specifically highlighted risks which can emerge for consumers in the context of cross-sales of credit protection insurance products jointly with loans.

Pension trends

Improved transparency and financial literacy initiatives fostering pension awareness and adoption

According to EIOPA's 2023 Eurobarometer survey, only 42% of EU consumers are confident that they'll have enough money to live comfortably throughout their retirement – this varies greatly across countries, with highest levels of confidence in Luxembourg (61%), the Netherlands (59%) and Denmark (58%) and the lowest in Latvia (23%), Slovenia (27%) and Poland (28%).

The low confidence among EU consumers regarding retirement could be partly due to the moderate/low penetration of pension services: 23% of EU consumers are members of an occupational pension scheme and 19% of EU consumers own a personal pension product.

The majority of regulatory authorities believe that to increase these figures, it's crucial to enhance disclosure and informational transparency and adopt financial literacy initiatives. *Pension market overview*

Occupational pension schemes and personal pension products affect Europe's economy by aiding retirement savings and optimizing long-term capital allocation. But the varied characteristics of these investments across countries create regulatory and supervisory challenges.

Italian Budget Law on mandatory insurance against catastrophic events raises several questions

WRITTEN BY: CHIARA CIMARELLI AND FRANCESCO EDOARDO ASCIONE

Law No. 213 of 30 December 2023[3] (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[4] caused by natural disasters and catastrophic events occurring on national territory.[5]

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 covers, 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 tax benefits of the "superbonus,"[6] in relation to expenses for works started after 30 December 2023, also have to take out insurance to cover damages caused to their properties – including residential properties – by natural disasters and catastrophic events, all 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.

However, 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 does not exclude that the procedures for identifying calamitous and catastrophic events eligible for compensation may also be referred to 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.

3 State budget for the financial year 2024 and multi-year budget for the three-year period 2024-2026.
4 The relevant assets are listed in Article 2424, paragraph 1, letter B-II, numbers 1), 2) and 3) of the Civil Code.
5 Article 1, paragraphs 101-112 of the Budget Law.
6 See Article 119, paragraph 8-ter, Law-Decree No. 34/2020.

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 nevertheless must be registered and approved by IVASS. Currently, 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

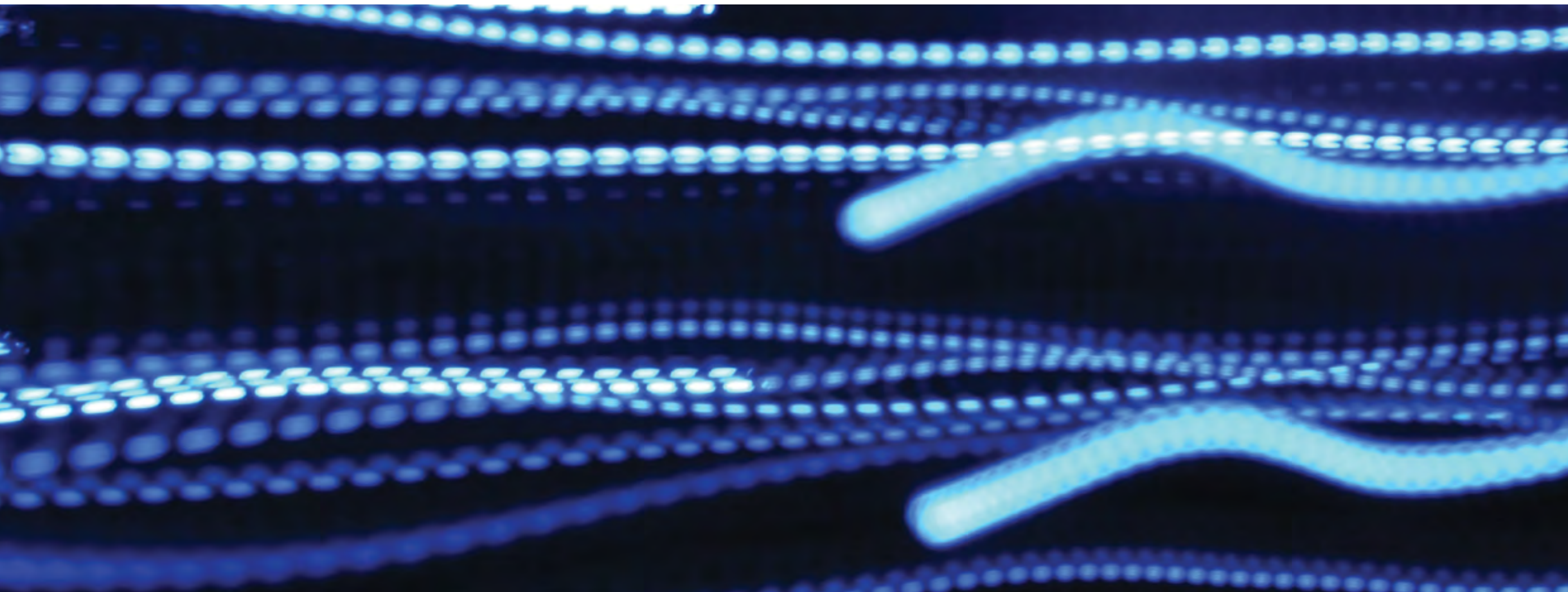
These provisions raise a number of questions. How will insurance companies manage and assess requests for coverage in relation to real estate located in earthquake-prone areas or frequently affected by natural disasters? And will the obligation to take out the insurance policies in question affect – 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 obtain sworn certifications of building conformity? 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.



Legal and regulatory updates

WRITTEN BY: CHIARA CIMARELLI, INA DOCI, FRANCESCA SANTOVITO

1. INTERLOCKING BAN CRITERIA UPDATED – 19 FEBRUARY 2024

On 16 February 2024 the Italian Insurance Supervisory Authority (IVASS), the Bank of Italy and the National Commission for Companies and the Stock Exchange (CONSOB), in agreement with the Italian Competition and Market Authority (AGCM), published a notice on their respective websites updating the application criteria (**Criteria**), first issued in 2012 and updated in 2018. The criteria relate to the application of the **interlocking ban**, pursuant to Article 36 of Law-Decree No. 201/2022 (**Law-Decree**).

The **interlocking ban** is the prohibition on taking up or holding office between competing companies or groups of companies operating in the credit, insurance or financial markets. The Criteria specify that the prohibition operates whenever one of the companies (or groups of companies) in which a person holds offices, has a total turnover, achieved at national level by the company or group to which it belongs, of at least EUR47 million. In 2018 this figure was reduced to **EUR30 million**.

To date, the revision of the Criteria is necessary to incorporate the new calculation method of the turnover of the undertakings, as amended by Article 16, paragraph, 2 of Law No. 287/1990 (**Competition Law**), to ensure that it continues to respond to logics consistent with those set forth in the competition rules, which the interlocking ban aims to protect.

Through this notice, the legislator has decided to replace the previous calculation method for **banks and financial intermediaries** based on the size of the intermediaries' assets with a new method based on operating income. With reference to these parties, the turnover is the sum of the income statement items listed and no longer one-tenth of the total assets of the balance sheet.

With regard to **insurance undertakings**, Article 16 paragraph 2 of the Competition Law specifies, in substantial continuity with the previous situation, that turnover is replaced by the value of gross premiums written. This includes all amounts collected or receivable in respect of insurance contracts entered into directly by the undertakings or on its behalf, including premiums ceded to underwriters, after deduction of any parafiscal taxes or levies collected on the amount of premiums or on the total volume.

All the amendments introduced to the Criteria are relevant for posts taken up or renewed after the date the update was published.

2. IVASS FURTHER REMINDER ON NEW RUI WEB PORTAL – 5 MARCH 2024

On 5 March 2024 the Italian Insurance Regulatory Authority (**IVASS**) published a new reminder on its website reiterating that from the beginning of June, the new RUI portal will be operational. The portal allows intermediaries and insurance companies to enter and update data; for example, applications for registration, directly in the Register.

To access the new portal, IVASS states that it will be possible to use, at one's discretion, the digital identity (SPID), the national services card (CNS) or the electronic identity card (CIE), according to the methods indicated in the technical instructions that will be published on the Authority's website.

Intermediaries who are natural persons, on the other hand, even if they operate as sole proprietorships/ businesses, do not have to proceed with prior accreditation on the Delegation Portal but will be able to access the new RUI Portal directly.

IVASS also informs that, to allow the transition from the old to the new Portal, **as from 30 April 2024**, it will no longer be possible to send applications by means of electronic form transmission (intelligent PDF) and the dedicated PEC box will be deactivated, and that, in addition, all requests for data entry and updating that reach the Institute by 30 April will be processed using the current method. After this date, it will be necessary to wait for the launch of the new Portal.

Finally, the manual for the use of the new RUI Portal will be made available close to its launch.

3. NEW THRESHOLDS FOR PROFESSIONAL INDEMNITY INSURANCE FOR INTERMEDIARIES – 22 MARCH 2024

On 21 March 2024 the Italian Insurance Regulatory Authority (**IVASS**) published on its website the Delegated Regulation (EU) no. 2024/896 (**Delegated Regulation**) of December 2023 issued by the European Parliament which amends IDD as regards to the base amounts for professional indemnity insurance and for financial capacity of insurance, reinsurance and ancillary insurance intermediaries.

Specifically, article 10, para. 4, of the IDD is modified as follows:

"4. Insurance and reinsurance intermediaries shall hold professional indemnity insurance covering the whole territory of the Union or some other comparable guarantee against liability arising from professional negligence, for at least EUR1,564,610 applying to each claim and in aggregate EUR2,315 610 per year for all claims, (...)"; while

paragraph 6, second subparagraph, point (b) of the same article as above is replaced by the following: *"(b) a requirement for the intermediary to have financial capacity amounting, on a permanent basis, to 4 % of the sum of annual premiums received, subject to a minimum of EUR23,480".*

The new thresholds will be effective starting **from 9 October 2024**.

4. WITHHOLDING TAX APPLICABLE ON COMMISSIONS PAID TO INTERMEDIARIES FROM 1 APRIL 2024 – 26 MARCH 2024

As of 1 April 2024, the provision of the fifth paragraph of Article 25 bis of Presidential Decree No. 600 of 29 September 1973 ("*Common Provisions on Income Tax Assessment*"), which exempted commissions paid to insurance agents, insurance brokers and general agents of insurance companies, from the application of withholding tax, **will be repealed** as a result of paragraphs 89 and 90 of Article 1 of Law No. 213 of 30 December 2023 ("Estimated budget of the State for the financial year 2024 and multi-year budget for the three-year period 2024-2026," (**Budget Law**)).

ANIA (the National Association of Insurance Companies) has provided some preliminary clarifications on this matter with its own circular, No. 80 published on last 12 March (the **Circular**). Based on the Circular, all commissions paid during the insurance distribution relationship and originating from the relationship, including reimbursements of expenses related to the activity exercised, should be subject to withholding tax.

It would appear that the scope of application of the provisions in question would also extend to the commissions due to banks, financial intermediaries, payment institutions and bancoposta, when they distribute insurance products, as well as, presumably, also to individuals registered in Sections E and F of the Single Register of Insurance Intermediaries (RUI), when they intermediate insurance policies.

Some uncertainty would seem to persist with regard to subjects who, in addition to their typical principal activity, also engage in insurance distribution operating as insurance intermediaries on an ancillary basis. According to ANIA, similar uncertainties would not seem to exist for travel and tourism agencies subject to the withholding tax when they market insurance policies.

With respect to co-assurance relationships, the Association would seem to conclude that the party responsible for applying the withholding tax is the company responsible for paying commissions to the intermediary.

Again, according to the Association, the amount of commissions, however denominated, resulting from the accounting systems of insurance undertakings would be the basis for quantifying the taxable amount to be withheld.

In the case of commissions paid in foreign currency, the insurance company that has paid the commission in foreign currency will only make the payment once the currency conversion has taken place.

With regard to the methods of payment of the withholding tax, when commissions are directly withheld from the amount of the sums collected, the recipients have to remit to the commissioners the amount corresponding to the withholding tax and that, to calculate the terms by which the commissioners remit the sums to the Treasury, the withholding tax is deemed to have been paid in the month following the one in which the commissions were withheld by the commissioners. **In other words, the withholding made on commissions in month one is deemed to have been made in month two and must be paid by the 16th day of month three**.

Intermediaries, who distribute for insurance companies operating in Italy under the freedom to provide services, would seem to be excluded from all the above, since a prerequisite for the application of the rules is the existence of a territorial link with the state.

Finally, on the starting date of the repeal, ANIA emphasized that, in the absence of a specific transitional regime, commissions reported from April 2024 should be taken into account. Nevertheless, it suggests that companies adhere to the cash criterion, according to which the withholding tax should be applied to commissions paid as of 1 April next, given the revenue expectations resulting from the adoption of the Budget Law.

With recent circular dated 21 March 2024, the Inland Revenue Agency confirmed that:

- subjects registered under section D of the RUI are captured by the provisions of the Budget Law;
- all commissions perceived by intermediaries, including subjects registered in sections E and F of the RUI, are captured by the scope of application of the above said provisions;
- withholding tax must be applied by insurance companies at the time the payment of the commissions is made;
- all payments made starting from 1 April 2024 are captured by the provisions of the Budget Law;
- the rate of the withholding tax applicable is 50% of the commissions paid, save for the cases where the intermediaries declare to the insurance companies that they avail themselves of the services of employees and/or third parties: in this latter case, the rate applicable is 20% of the amount of the commissions.

13. IVASS NEWS – 28 MARCH 2024

The Italian Insurance Regulatory Authority (IVASS) published the following:

- Consultation Document no. 2/2024 on unit linked contracts (Consultation Document 2);
- Consultation Document no. 3/2024 amending and integrating ISVAP Regulation no. 38/2011 in matter of separately managed accounts (*gestioni separate*) for life insurance undertakings (Consultation Document 3);
- Letter to the Market of 27 March 2024 – IVASS expectations concerning product oversight and governance of insurance products (POG) (Letter).

Here we summarise IVASS' publications.

Consultation Document 2

On 11 March 2022, IVASS launched a public consultation laying down provisions relating to linked contracts according to art. 41, paragraphs 1 and 2 of the Code of Private Insurances. During the consultation, closed on 9 June 2022, IVASS received a high number of comments and observations from stakeholders.

Based also on the comments received by stakeholders, IVASS decided to modify, integrate and confirm the provisions of the consultation document published in 2022.

With Consultation Document 2, which contains a draft regulation (Draft Regulation), IVASS intends to regulate linked policies, updating, in line with regulatory changes that have occurred at an European and national level, the provisions contained in Circular No. 474 of Feb. 21, 2002 and Regulation No. 32 of June 11, 2009. The provisions contain the regulation of insurance products linked to internal funds or UCITS and policies with benefits directly linked to a stock index or other reference values.

The Draft Regulation contained in Consultation Document 2 provides for the following:

- **Part I:** contains the general provisions, the sources of law and definitions, as well as its scope of application. In respect to the latter, the Draft Regulation, except for the provisions that provide otherwise, also applies to EU insurance undertakings operating in Italy under the freedom to provide services or the right of establishment regimes (articles 1, 2 and 3).

  Article 4 describes the characteristics of unit and index linked contracts, while article 5 provides for the evaluation of the demographic risk.

- **Part II** focuses entirely on **unit linked products:**
  - In Chapter I, in particular, reference is made to Chapters III, IV and IV-bis and to Chapter V for the identification, respectively, of the characteristics of the assets contained in internal funds held by the insurance company and UCITS in the case of policies whose benefits are directly linked to them.
  - Chapter II contains the provisions pertaining to the manner in which internal funds are established and the criteria for drafting the relevant regulations (Article 7), the minimal content of the regulations containing the criteria for the management of the fund or individual sub-funds (Art. 8), the manner and frequency of calculation of the value of the unit (art. 9), the criteria for the representation of expenses, direct and indirect, borne by the internal fund or individual sub-fund (art. 10).

    With particular regard to the overperformance commissions (art. 11), reference is made to the European guidelines on performance commissions of UCITS issued by ESMA and their transposition into the national framework.

    Article 12 also provides for the amendments to fund regulations, while articles 13 and 14, respectively, regulate the relationships between intermediaries and undertakings for the purposes of valuation of premiums paid and the payment of insurance benefits, and the accounting of the assets of each internal fund and of each individual sub-fund separate from that relating to the insurance company's other activities.
  - Chapter III: provides for the types and for the limits on investments of the assets comprising the internal fund or individual sub-funds and refers, where relevant, to the instructions contained in the regulation on collective asset management issued by the Bank of Italy. Without prejudice to the need to ensure an adequate distribution of risks, the internal fund is allowed, for a maximum period of six months from the date of start of operations, to derogate from the investment limits indicated in the Draft Regulation (art. 15).

    The subsequent articles regulate in more detail the investment criteria to use with reference to listed financial instruments (art. 16), unlisted money market instruments (art. 17), listed derivative financial instruments (art. 18), unlisted derivative financial instruments (art. 19), unlisted financial instruments – for which the company is required to evaluate the degree of liquidity using specific parameters (art. 20) – investments in AIFs and UCITS (art. 21) and, finally, to other eligible assets (art. 22).
  - Chapter IV: provides for limits on management of investments and concentration of risks, providing for general limits (art. 23) and specific limits, such as concentration limits for issuers (art. 24), bank deposits (art. 25), OTC derivative financial instruments (art. 26), overall investment limits (art. 27), investments in parts of open-ended UCITS (art. 28), limits on investments in unlisted financial instruments (art. 29), assets underlying derivative financial instruments (art. 30) and overall exposure in derivatives (art. 31).
  - Chapter IV-bis: provides for exceptions to investment limits upon the occurrence of conditions specifically identified by regulatory provisions (Art. 31-bis) and indicates also specific safeguards for risk management of the undertaking (article 31-ter).

- Chapter V: regulates the investments of insurance contracts whose performance are directly linked to the value of UCITS units. In the event that the value of the insurance performance is directly linked to the units of more than one UCITS, the conditions of insurance will clearly define the composition, predefined or variable, of the basket of UCITS, the method of determining its value for the purpose of determining the insurance performance, as well as the type of risk that can occur with the basket (Art. 32).

  Furthermore, management commissions charged by insurance companies are allowed only if an effective management service is provided on the basis of an investment strategy, consistent with predefined risk-return objectives and will be identified in the conditions of insurance (art. 33).

  - Chapter VI: provides for the asset and financial separation regime of the assets that are part of each internal fund or external UCITS (art. 34).

- **Part III** focuses on index linked products:

  - Chapter I: sets out the requirements for financial indexes and other reference values to which the performance or surrender values relating to index-linked contracts can be linked (Art. 35) and the manner of indexing (Art. 36).

  - Chapter II: contains the regulation of assets covering technical provisions (Art. 37).

- **Part IV** indicates that the new Draft Regulation applies only to the linked contracts concluded after its entry into force.

If the Draft Regulation enters into force, all insurance undertakings have to gradually comply with its provision within 12 months after its entry into force.

In addition, all the previous regulations in matter of unit and index linked are repealed once the Draft Regulation enters into force.

IVASS Circular no. 474/2002, which continues to produce effects only to contracts concluded before the entry into force of the Draft Regulation, is repealed as well.

Any comment or proposal may be sent to IVASS, by 27 May 2024, to linked@ivass.it, using the word table attached to Consultation Document 2.

Consultation Document 2 is available, in Italian, here.

Consultation Document 3

ISVAP Regulation No. 38/2011 (Regulation 38) provides for the constitution and management of separately managed accounts of life insurance undertakings. Its original wording indicates that the average rate of return of separately managed accounts will be determined based on a calculation criterion which provides for the allocation of all realized capital gains and losses to the return of the separately managed accounts in the same year of realization.

The economic and financial situation determined by a progressive and significant reduction of returns recorded over the years led IVASS to modify Regulation 38 and to introduce additional criteria for calculating the return rate of separately managed accounts. It allows undertakings to set aside net capital gains realized in favourable economic periods and allocate them in less favourable periods.

IVASS Order no. 68/2018 introduced amendments to allow insurance undertakings to provide for ways to determine the average rate of return of separately managed accounts that take into account the allocation of the net capital gains realized – following the sale of securities held in the separately managed accounts – in a special "profit fund," having the nature of a mathematical reserve.

The net capital gains set aside are fully allocated to insurance obligations provided for in the contracts within the maximum period of eight years from their realization. This produces an effect of stabilization of the returns over time.

The Order applies only for new contracts.
The calculation methods of returns are indicated in the separately managed account regulation, which cannot be modified unilaterally by insurance undertakings, unless certain conditions occur (ie art. 6, para. 1, lett. g) of Regulation 38).

Based on the new provisions introduced in 2018, in the same separately managed account contracts may coexist to which two different criteria for determining the average rate of return apply (depending on whether in the respective contractual terms and conditions is provided for the profit fund or not).

Following a specific request from stakeholders, IVASS has focused on the possibility of extending profit funds to ongoing contracts, when specific conditions occur, to allow insurance companies to propose to policyholders of existing contracts to modify, on a consensual basis, the criteria for the calculation of the average rate of return, to introduce a profit fund.

With Consultation Document 3, which is a draft Order, IVASS intends to modify Regulation 38 introducing new provisions that will allow insurance companies, when specific conditions occur, to use the profit fund and the consequent methods of calculating the average rate of return of separately managed accounts even for ongoing contracts.

In particular, the draft Order contained in Consultation Document 3:

- modifies para. 3 of art. 14-bis of Regulation 38, extending to existing contracts the possibility to adopt the rules for the determination of the average rate of return linked to the presence of the profit fund, making reference to the newly introduced art. 14-sexies of the same regulation. This latter provides for the modalities and conditions that insurance companies must comply with when they intend to propose to policyholders an amendment to the regulation of the separately managed account and part of the policy's condition to introduce the profit fund for existing contracts;
- introduces a new paragraph in article 14-ter of Regulation 38, to provide for the applicability of the information provided with respect to policyholders of insurance contracts with re-valuable benefits who have not consented to the modification of the rule for determining the average rate of return proposed by the company pursuant to the newly introduced article 14-sexies.

Any comment or proposal can be sent to IVASS, by 27 May 2024, to: fondoutili@ivass.it, using the word table attached to Consultation Document 3.

Letter to the Market

The Letter is the outcome of the public consultation started in 2023 by consultation document no. 8/2023.

This Letter aims to outline IVASS's POG expectations directed at insurance companies' and manufacturers' de facto intermediaries, to facilitate the uniform and correct application of the European and national regulatory framework.

As to the scope of application of the Letter, despite being addressed to insurance companies with legal seat in Italy and to establishments of extra-EU companies, IVASS anticipates that it will represent the content of the Letter to other EU insurance supervisors (home supervisory authorities of the companies operating in Italy under the right of establishment or the freedom to provide services regimes) to give Italian customers the same level of protection.

IVASS clarified that, considering that the expectations are aimed at strengthening the POG process and considering the comments made during the public consultation, the governance profiles of the POG process of companies with registered offices in other EEA states must be considered subject to the regulatory framework of the home authority.

In a nutshell, IVASS's 15 expectations regarding POG are:

1. The POG process is an essential part of the corporate governance of the company, of the system of management and controlling risks. It should be adequately considered in the organization of the company, in the distribution of the tasks and of the responsibilities of the operation structure and of the fundamental functions. In this respect, the administrative body of the company must have an adequate level of knowledge of the POG legislation to define the strategies of the corporate governance of the company and to verify that company implements the strategies.
2. The POG policy must include clear granular indications of the target market and indications on how the product tests have been carried out. In particular, the company's targets with respect to the value for money of the product for the client must include assessments that the costs and the expenses of the products won't jeopardize the expected financial performance of the IBIP.

3. The second level key functions of the company (with the exclusion of internal audit function) must evaluate the activities carried out by the operational units involved in the POG process through a complete and autonomous assessment. For the approval process of new products, a specific committee made of the above indicated fundamental functions must be set up.
4. In the company's risk assessment framework and in the risk management system, the administrative body must consider the market conduct risks related to the POG, also by identifying risk targets and tolerance thresholds, in any case in the light of the need of minimizing compliance risk.
5. The definition of the target market must be carried out with an adequate level of granularity, with respect to both the factors provided by article 5 of Delegated Regulation (EU) 2017/2358 and other reference values considered relevant for the evaluation.
6. The insurance company must identify a sufficiently graduated scale of complexity in which to place IBIPs. The placement of the IBIP in the scale must be carried out by taking into account the IBIPs' features and its comprehensibility by the client.
7. With respect to MOP (multi-options products), IVASS expects that the number of options is critically evaluated and that the definition of the target market is made through combinations of predefined options which reproduce the segmentation of the target market.
8. The product test must be carried out separately (although consistently with) the sustainability and profitability analysis carried out by the company.
9. The product test must be:
   - defined and developed consistently with the granularity of the target market and must be grounded on realistic data in line with the company's portfolio;
   - defined formally in details and contain metrics and thresholds whose unfulfillment is followed by adequate remedial actions (escalation, amendment or not approval of the product); and
   - carried out in a traceable way.
10. The profit test from the perspective of the client must be central in the product test process. The profit test must consider jointly the profit, the costs for the client in the development of the product and, where relevant, the impact of inflation. With respect to MOPs, the profit test must be developed considering the combinations of the various investment options.
11. The profit test in the perspective of the client must produce a value which is adequate to the client, ie in line with the target market's features, the client's expectations of profits and their insurance needs, lacking which adequate measures must be adopted, including the non-commercialization of the product. The indexes used for the profit test in the perspective of the client must comply with the purposes which are generally attributed to the product test activity.
12. The test product must include a limited weighted qualitative component, in which:
    - only the elements in line with the target market's needs are considered; and
    - the technical features of the product already considered in the quantitative analysis are disregarded, to avoid a double evaluation of the same component.
13. The product test activity must end with a final assessment determined by an evaluation system which must adequately integrate the findings of the various analysis carried out. In the final assessment, the quantitative analysis must have a significant weight, with the application of the blocking thresholds applied on the most relevant variables.
14. The monitoring and the review of the product must be carried out with a methodology consistent with the one used during the product testing to verify that it meets the features, needs and targets of the target market for which the product was created, by taking into account the experience gained by the product as compared to the evaluations made before its commercialization.
15. The insurance company must periodically review the IBIPs marketed before 1 October 2018 and the products no longer marketed for a number of years exceeding the relevant RHP (Recommended Holding Period).

14. IVASS FURTHER REMINDER ON THE UPCOMING DEADLINES FOR THE NEW RUI WEB PORTAL – 4 APRIL 2024

On 29 March 2024 the Italian Insurance Regulatory Authority (IVASS) published on its website a reminder concerning the upcoming new RUI portal.

Specifically, IVASS reminded that the new Portal will be operational as of 4 June 2024 and will allow intermediaries and insurance companies, respectively, to directly enter into the Portal:

- their own and their collaborators' requests for registration
- requests for cancellation or transfer from one section to another of the RUI
- changes in personal details and all other communications provided for by IVASS Regulation no. 40/2018
- conferment and terminations of agency appointments or distribution agreements
- registration or cancellation of insurance producers
- the details of the person in charge of distribution

The Authority stated that as of 30 April 2025, it will no longer be possible to transmit requests and communications to IVASS. These PEC boxes will be deactivated:

- istanze.rui@pec.ivass.it used for the transmission of applications for registration and deregistration of intermediaries by means of an electronic template (s.c. intelligent PDF)
- incarichirui@pec.ivass.it used for communications from companies concerning distribution agreements
- domini.intermediari@pec.ivass.it used for communications from intermediaries concerning new websites
- variazioni.domini.intermediari@pec.ivass.it used for communications from intermediaries concerning changes to their websites

IVASS invites all applications and communications to be submitted by 30 April 2024.

From 4 June, then, it will be possible to send applications and communications via the new RUI portal.

Reinsurance

How the Italian market is dealing with mass lapse reinsurance

WRITTEN BY: FRANCESCO CERASI AND MAURO CARRETTA

The Russian invasion of Ukraine. The ensuing energy crisis. Rising inflation. The ECB's quantitative tightening. And worsening economic and financial uncertainty, intensified by the Israeli-Palestinian conflict and the Suez Canal crisis.

In the last few years, global conditions have radically affected the financial variables that influence the insurance sector.

In the life insurance business, the sudden increase in interest rates improved companies' solvency, reducing the value of the best estimate liabilities (BEL) for the discounting component. But the same increase in rates led to the depreciation of government bonds held by companies. It progressively determined the absorption of a large part of the capital gains on investment portfolios. And it finally led to the emergence of significant latent capital losses.

Life insurance companies' vulnerability to the risk of "massive" redemptions (lapse risk) has led to an increase in liquidity risk, requiring greater capital absorption.

The Italian insurance market has a higher exposure to lapse risk than the European average. This is mainly because of the higher proportion of redeemable life contracts, the reduced penalties in the event of early contract redemption, and the tax regime applicable to life insurance.

Life liabilities, measured according to EIOPA methodologies, show a high vulnerability to liquidity risk, because all best-estimate reserves relate to products with a surrender option.

EIOPA, in its document on methodological principles for liquidity stress testing, ranks the best estimate reserves of insurance products according to the degree of contractual and tax penalties. It assigns a high vulnerability to products with no penalty, a medium-high vulnerability to products with penalties, and a zero vulnerability to products with no surrender option (see EIOPA report on insurers' asset and liability management, December 2019).

The Russian invasion of Ukraine. The ensuing energy crisis. Rising inflation. The ECB's quantitative tightening. And worsening economic and financial uncertainty, intensified by the Israeli-Palestinian conflict and the Suez Canal crisis.

In the last few years, global conditions have radically affected the financial variables that influence the insurance sector.

In the life insurance business, the sudden increase in interest rates improved companies' solvency, reducing the value of the best estimate liabilities (BEL) for the discounting component. But the same increase in rates led to the depreciation of government bonds held by companies. It progressively determined the absorption of a large part of the capital gains on investment portfolios. And it finally led to the emergence of significant latent capital losses.

Life insurance companies' vulnerability to the risk of "massive" redemptions (lapse risk) has led to an increase in liquidity risk, requiring greater capital absorption.

The Italian insurance market has a higher exposure to lapse risk than the European average. This is mainly because of the higher proportion of redeemable life contracts, the reduced penalties in the event of early contract redemption, and the tax regime applicable to life insurance.

Life liabilities, measured according to EIOPA methodologies, show a high vulnerability to liquidity risk, because all best-estimate reserves relate to products with a surrender option.

EIOPA, in its document on methodological principles for liquidity stress testing, ranks the best estimate reserves of insurance products according to the degree of contractual and tax penalties. It assigns a high vulnerability to products with no penalty, a medium-high vulnerability to products with penalties, and a zero vulnerability to products with no surrender option (see EIOPA report on insurers' asset and liability management, December 2019).

To cope with these tensions, in the last two years, companies have resorted to capital strengthening operations (for a total of EUR2,202 million in 2022 alone, IVASS data), including through a significant share of subordinated liability issuance. And they've drawn on the reinsurance instrument, which, in addition to allowing the transfer of risks, determines effects in terms of capital absorption.

Traditionally, the Italian reinsurance market has a risk profile focused on non-life lines of business. Reinsurance cessions mainly concern non-life lines of business (96% of ceded premiums) and are generally implemented through non-proportional treaties.

But since the second half of 2022, demand for mass lapse reinsurance has increased in the life insurance sector.

The solutions identified by the market involve transferring the risk arising from an increase in surrenders exceeding the assumptions used in the BEL calculation to the reinsurer.

Treaty wordings specify that the reinsurer will compensate the ceding company, within certain thresholds, the amounts equivalent to the negative effects on its own funds. The amount is calculated based on the difference between the observed increased rate of surrenders, exceeding a predefined threshold (known as the attachment point), and that used to calculate the BEL.

The treaty operates up to a maximum level of the observed redemption rate, called the detachment point.

The attachment point in the stressed scenario, with respect to the central BEL scenario, is set at a redemption rate which, according to the assessments of the individual companies, can guarantee an effective transfer of risk, generally between 15% and 17.5%.

The detachment point is generally equal to the frequency of the mass lapse scenario of the standard formula, ie the instantaneous termination of 40% of the policies in force at the time of the BEL calculation.

IVASS has scrutinised these contracts to verify the adequacy of the proposed solutions with the regulatory framework and the EIOPA Opinion of 9 July 2021. They looked at the effective transfer of risk and its consistency in terms of benefits on capital absorption.

IVASS wants to check the consistency between the method used to calculate the reinsurance benefit and the assumptions underlying the calculation of the BEL and SCR lapse. It also checks that the attachment/detachment thresholds are based on realistic surrender frequency increase assumptions with respect to the company's portfolio. The assessment is to make sure the treaty mitigates the volatility of the Solvency ratio even in difficult situations, consistent with the thresholds defined by the companies in the Risk Appetite Framework.

White Collar Crime

Legislative Decree No. 231/2001: the extensions to the catalog of predicate offenses

WRITTEN BY: VERONICA BERTOCCI, GIULIA RODIO

Legislative Decree No. 231/2001 (Decree 231) has been amended to include additional predicate offenses. The amendments reflect the dynamic nature of corporate governance and the broader societal expectations of corporate conduct.

The legislator expanding the catalog of the relevant crimes under Decree 231 post-2001 has resulted in an assortment of predicate offenses, fundamentally transforming the initial framework of Decree 231. Closer examination reveals that the document has transcended its original aim of addressing "business-related crime." It now targets, more broadly and substantially, the concept of a "criminal enterprise."

Legal scholars understand that the legislative body will take advantage of every available opportunity to extend criminal safeguards, incorporating corporations and organizations and employing Decree 231 as a holistic tool for prevention.

To enhance corporate accountability, legislators have made significant strides in expanding the scope of Decree 231 through a series of robust legal reforms. These reforms have introduced stringent measures against a wide array of criminal activities, signaling a decisive shift towards reinforcing corporate responsibility.

From 2021, here are the updates to Decree 231.

Crimes related to non-cash payment instruments

Legislative Decree of November 8, 2021, No. 184, titled "Implementation of Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA," has introduced Article 25 *octies.1* to Decree 231, concerning "Crimes related to non-cash payment instruments."

The new article has extended the catalog of predicate offenses for the liability of legal persons. The catalog now includes:

- unauthorized use and forgery of credit and payment cards (Art. 493 *ter* of the Italian Criminal Code)
- possession and dissemination of equipment, devices, or computer programs intended for committing crimes involving non-cash payment instruments (Article 493 *quarter* of the Italian Criminal Code)
- computer fraud (Article 640 *ter* of the Italian Criminal Code). The latter is included not only when committed against the state, another public body, or the EU, as previously stipulated by Article 24 of the Decree, but also "in the aggravated circumstance of resulting in the transfer of money, monetary value, or virtual currency"

Pecuniary penalties up to 800 quotas and prohibitive sanctions referred to in article 9, paragraph 2 of Decree 231 are provided for committing these crimes.

Specifically, the prohibitive sanctions include:

- the prohibition from engaging in business activities
- the suspension or revocation of authorizations, licenses, or concessions necessary to commit the offense
- a ban on contracting with the public administration, except to obtain public service benefits
- exclusion from benefits, financing, contributions, or subsidies and the possible revocation of those already granted
- a ban on advertising goods or services

Crimes against cultural heritage

Law No. 22/2022 has marked a significant advancement in the protection of Italy's cultural patrimony, introducing severe penalties for crimes against cultural heritage perpetrated by members of a company (i.e., executives, or individuals under their supervision). This law has integrated two new articles into Decree 231:

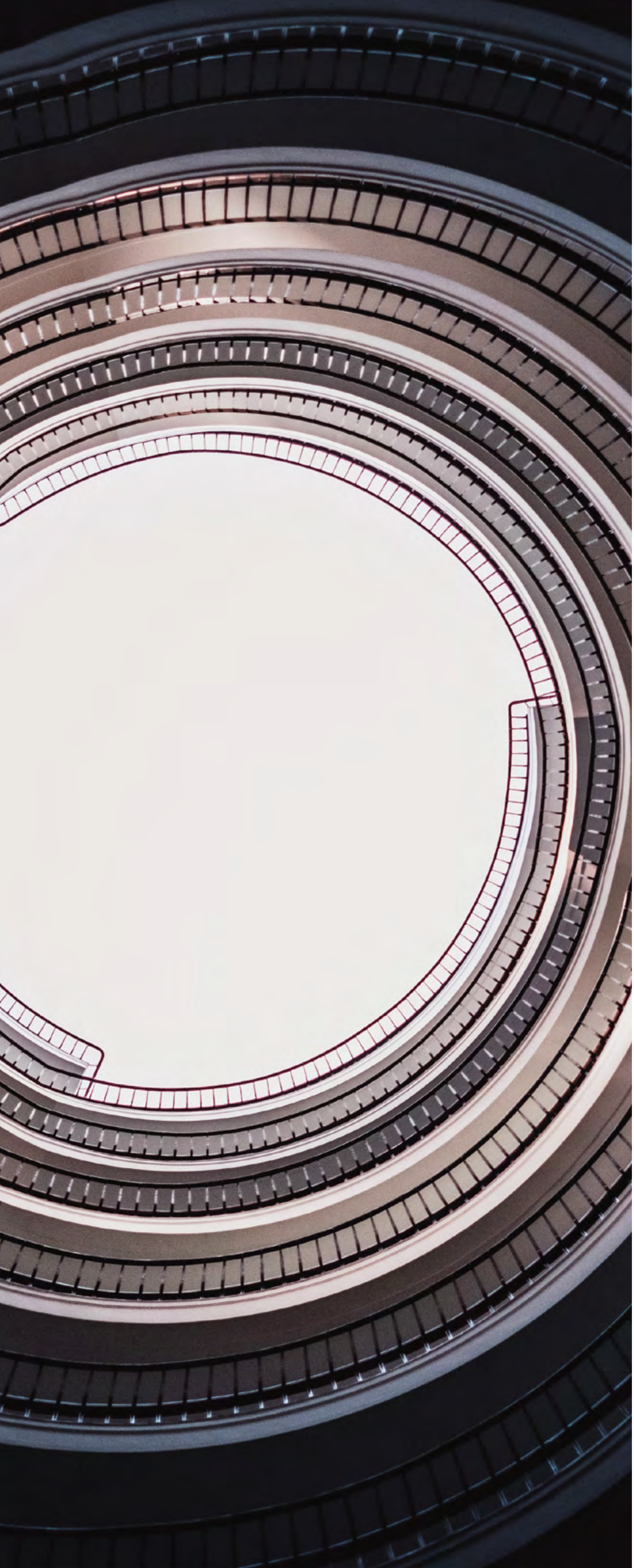
- **Article 25 *septiesdecies*** (Crimes Against Cultural Heritage), imposing monetary and prohibitive sanctions for crimes related to:
  - Alienation of cultural goods (Art. 518 *novies* of the Italian Criminal Code)
  - Embezzlement of cultural goods (Art. 518 *ter* of the Italian Criminal Code)
  - Illicit importation of cultural goods (Art. 518 *decies* of the Italian Criminal Code)
  - Illicit exportation of cultural goods (Art. 518 *undecies* of the Italian Criminal Code)
  - Destruction, dispersion, deterioration, disfigurement, defacement, and illicit use of cultural or landscape goods (Art. 518 *duodecies* of the Italian Criminal Code)
  - Counterfeiting of artworks (Art. 518 *quaterdecies* of the Italian Criminal Code)
  - Theft of cultural goods (Art. 518 *bis* of the Italian Criminal Code)
  - Receiving stolen cultural goods (Art. 518 *quater* of the Italian Criminal Code)
  - Forgery in private documents relating to cultural goods (Art. 518 *octies* of the Italian Criminal Code)
- Article 25 ***duodevicies*** (Money Laundering of Cultural Goods and Devastation and Pillage of Cultural and Landscape Goods), introducing monetary and prohibitive sanctions for:
  - Money laundering of cultural goods (Art. 518 *sexies* of the Italian Criminal Code)
  - Devastation and pillage of cultural and landscape goods (Art. 518 *terdecies* of the Italian Criminal Code)

There are severe penalties for committing these new predicate offenses. A pecuniary penalty, up to 1,000 quotas, is sanctioned. Moreover, the application of the prohibitive sanctions referred to in article 9, paragraph 2 of Decree 231 is also provided, together with the sanction of permanent disqualification from carrying out the activity, applied whenever the entity or one of its organizational quotas is consistently used for the sole or predominant purpose of enabling or facilitating the commission of the crimes provided for by Articles 518 *sexies* and 518 *terdecies* of the Italian Criminal Code.

False or omitted declarations for the issuance of a preliminary certificate, crimes related to public tenders and Fraudulent transfer of values

Article 55 of Legislative Decree March 2, 2023, No. 19 extends the range of corporate crimes to include into Article 25 *ter* of Decree 231 (Corporate Crimes) the offense of "False or omitted declarations for the issuance of a preliminary certificate," mandating a monetary penalty of 150 to 300 quotas.

On October 9, 2023, Law No. 137/2023 "Conversion into law, with modifications, of the decree-law of August 10, 2023, No. 105, containing urgent provisions regarding criminal and civil procedure, combating forest fires, recovery from drug addiction, health and culture, as well as concerning the judiciary and public administration personnel" (DL) came into force.



The DL, within the context of a diverse range of interventions, has further expanded the catalog of predicate offenses under Decree 231, by incorporating:

- **Article 24** (Crimes against public administration), imposing monetary and prohibitive sanctions for crimes related to:
  - Disrupted freedom of auctions (Art. 353 of the Italian Criminal Code)
  - Disrupted freedom of the contracting process (Art. 353 *bis* of the Italian Criminal Code)

For such offenses, there's a pecuniary penalty of up to 500 quotas, or from 200 to 600 quotas if the entity has made a profit of significant amount or if particularly serious damage has been caused.

- **Article 25 *octies.1*** (Crimes related to non-cash payment instruments and fraudulent transfer of values), introducing monetary and prohibitive sanctions for:
  - Fraudulent transfer of values (Art. 512 *bis* of the Italian Criminal Code)

In relation to the commission of this crime, the entity will have to pay a pecuniary sanction of 250 to 600 quotas.
The prohibitive sanctions referred to in article 9, paragraph 2 of Decree 231 will also apply in this case.

Beyond these aspects, it's important to note that reform proposals are currently underway. They could considerably broaden the compendium of predicate offenses and alter the framework of Decree 231 in its entirety.

On March 26, 2024, the Council of Ministers preliminarily approved the Legislative Decree implementing the delegation law for the tax reform (Law No. 111/2023), with the "Revision of customs regulations and the sanction system concerning excise duties and other indirect taxes on production and consumption."

If the legislative novelty is definitively approved and comes into effect, it would further extend the Decree 231 liabilities to the crimes specified in the Consolidated Text on Excise Duties. And, in certain aggravated circumstances, it would also envisage the application of prohibitive measures.

Tax

Tax Authority clarifies withholding tax rules for insurance agents

WRITTEN BY: GIOVANNI IASELLI

Background

With the amendments introduced by the Budget Law 2024 (Art. 1, Par. 89, Law 231 of 2023), as of 1 April 2024, insurance agents' commission for direct services to insurance companies is now subject to withholding tax.

The provision extends the application of the withholding tax. It was already applicable to fees paid under commission, agency, mediation, sales representation and business procurement relationships. Now it's also applicable to commission received by insurance agents directly from insurance companies to the extent and under the conditions set forth in Article 25-bis of Presidential Decree No. 600/1973.

As of 1 April 2024, the withholding tax will be levied at 23% when the commission is paid (regardless of the time of accrual):

1. on 50% of the amount of commission received by insurance agents; or
2. on 20% of the amount of that commission if the recipients declare to their principals that they rely continuously, in exercising their activity, on the assistance of employees or third parties.

According to Ministerial Decree 16.4.1983, a declaration must be sent for each calendar year, by 31 December of the year before. It must be sent as a registered letter with notice of receipt or PEC. And it must be filled on plain paper, dated, signed, and contain the sender's identification data.

Tax Authority Circular no. 7 of 21 March 2024

With Circular no. 7 of 21 March 2024, the Italian Tax Authority has clarified the implications of the amendments, with particular reference to point 2 above.

The Italian Tax Authority clarified that the communications under 2 above "may be received within fifteen days following the effective date of the provision, ie by 16 April 2024."

Circular No. 7 of 2024 also provides more detail about when agents directly withhold the commission due to them, deducting it from the amounts collected as a result of the transaction for which they provided services. In this case, the recipient of the commission also has to remit to its principals the amount corresponding to the withholding. This withholding is deemed to have been levied in the month following the one in which the commission is retained and must be paid by the 16th day of the month following the one in which it is deemed to have been levied. Therefore, agents also have to remit to principals the withholding taxes deemed to have been levied as of May 2024 – ie retained in April 2024 – for commission received before April 2024 and which they remit to principals as of that month (irrespective of when the contract was concluded).

Case law

Italian Supreme Court Rules on the nature of unit-linked policies – 20 march 2024

WRITTEN BY: CHIARA CIMARELLI, INA DOCI

On 12 February 2024 the Italian Supreme Court issued ruling no. 3785 which contains, in its legal arguments, interesting statements on the nature of unit-linked policies. In summary, the principle of law affirmed by the Supreme Court is as follows:

"Having regard to Court of Appeal factual finding, which excluded any social security component in the unit-linked policy at issue, the Court of Appeal's conclusion on the inapplicability of the protections provided for by Article 1923 of the Italian Civil Code is fully consistent, which are justified, in the light of the judgment of the Court of Cassation no. 8271/2008, only when the financial component is inseparably accompanied by the social security component, but not when the social security component is totally excluded, as in the present case."

This is followed by a systematic analysis of the judgment in question.

The judgement was issued following an appeal against the judgement of the Court of Appeal of Venice, which denied the social security nature of a unit-linked policy submitted to it, holding that it represented a mere financial instrument similar to a mutual fund.

The Supreme Court recognized the importance of the question relating to the nature of unit-liked policies and agreed with the conclusions of the Court of Appeal on the basis of the following.

First of all, the court identified the social security purpose as the dividing line for qualifying a unit-linked policy as a life insurance contract or not. This was previously established by the same court's ruling in United Sections no. 8271 of 2008. It's the social security purpose, implemented in life insurance policies through the accumulation of capital so as to guarantee the insured an annuity, that justifies the sacrifice of creditors provided for by Article 1923 of the Civil Code a provision that has been held in doctrine to limit the debtor's liability. The provision recognizes in it an express derogation from the principle established by Article 2740 of the Civil Code, with the consequence that the life insurance policy benefits from a favourable discipline not because it is formally an "insurance product" but because it fulfils a particular function of supplementary welfare provision with respect to the compulsory one.

At this point, the court recalled that the doctrine has classified unit-linked policies into several categories according to their different features, most of which relate to the premium refund guarantees granted to the insured. In particular:

- the "guaranteed unit-linked" guarantee the return of capital to the insured, with the possibility of a minimum surcharge;
- the "partial guaranteed unit-linked" provide the policyholder with a guarantee of only partial repayment of the premiums paid; and
- "pure unit-linked policies" in which the sum payable by the insurer depends solely on the value of the "end-to-end" connection to the underlying value of the investment units.

In the case of "guaranteed" and "partial guaranteed" policies, it's clear how the insurer assumes a demographic risk, in the sense that, when an event occurs pertaining to human life, the insured is always paid the sum of money guaranteed at the time of the contract, even regardless of the underlying value of the mutual fund units, which may have decreased with respect to the premiums paid. In "pure" unit-linked policies, on the other hand, the investment risk is fully borne by the insured, with the consequence that, in the event of the value of the units falling to zero, nothing is owed by the insurer.

In Article 2 of Legislative Decree No. 209/2005 (Private Insurance Code or CAP), the legislator decided to include in the category of class III life insurance policies not all unit-linked policies, but only "guaranteed" or "partial guaranteed" policies, since the demographic risk was deemed to be an unavoidable requirement. It follows that where the investment risk lies entirely with the insured, the demographic risk is non-existent.

The court again affirmed what it had already stated in its previous judgment no. 6061/2012; that a case-by-case assessment by the court of merits is necessary to determine whether a unit-linked policy is characterized by the presence of demographic risk.

The assessment cannot be reviewed in the court of legitimacy, except for a defect of reasoning in the terms of the new strict wording of article 360, paragraph 1, number 5, of the Code of Civil Procedure, as interpreted by the United Sections of this Court in judgment no. 8053/2014.

Unit-linked insurance policies: Regulatory and tax aspects of Supreme Court ruling no. 9418/2024 and inheritance and gift tax reform scheme

WRITTEN BY: CHIARA CIMARELLI, ANTONIO LONGO, ANGELA DULCETTI

After years of debate, the Italian Supreme Court's order no. 9418 dated 9 April 2024 issued a clear indication regarding the nature of unit-linked insurance policies.

Following the same Supreme Court's ruling number 3785/2024 from last February, the Court reaffirmed that for unit linked policies to fall under the definition of life insurance policies, they should have a social security purpose. On the contrary, unit linked policies should not be considered as falling under the definition of life insurance contract where there's a concrete risk of losing the entire capital invested or receiving inadequate compensation because of the poor performance of the stock market in which the premium is invested.

With the most recent order and the previous ruling, the Supreme Court has emphasized that the presence of the "demographic risk" is a crucial factor in qualifying the policy as a life insurance product and not as a pure financial instrument. According to the Supreme Court, with respect to unit linked policies having a social security purpose, the provisions provided for by the Italian Civil Code are applicable (in particular Article 1923, which establishes the unseizability and distrainability of the sums owed by the insurer to the policyholder or beneficiary).

Based on an interpretation of article 2 of the Italian Legislative Decree no. 209/2005 (Code of Private Insurances), which does not find any ground in the wording of the provision, the Supreme Court, with both rulings, has distinguished unit-linked policies into three categories considering the guarantees offered to the policyholders and the beneficiaries:

- Guaranteed unit-linked policies: They guarantee the beneficiary repayment of the entire premium paid, with the possibility of a minimum return of the premium invested.
- Partially guaranteed unit-linked policies: They guarantee the beneficiary a partial reimbursement of the premiums paid by the policyholder.
- Pure unit-linked policies: In this case, the unit linked policy's performance depends solely on the value of the underlying financial parameter at the time of the insured event (leaving the policyholder and the beneficiary bearing the financial risk related to the performance of the assets underlying the policy).

If a policy falls in the first two categories the policy is a life insurance policy, since the insurer undertakes demographic risk. In these cases, if the insured event occurs, the beneficiary will receive the sum assured when the policy was agreed, regardless of the value of the underlying financial instruments at the time the event occurred.

If, on the other hand, the investment risk falls entirely on the policyholder/beneficiary, the policy cannot be qualified as a life insurance contract (with the consequential classification of the same as a financial product).

The position held by the Supreme Court, although – as stated – does not correspond to the wording of article 2 of the Code of Private Insurances and to the EU Court of Justice position on the nature of unit linked policies. They should be considered as life insurance contracts, regardless of the identification of the subject bearing the financial risk connected to the underlying assets of the policy. The Supreme Court's position aligns with the recent positions expressed by the Italian insurance regulatory authority (IVASS) with the recent consultation document no. 2/2024 on unit linked products, which emphasizes the importance of the demographic risk.

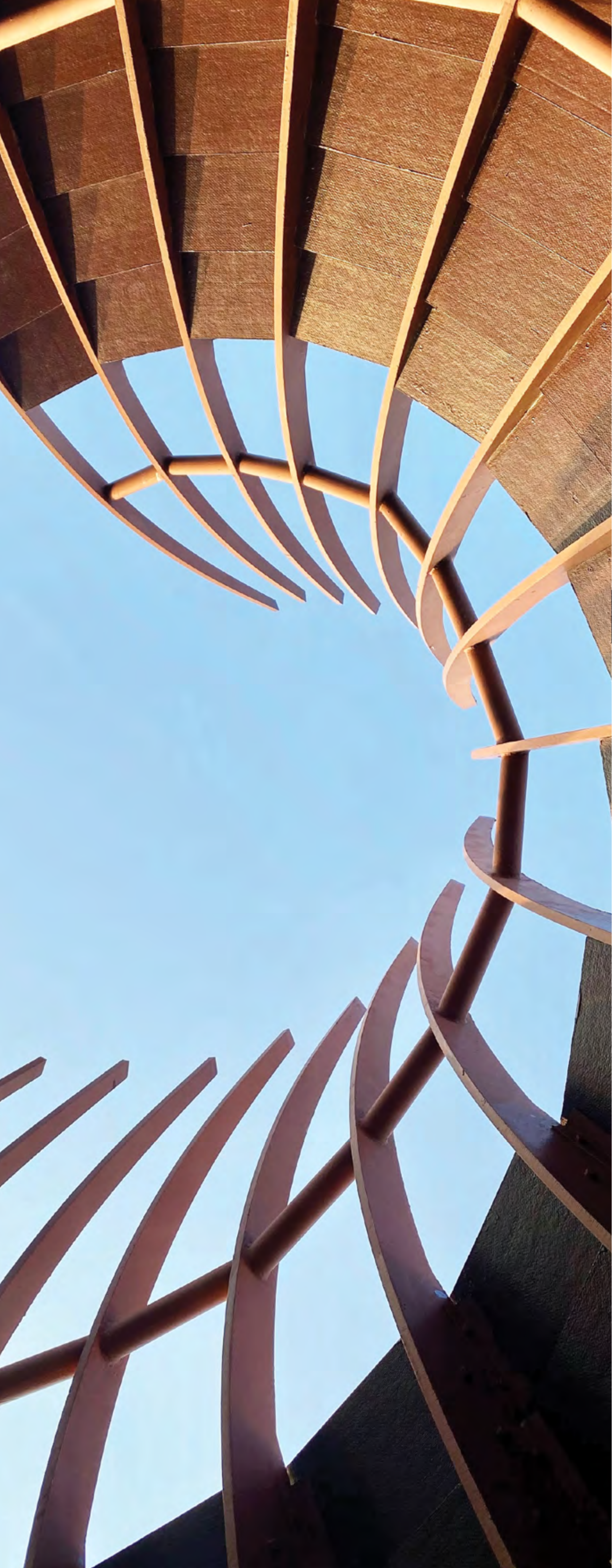
Based on the consultation document (which introduces a level playing field for all the operators of the sector, in particular regarding the type of underlying assets that can be used for unit linked purposes and the concentration limits of investment), all unit linked products that will be entered after the entry into force of the document will have to provide for a liquidation of a benefit (in case of death or of survival of the life assured) depending on the demographic risk. Only for domestic insurance companies (and not for EU companies operating in Italy under the right of establishment or the freedom to provide services regime), will the demographic risk have to be consistent with the features of the product and of the target market. This includes in terms of premium paid, age of the assured and length of the contract, so that the benefit liquidated to the beneficiaries is not less than a consistent percentage of the premium invested, taking into account the insurance needs of the policyholder.

The document consultation will end the next 27 May. It's expected it will raise questions among operators on its provisions, considering the vagueness and uncertainty of its rules (including those on the demographic risk) and the alleged level of uniformity that it tends to impose on all operators. This is particularly the case for EU insurers, who, so far, have relied on the principle of the "home country authority and control" as regards identifying the types of underlying assets eligible for unit linked purposes.

But the Supreme Court's considerations expressed in the recent ruling and orders do appear to match the tax treatment applied to life insurance products.

From a tax perspective, indemnities due to heirs as beneficiaries of insurance policies are exempt from inheritance tax, as provided for by Article 12, par. 1, of the Legislative Decree No. 346/90. The exemption is based on the assumption that the sums received by the beneficiaries of the policies as a result of the death of the policyholder do not constitute "inheritance assets," to the extent they're not assets owned by the deceased that are transferred to the heirs *mortis causa*. The event of death, is only the time from which the beneficiary's right becomes effective, according to the civil law scheme of the *contratto a favore del terzo* (third-party beneficiary contract ex art. 1411 et seq. and 1920 of the Civil Code).

Article 12, par. 1, of the Legislative Decree No. 346/90 does not seem to be affected by the changes introduced by the Delegated Decree concerning the Reform of the Italian Inheritance and Gift Tax still being approved by the Italian government. So the exemption for unit linked insurance policies from inheritance and gift tax should remain in force.



Multiple insurance: Italian Supreme Court rules on recovery action determined based on indemnity due

WRITTEN BY: VALENTINA GRANDE

The Italian Supreme Court, with its ruling no. 4273/2024 of 16 February 2024 has ruled on a much-debated issue with few clear precedents. The court has clarified how to determine the amount due by each insurer if someone has multiple insurance.

The case at issue

One of the insurers involved in the case (Insurer X) issued an insurance policy covering med-mal liability of its doctors.

During a childbirth procedure, a newborn suffered permanent injuries. The parents attributed negligence to one of the attending doctors of the clinic covered by Insurer X.

In light of the claim, Insurer X indemnified the insured parties, paying EUR1,502,442 to the injured third parties. In 2010, Insurer X filed a lawsuit against the Insurer of the liable doctor indemnified under Insurer X's policy (Insurer Y).

The argument was that the liable doctor was covered by two policies: one taken out by the clinic with Insurer X and the other one covering his own personal liability taken out by the doctor himself with Insurer Y. This constituted a case of dual insurance coverage as per art. 1910 of the Italian Civil Code.

Having fully compensated the affected parties, Insurer X brought a recovery action against Insurer Y in accordance with Article 1910 (4) of the Italian Civil Code. The claim was dismissed by the first instance Court.

Constitutional Court rules on statute barred period for life insurance contracts

WRITTEN BY: CHIARA CIMARELLI

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[7] and, prior to 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.[8]

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,[9] 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."

7 Article 3, paragraph 2-ter, of Law-Decree no. 134 of 28 August 2008, as subsequently converted, provided as follows: "The second paragraph of article 2952 of the Civil Code shall be replaced by the following: 'The other rights deriving 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.'"

8 Article 22, paragraph 14, of Law-Decree no. 179 of 18 October 2012, as subsequently converted, provided as follows: "In order to overcome possible unequal treatment between consumers in the field of life insurance policies, the second paragraph of Article 2952 of the Civil Code shall be replaced by the following: 'Other rights arising from insurance contracts and reinsurance contracts shall be time-barred in two years from the day on which the event on which the right is based occurred, with the exception of life insurance contracts whose rights shall be time-barred in ten years.'"

9 Article 3 of the Constitution states: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions."
Article 47, first part of the Constitution states that: "The Republic shall encourage and protect savings in all its forms; (...)".

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.

Authors

David Maria Marino
Partner
+39 02 80 618 1
davidmaria.marino@dlapiper.com

Francesco Cerasi
Partner
+39 06 68 880 1
francesco.cerasi@dlapiper.com

Chiara Cimarelli
Partner
+39 06 68 880 1
chiara.cimarelli@dlapiper.com

Giovanni Iaselli
Partner
+39 02 80 618 1
giovanni.iaselli@dlapiper.com

Antonio Longo
Partner
+39 02 80 618 1
antonio.longo@dlapiper.com

Francesco Edoardo Ascione
Legal Director
+39 06 68 88 064 6
francesco.ascione@dlapiper.com

Mauro Carretta
Legal Director
+39 02 80 618 1
mauro.carretta@dlapiper.com

Karin Tayel
Legal Director
+39 02 80 618 1
karin.tayel@dlapiper.com

Giulia Zappaterra
Legal Director
+39 02 80 618 1
giulia.zappaterra@dlapiper.com

Veronica Bertocci
Senior Lawyer
+39 02 80 6181
veronica.bertocci@dlapiper.com

Giacomo Lusardi
Senior Lawyer
+39 02 80 618 1
giacomo.lusardi@dlapiper.com

Ina Doci
Lawyer
+39 06 68 880 1
ina.doci@dlapiper.com

Angela Dulcetti
Lawyer
angela.dulcetti@dlapiper.com

Valentina Grande
Lawyer
+39 02 80 618 1
valentina.grande@dlapiper.com

Maria Chiara Meneghetti
Lawyer
+39 02 80 618 1
maria.meneghetti@dlapiper.com

Giulia Rodio
Intern
+39 02 80 618 1
giulia.rodio@dlapiper.com

Andrea Olivieri
Trainee Lawyer
andrea.olivieri@dlapiper.com

Erica Simone
Intern
Lit&Reg
+39 02 80 618 512
erica.simone@dlapiper.com

Francesca Santovito
Intern
+39 06 68 880 914
francesca.santovito@dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com.
This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. This may qualify as "Lawyer Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.
Copyright © 2024 DLA Piper. All rights reserved. | MAY24 | A23059-6