DLA PIPER

JANUARY 2014

INSURANCE AND REINSURANCE NEWSLETTER

ITALY

1. IVASS – TOWARDS *SOLVENCY II*

In the process of implementing the rules of *Solvency II*, **EIOPA** on 31 October 2013 published **guidelines** relating to the following areas: the system of governance; prospective assessment of risks (based on ORSA principles); the transmission of information to the competent national supervisory authorities (reporting); the preliminary procedure for internal models (pre-application) to enable each company to calculate the solvency capital requirement.

These guidelines have been issued under art. 16 of EU Regulation no. 1094/2010 (the "EIOPA Regulation") and are addressed to the supervisory authorities of the various countries. They anticipate parts of the future *Solvency II* prudential supervisory regime.

These guidelines are aimed (*inter alia*) at:

(i) ensuring that insurance and reinsurance undertakings that will be subject to the *Solvency II* regime prepare in good time for their initial application (envisaged for 1 January 2016) and

(ii) ensuring that the approach to the new *Solvency II* regime is harmonised in the various Member States.

The guidelines take account of the **principle of proportionality** referred to in the *Solvency II* Directive (2009/138/EU) and require account to be taken, when applying them, of the nature, scale and complexity of the risks related to the company/group activity.

Based on the aforementioned guidelines, IVASS (Italian Insurance Supervisory Authority) submitted for **public consultation:**

(a) **amendments and integrations to ISVAP Regulation no. 20/2008** (relating to internal controls, risk management, compliance and outsourcing of the activities of insurance undertakings),

(b) **amendments and integrations to ISVAP Regulation no. 36/2011** and

(c) the draft **letter to the market** aimed at highlighting the more novel aspects vis-a-vis the current *Solvency I* regime.

(a) Regulation no. 20

There are many proposed amendments and integrations to Regulation no. 20/2008.

Worth mentioning, *inter alia,* are the amendments to the provisions relating to the role of corporate bodies.

IVASS has indicated that the proposed amendment to article 5 (**Administrative Body**) is of particular significance: it is designed to ensure a growing awareness and participation by the administrative body in the decision-making process. The proposal is that the Board of Directors shall be asked to approve **further management policies** in addition to those already envisaged in relation to outsourcing and investment, with particular reference to the following aspects:

- requirements of suitability for office, in terms of professional integrity and professionalism not only for the members of corporate bodies but also for those in charge of the internal audit, risk management and compliance departments, or for those who hold "key positions" in the management of the company;
- management of risks;
- internal audit;
- internal and external reporting (to the supervisory authority) of the undertaking.

Also in order to ensure the transparency of the undertaking's management and the ensuring **clear definition of roles and responsibilities** within the undertaking, provision was made for the approval and dissemination to all interested parties of a document in which the administrative body describes the duties and responsibilities of the corporate bodies, the board committees and the risk management, compliance and internal audit departments and also the information flows between the aforementioned bodies.

(b) Regulation no. 36

From what one reads of the documentation submitted by IVASS for public consultation, the proposed changes to the draft Regulation no. 36/2011 are aimed, in particular, at concretely implementing the so-called **prudent person principle** that extends to all investments implemented by the company.

The amendments and integrations made primarily affect the section of Regulation no. 36/2011 relating to **governance**, while the integrations relating to Part III of the Regulation (Provisions relating to coverage of technical reserves) are simply adjustments of the amendments and integrations made in Part II.

(c) Letter to the market

The draft letter to the market deals with aspects of governance, prospective risk assessment, reporting and pre-application of internal models for the purpose of calculating capital requirements.

Observations and comments on the aforementioned documents may be sent to IVASS by **28 February 2014.**

2. IVASS – NON-LIFE LONG TERM INSURANCE CONTRACTS. EVIDENCE OF DISCOUNT IN THE POLICY AND WITHDRAWAL

Art. 21 para. 3 of Law no. 99/2009 has amended art. 1899 of the Italian Civil Code providing that the undertaking, instead of providing annual cover, may propose a multiyear cover for a premium lower than that applicable to the annual contract. In this case, if the contract exceeds five years duration, the policyholder shall be entitled to withdraw from the contract after the 5th year, on provision of sixty days' notice.

In return for eliminating the policyholder's entitlement to withdraw from the contract on an annual basis, the legislation recognised the right – in return for the policyholder committing to sign a multiyear contract – to receive the same cover at a lower price than in an annual contract.

By letter of 5 November 2011, IVASS invited companies **to specify in the policy, with suitable graphic highlight, the amount of the premium reduction applied to the multiyear contract** and to emphasise that, in return for such premium reduction, the contracting party shall be unable to exercise his or her right to withdraw from the contract for the first five years thereof.

3. IVASS – CHANGE OF RULES FOR THE PROFESSIONAL PROFICIENCY OF AGENTS AND BROKERS

The experience gained by IVASS has underlined the relevance of amending the rules of access for agents and brokers, in order to simplify and rationalise the activities associated with implementation of the professional proficiency test, having also taken into account the objective of harmonising to the maximum extent possible the rules regulating access to insurance brokerage activities, compared with those applied in the financial and credit intermediation sectors. Access to the professional activities of agents and credit brokers is in fact conditional, *inter alia*, on passing a special written examination (or assessment test).

By Order no. 12 of 3 December 2013, therefore, IVASS amended arts. 9 and 10 of Regulation 5, removing the oral test.

The new "consolidated" text of Regulation 5 is available on the IVASS website.

4. CLAIMS MADE CLAUSES: RECENT CONFIRMATION BY THE SUPREME COURT OF CASSATION

The Supreme Court of Cassation has recently revisited the controversial claims made clauses.

By judgement no. 7273 of 22 March 2013, the Court confirmed that **the claims made clause** "*... is valid and effective, while it is for the court to determine, on a case by case basis on the merits, whether such clause is unconscionable pursuant to art. 1341 of the Italian Civil Code....*" (the judgement is consistent with the previous judgement of the same Court, no. 5264 of 2005).

We note that to date, three basic guidelines have been handed down on this theme: the claims made clause is: (i) valid and not unconscionable, (ii) valid but unconscionable in specific fact circumstances, (iii) invalid.

5. LIFE INSURANCE POLICIES – RIGHT OF WITHDRAWAL – EU COURT OF JUSTICE

By judgement no. C-209/12, the EU Court of Justice held that the right of withdrawal from a life insurance contract may be exercised, even subsequent to the applicable statutory time limits, if the insurance company failed to inform the contracting party of the relevant deadlines, irrespective of whether the policyholder could have become aware of them from another source.

In particular, the Court held that: *"... art. 15, para. 1 of the Second Council Directive 90/619/EEC of 8 November 1990, which coordinates laws, regulations and administrative provisions relating to direct life assurance and which lays down provisions to facilitate the effective exercise of the freedom to provide services and amends Directive 79/267/EEC, as amended by Council Directive 92/96/EEC of 10 November 1992, read in conjunction with art. 31 of the latter directive, should be interpreted as* ***inhibiting a national provision… which limits the policyholder's right of renunciation (withdrawal) to a period of one year only, at most, from the date of payment of the first insurance premium, where the policyholder has not been informed of the aforementioned right of renunciation (withdrawal)...****".*

6. THE SUPREME COURT OF CASSATION, ON THE DIFFERENCE BETWEEN CLAUSES THAT DEFINE THE RISK INSURED AND THOSE THAT LIMIT THE LIABILITY OF THE INSURER

By judgement no. 10619 of 26 June 2012, the Supreme Court of Cassation again tackled the issue of the difference between clauses that define the risk insured and those that limit the liability of the insurer, confirming the aforementioned orientation to the effect that: *"... in contracts of insurance, the only clauses that may be deemed to have the effect of* ***limiting liability****, pursuant to Art. 1341 of the Italian Civil Code (which, as such, require the specific approval in writing of the policyholder), are those that* ***limit the consequences of the fault or default or that exclude the risk guaranteed,*** *while* ***clauses that relate to the content and limits of the insurance guarantee,*** *and therefore specify the risk guaranteed,* ***relate to the subject-matter of the contract*** *and are not, therefore, subject to the regime envisaged by para. 2 of this provision,...".*

In this case, the Court rejected the restrictive nature of the insurer's liability and, therefore, the unconscionable nature of a clause – contained in a notary's contract of professional indemnity insurance – which limited cover for claims of damages arising from erroneous property surveys to a time limit of four years from the date of their transmission to clients.

7. EARLY DECISIONS (CONTRASTING) RELATING TO MEDICAL LIABILITY FOLLOWING THE "BALDUZZI DECREE"

Article 3, para. 1 of Decree Law no. 158 of 13 September 2012 (converted by Law no. 189 of 8 November 2012) states that *"...the health worker who carries out his/her professional duties in compliance with guidelines and best practices accredited by the scientific community is not criminally liable for ordinary negligence. This is without prejudice to the obligation specified in art. 2043 of the Italian Civil Code. The court, also in deciding the applicable compensation for loss, takes due account of the conduct referred to in the first sentence...".*

This provision has generated competing views of the interpretation of the express reference to non-contractual liability (2043) and the lack of reference to (contractual) liability deriving from so-called "social contact".

Early commentators have concluded that the absence of reference to the liability deriving from "social contact" should be interpreted as excluding the possibility of relying on the contractual responsibility of the physician.

The early decisions of the trial Court have confirmed the presence of differing viewpoints on this issue.

Nevertheless the Supreme Court of Cassation in its judgement no. 4030, delivered on 19 February 2103, held that even after the introduction of the new provisions of the Balduzzi Decree, **the issue of civil liability continues to be based on** ***"...the established rules,*** *not only for the non-contractual liability of the physician, but* ***also for the so-called contractual liability of the physician*** *and health care facility* ***deriving from social contact****...".*

8. NON-PECUNIARY LOSS AND SCOPE OF APPLICATION OF ART. 139 OF THE INSURANCE CODE – CONTRASTING CASE LAW

Article 139 of the Insurance Code lays down the criteria for determining non-pecuniary loss in the event of non-minor injuries arising from accidents associated with the circulation of motor vehicles and boats.

The Court of Milan was recently asked to rule on the applicability of the criteria for the quantification of damages, pursuant to art. 139 of the Insurance Code, to non-minor injuries arising from accidents not associated with the circulation of motor vehicles and boats.

The judgements handed down were not unambiguous.

By its decisions of 2 May 2013 and 23 May 2013, the Court held that Article 139 of the Insurance Code can/should also be applied outside the sphere of accidents arising from the circulation of motor vehicles and boats, since *"... **the good that is one's health.... deserves the same protection irrespective of the cause of its impairment.** And, without a good reason justifying an alternative basis for compensation, the application of different evaluative criteria to fact circumstances that are similar in the quality of their consequences, would be inconsistent with the spirit of one of the cardinal rules of the Italian legal order laid down by art. 3 of the Constitution..."*.

Following this line of argument, it was stated that the criterion for the quantification of the loss provided for by art. 139 of the Insurance Code *"... certainly appears fair and should also be applied outside of the cases [provided for therein], since there is no good reason to justify the application of different criteria to measure loss to the person based on the circumstances in which such loss has occurred..."*.

By contrast to this, the Court of Milan again, in its judgement of 10 May 2013, stated that *"... non-pecuniary damage to health can only be assessed on the basis of equity and, in the absence of binding legal criteria, this equitable assessment should be based on the criteria laid down in the tables of the Court of Milan, rather than on the parameters specified in art. 139... **The application of the criteria set forth in art. 139... outside the sphere of vehicular circulation would artificially restrict to unjustifiable limits the compensation due …".***

9. Public officials – "In-house" companies – Liability for loss caused to the Public Purse – A recent Supreme Court of Cassation decision

The Court of Cassation recently returned to the controversial topic of the division of jurisdiction (ordinary and administrative) in relation to the liability of directors of private companies with public capital.

By its judgement no. 26283 of 25 November 2013 the Supreme Court of Cassation laid down that "*.... the conclusions reached by this court in identifying the limits of the jurisdiction of the accounting court in cases involving the liability of public company bodies cannot stand, even in the case of in-house companies. **This is because... the latter are companies only in external appearance and, as has been seen, they are in fact parts of the public administration** from which they derive, and not legal entities external to and independent from that administration. It follows that the bodies of those companies, subject as they are to hierarchical constraints right up to the governmental administration, cannot even be considered – unlike the case of directors of other public companies – as vested with private functions based on a contractual relationship established with the same company. **Since they are in charge of a structure corresponding to an internal division of that public administration, they should be considered to be personally associated with it by a real relationship of service, as in the case of managers in charge of services provided directly by the public institution.** The similarity between the two situations, which has proved to be one of the salient characteristics of the in-house phenomenon, cannot justify a different conclusion for the two cases nor, therefore, a different treatment in terms of responsibility and relevant jurisdiction. **On the other hand, if there cannot be said to be any relationship of alterity between the public institution and the in-house company answering to it, then the distinction between the assets of the institution and those of the company cannot be based on separate ownership, but mere separation of assets**. It follows that, in this case, any loss caused to the company's assets by the unlawful acts of its directors – potentially assisted by a culpable lack of vigilance on the part of the governing bodies – is caused to assets (although separate) that are attributable to the public body: it thus constitutes loss to the State, which justifies granting to the Court of Auditors jurisdiction over the associated action for liability...".*

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