D&O RISK & LIABILITY

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Q TO WHAT EXTENT HAVE PERSONAL RISKS FACING BOARD MEMBERS INCREASED IN TODAY'S CHALLENGING BUSINESS ENVIRONMENT?

AUCONE: The current economic and political situation in Italy has brought changes to D&O liability actions. Specifically, the provisions of European law and national law of primary and secondary legislation, which state the liability of the administrative bodies of companies in relation to various areas, have increased. This has encouraged more responsible company management, and responds to the needs of those prejudiced by the negative effects of management choices taken at the highest level. Within this framework, the need for wronged parties to obtain compensation for damages, and improve their awareness, have led to an increase in the number of requests for compensation, and the number of liability actions brought against D&Os.

Q COULD YOU HIGHLIGHT SOME OF THE MAJOR THEMES YOU HAVE SEEN IN RECENT D&O LITIGATION IN ITALY? HAS THERE BEEN AN INCREASE IN THE NUMBER OF SUCH CASES OVER THE LAST 12-18 MONTHS?

AUCONE: Although most legal actions brought against D&Os are filed by the trustee in a bankruptcy for mismanagement, over the last 12 months there has been an increase in proceedings filed against banks or listed companies. Indeed, at the opening of the judicial year 2016, the president of the Court of Milan stated that claims brought by shareholders or investors against listed companies and banks have grown exponentially in recent years. These mainly concern loss in listed company share value, including banks, and banks' liability for failure to provide adequate information to investors when issuing shares, bonds – especially so-called 'subordinated bonds' – and other financial products.

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

AUCONE: Various actions may be brought. Considering the recent discussions on the '*Decreto Salva Banche*', the analysis of different kinds of securities has been an interesting development. In Italy, securities litigation against banks arises because of the loss in share value, mainly due to mismanagement, accounting fraud or an excessive amount of non-performing loans. In most cases these issues are interconnected and affected by political changes. Generally, these actions are brought before a criminal court to trigger the intervention of the public prosecutor to investigate a case of corporate fraud or other crimes connected with share trading; and before a civil court for the possible invalidity or termination of contracts relating to the issuing of shares or other financial products. In broad terms, the shareholders join the criminal proceedings as '*parte civile*', which roughly means that the shareholders are the damaged parties that have an interest in punishing the improper actions perpetrated by the D&Os of the bank.

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: It is fair to assume that given the continuing financial downturn of the Italian economy, those Italian banks that are suffering from a serious financial crisis may become the target of more legal actions, including class actions, brought by shareholders and investors aimed at recovering their losses. This is particularly relevant for those banks that are presently struggling for survival and that may be subject to state bailouts in the event that a market solution cannot be found immediately. Inspections carried out by the European Central Bank, CONSOB and Bank of Italy, concerning the loss of share value at certain banks, have found that there were a significant number of problematic issues in relation to financial accounts and in the procedure for issuing shares to investors. Therefore, it is possible that securities litigation in Italy against banks or companies are likely to follow the same patterns

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seen in other more mature jurisdictions such as, for example, the US and the UK.

Q WHAT EFFECT ARE INCREASED REGULATION, PENALTIES, DAMAGES AND SETTLEMENT FIGURES HAVING ON THE COSTS ASSOCIATED WITH DEFENDING D&O CLAIMS?

AUCONE: Over the last few years the role of the director has been subject to significant pressure due to new legislative provisions, judicial actions and agreements reached between parties. Specifically, the increase in litigation, as well as changes to the legislative, economic and political framework, have imposed an excessive amount of obligations on D&Os, subsequently exposing them to the risk of legal actions being brought against them. As a result, directors will need to carry out a number of specific defensive actions explicitly indicating why they disagreed with a particular transaction which may have been detrimental to the company or any activities which they might have undertaken which were of benefit to the company.

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 CURRENTLY?

AUCONE: A D&O policy is significant as it protects board members from personal risk, but it is also valuable for the company and for the damaged parties. Interest in D&O policies is increasing. However, such an increase is limited to large companies, which require complex and structured policies. Medium-size companies appear to be less interested in D&O policies due to the fact that shareholders and D&Os are often members of the same family. In any case, D&O policies are crucial to limiting the liability of a company's governing body, and securing the D&Os' assets against any claims within the terms of the related insurance contract. It appears that in the absence of a D&O policy, especially in medium-size businesses, professional indemnity policies, which provide coverage extensions to the activities carried out by directors or statutory auditors, are increasing.

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

AUCONE: Before executing a D&O policy it would be advisable to assess the company's insurance coverage requirements carefully. For this reason, due diligence of the insured party's needs, such as the need to cover an associated or subsidiary company, insurance coverage in the case of mergers and acquisitions and insurance to cover some specific events or circumstances, would be advisable. D&O policies cover circumstances that could be carried out by more insured parties. Therefore, it would be appropriate to verify with insured parties the truthfulness of declarations made when signing the questionnaire or insurance contract. Moreover, the applicability of claims made clauses, run off periods or any further coverage that could apply following the termination of a director or officer from their office should also be evaluated. In addition, the maximum insured amount and the possibility to execute excess policies should also be evaluated.

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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.