

# ANNUAL REVIEW

## D&O risk & liability

REPRINTED FROM  
ONLINE CONTENT  
FEBRUARY 2019

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## Italy ■

**GIOVANNA AUCONE**  
PG Legal  
Partner  
+39 06 884 1535  
aucone@pglegal.it

Giovanna Aucone is a partner and head of PG Legal's insurance team.

Her work focuses on providing legal assistance to insurance companies with particular emphasis on structuring complex insurance products. Her insurance experience also includes the drafting of contractual documentation required for compliance with the Italian regulators and assistance on the establishment of subsidiaries or branches of insurance undertakings in Italy. In addition to her solid and versatile knowledge of insurance law, she is often invited to speak at conferences and seminars to discuss the hottest topics of insurance law. She is recommended by Chambers Europe for insurance in Italy.

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■ **Q. To what extent have personal risks facing board members increased in today's challenging business environment?**

**AUCONE:** Today, a lot of directors and officers (D&Os) are confronted with liability claims arising from their connections with companies that have been declared bankrupt. Indeed, it has become an increasingly common course of action in insolvency proceedings to bring actions against former directors, officers and auditors.

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■ **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:** The number of actions initiated against D&Os has remained at a high level over the last 12-18 months and may have increased. This increase can be attributed to the after effects of the global economic crisis, which are still being felt, causing insolvencies across the banking sector. The major themes we have seen in recent D&O litigation have been related to the responsibilities of D&Os of banks and credit institutions, and lawsuits brought against the former D&Os of insolvent companies.

■ **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:** In the last few years, a broad range of claims have been brought against D&Os, auditors and other corporate bodies before the Italian civil and criminal courts. Actions brought by the receivers in insolvency proceedings account for a big share. Actions against D&Os of banks and financial institutions are also rising. Under many D&O policies, offences committed with wilful intent, such as fraud and corruption, are excluded, and the behaviour of many D&Os is categorised as negligent, unless the wilful intent of the director or officer is considered within a criminal proceeding.

■ **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:** The number of securities class action lawsuits against D&Os continues to rise, particularly in the banking sector. The trend

of extending lawsuits to auditors and all other corporate organs involved in the control and supervision of corporate operations, such as internal and external auditors, is also evident.

■ **Q. What affect are increased regulation, penalties, damages and settlement figures having on the costs associated with defending D&O claims?**

**AUCONE:** The cost of defending D&O claims is increasing. Under Italian law, insurers have to compensate the insured's defence costs, up to a quarter of the maximum insured amount. In light of a potential settlement, receiverships in insolvency proceedings tend to overestimate the damages. This overblown estimate causes an increase in the defence costs calculated, based on the value of the proceeding. Furthermore, 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 currently?**

**AUCONE:** D&O liability insurance has become ever more important over the last few years. Previously, small- and medium-sized companies have underestimated the essential importance of D&O insurance coverage with regard to mitigating the individual risks faced by their D&Os. This appears to be changing. After Italy introduced mandatory professional insurance coverage for some professions, such as lawyers and accountants, other professional groups are paying more attention to adequate insurance coverage.

■ **Q. What is your advice to companies and their D&Os when assessing the terms, coverage and pricing of a D&O insurance policy?**

**AUCONE:** For some professions, Italian legislation has established a compulsory obligation to take out professional liability insurance and has further specified the activities to be covered by that mandatory insurance coverage. For D&Os, no legal requirements have been established and therefore, each director or officer should carefully assess if the coverage offered is appropriate for the role covered and if the maximum insured amount corresponds to the individual risk assumed by the insured. Special attention should also be paid to the retroactivity period and the posthumous coverage period offered. Each director should carefully assess if a D&O policy taken out by the company is in his or her interest and actually covers all activities performed and offices held, or if additional insurance coverage should be sought. ■



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**GIOVANNA AUCONE**

Partner

+39 06 884 1535

[aucone@pglegal.it](mailto:aucone@pglegal.it)

**GIANFRANCO PUOPOLO**

Partner

+39 02 7601 3359

[g.puopolo@pglegal.it](mailto:g.puopolo@pglegal.it)