D&O RISK & LIABILITY

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ITALY

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PG LEGAL

Q IN WHAT WAYS ARE THE PRESSURES EXERTED BY REGULATORS, CREDITORS, CUSTOMERS AND SUPPLIERS INCREASING THE PERSONAL RISKS FOR CORPORATE DIRECTORS AND OFFICERS (D&OS) IN ITALY?

AUCONE: Considerable pressure has been exerted on D&Os in recent years. A high percentage of the receiverships in insolvency proceedings have brought responsibility actions against the former D&Os of bankrupt companies. Furthermore, the recent provisions of the Italian legislator and the rulings of the Italian courts have required a higher level of diligence from D&Os. Since the requirements for commencing insolvency proceedings are rather low – in fact, insolvency proceedings may be brought in case of debts exceeding an amount of €30,000 – a single customer and supplier can put D&Os under a certain degree of pressure.

Q WHAT TYPES OF CLAIMS ARE BEING BROUGHT AGAINST D&OS IN ITALY, INCLUDING ISSUES ARISING FROM BUSINESS DECISIONS, FINANCIAL PERFORMANCE AND BANKRUPTCY, THROUGH TO ALLEGED FRAUD AND CORRUPTION?

AUCONE: A wide variety of claims have been brought against D&Os in Italy in recent years. A large number of these actions were brought by the receiverships of insolvent companies. Following the crisis within the Italian bank system, there has been an increase in the number of responsibility actions brought by individual savers and institutional investors, such as investment funds. Since D&O policies exclude coverage for offences committed with wilful intent, such as fraud and corruption, the actors tend to qualify the actions committed as negligent, unless a criminal proceeding has established that the director or officer has acted with wilful intent.

Q GIVEN THAT VIRTUALLY EVERY M&A TRANSACTION NOW SEEMS TO DRAW SOME FORM OF LITIGATION – PERHAPS RELATING TO DISCLOSURES, CONFLICTS OF INTEREST, ERRORS AND OMISSIONS, OR ANOTHER ISSUE – WHAT IS YOUR ADVICE TO D&OS ON MANAGING POTENTIAL LIABILITIES ARISING FROM A DEAL?

AUCONE: D&Os should perform each transaction with due diligence. When not consenting to the decision of a corporate organ, such as the board of directors or board of statuary auditors, the dissenting director or officer should make sure that his or her objections are recorded in writing in the minutes and corporate ledgers. All D&Os are held to act in an "informed manner" according to the Italian courts. This obligation to furnish oneself with all the information required to make an informed decision on the items brought to their attention applies to all directors and auditors, even if the degree of knowledge will vary based on their role. In order to act in an informed manner, a single director or officer may require the expertise of a third party. When appointing a third-party expert, the director or officer needs to verify whether the expert has the necessary qualifications and experience. Furthermore, D&Os should notify their respective insurance company of the circumstances in which a liability claim or action might be triggered as early as possible.

Q TO WHAT EXTENT IS THE LITIGATION LANDSCAPE CHANGING? FOR EXAMPLE, ARE YOU SEEING MORE SECURITIES CLASS ACTION LAWSUITS AGAINST D&OS IN ITALY?

AUCONE: In recent years, the number of securities class action lawsuits brought before Italian courts by shareholders and investors of listed companies, including banks, has significantly increased. In particular, the banks affected by the banking crisis have become the target of class actions brought by shareholders and private and institutional investors aimed at recovering their losses. The criminal and civil proceedings brought in recent years against the D&Os of banks and large companies have demonstrated that their actions are directed not only against the managing director, but against all individuals involved in the control and supervision of the operations of the bankrupt companies or banks, such as internal or external auditors.

"Following the increase in criminal and civil proceedings brought against D&Os, there is greater awareness of the need for extensive liability insurance cover."

Q HOW WOULD YOU DESCRIBE THE DEFENCE COSTS ASSOCIATED WITH DEFENDING CLAIMS AGAINST D&OS? ARE THESE COSTS ON THE RISE?

AUCONE: Based on Italian law, insurers are obligated to compensate the insured's defence costs, up to a quarter of the maximum insured amount. With a D&O policy in place, the fees requested by a defence lawyer appointed by the insured tend not to be in line with the fee schedule provided under Italian law.

Q IN YOUR OPINION, HOW IMPORTANT IS D&O LIABILITY INSURANCE AS A TOOL TO MITIGATE THE PERSONAL RISKS TO BOARD MEMBERS? DO YOU BELIEVE ENOUGH ATTENTION IS PAID TO THIS ISSUE IN ITALY?

AUCONE: D&O liability insurance is a very important tool for directors, board member and auditors to mitigate the risks linked to their office. While big companies have recognised the essential importance of insurance coverage for their D&Os, those D&Os of small and medium sized enterprises often underestimate the importance of D&O liability insurance. While the legislator has introduced the obligation to take out adequate professional liability insurance for some professions, such as architects, lawyers and accountants, there is no such legal obligation for D&Os. In any event, in recent years, following the increase in criminal and civil proceedings brought against D&Os, there is greater awareness of the need for extensive liability insurance cover.

Q WHAT IS YOUR ADVICE TO COMPANIES AND THEIR D&OS WHEN ASSESSING THE TERMS, COVERAGE AND PRICING OF A D&OS INSURANCE POLICY?

AUCONE: Liability insurance coverage should be tailored to the role of a single director or officer. Particular attention should be devoted to certain aspects. The maximum insured amount should correspond to the individual risk exposure of the director or officer. In the case of multiple policies, each insurance layer should be verified. The period of retroactivity should be in line with the role performed by the respective directors or officers. The policy should offer adequate tail coverage for the period following the insurance period, with particular attention given to a director or officer who is no longer associated with the company and no new insurance policy is taken out for him. The director should verify if all of his or her offices are covered under the policy, in particular if the director is appointed with an 'external office' – an office at a different, not always affiliate-company, rather than the company that took out the D&O liability policy. The director or officer should further assess whether integration of the insurance coverage taken out by the company on his or her behalf with an individual policy might be appropriate.

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Giovanna Aucone is a partner and head of PG Legal's insurance team. Her practice focuses on providing legal assistance to insurance companies with a particular emphasis on structuring complex insurance products. Her insurance experience also includes the drafting of contractual documentation required for compliance with Italian regulators, and assistance on the establishment of subsidiaries or branches of insurance undertakings in Italy. She is also an experienced litigator with an impressive track record of significant cases regarding D&O and financial lines' policies.