

# The Assessment of Sustainability in Insurance Activity: Corporate and Products Governance. The Perspective of the European Union and the Effects on Italian Insurance Regulations

Ciro G. Corvese\*

### Abstract

The Author examines the European legislation regulating sustainability risk, sustainability factors, and sustainability preferences; this legislation is embedded in the existing rules concerning the governance of insurance and reinsurance, the control and product governance requirements for insurance undertakings and distributors of insurance products and the rules of conduct and advice on insurance based-investment products. The main purpose of this research is to examine whether the legislator's choice to simply integrate the existing regulations rather than not to introduce an ad hoc regulation has effectively raised awareness of the importance of insurance and reinsurance undertakings.

### I. Introduction: Purpose and Limits of the Research

In March 2018, the European Commission published its Action Plan 'Financing Sustainable Growth',<sup>1</sup> setting up an ambitious and comprehensive strategy on

\*Associate Professor of Business Law and Corporate Law; Director of the Department of Business and Law and Coordinator of the PhD in Sustainability of Law and Management, University of Siena, Italy.

<sup>1</sup> European Commission, 'Communication - Action Plan: Financing Sustainable Growth' (COM (2018) 97 final, 8 March 2018) available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). See, in doctrine, M. Siri and S. Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' 11(22) *Sustainability*, 1-23 (2019); available at <https://tinyurl.com/3yxr5kv9> (last visited 30 September 2024); L. Alessi, B. Alemanni and G. Frati, 'Financial Regulation for Sustainable Finance in the European Landscape', in N. Linciano et al eds, *Information as a Driver of Sustainable Finance. Palgrave Studies in Impact Finance* (Cham: Palgrave Macmillan, 2022), 207-242, available at <https://tinyurl.com/mr2xm8r5> (last visited 30 September 2024); L. Böffel and J. Schürger, 'Sustainability: A Current Driver in EU Banking and Insurance' Part of the EBI Studies in Banking and Capital Markets Law book series (ESBCML); D. Bush et al, 'The European Commission's Sustainable Finance Action Plan and Other International Initiative', in Ead eds, *Sustainable Finance in Europe. EBI Studies in Banking and Capital Markets Law* (Cham: Palgrave Macmillan, 2021), 19-59, available at <https://tinyurl.com/yhf6bn76> (last visited 30 September 2024); M. Driessen, 'Sustainable Finance: An Overview of ESG in the Financial Markets', in D. Busch et al eds, *Sustainable Finance in Europe. EBI Studies in Banking and Capital Markets Law* (Cham: Palgrave Macmillan, 2021), 329-350, available at <https://tinyurl.com/3ejtnnj6> (last visited 30 September 2024); A. Martini, 'Socially responsible investing: from the ethical origins to the sustainable development framework of the European Union' 23 *Environ Dev*

sustainable finance. One of the objectives in that Action Plan is to reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth. The impact assessment underlying subsequent legislative initiatives published in May 2018 demonstrated the need to clarify that insurance and reinsurance undertakings should consider sustainability factors, risks, and preferences.

As we know, the regulatory framework on sustainable finance is very relevant for the insurance industry, which plays a key role in promoting the sustainable transition as an investor, protection provider, and risk manager.

Insurance and reinsurance undertakings should, therefore, assess not only all relevant financial risks on an ongoing basis but also all relevant sustainability risks as referred to in Regulation (EU) 2019/2088 (hereinafter SFDR) of the European Parliament and of the Council that, if they occur, could cause an actual or potential material negative impact on the value of an investment or a liability.<sup>2</sup>

Sustainability risk is now defined as

‘an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment’ (see SFDR, Art 2, point 22).<sup>3</sup>

With the adoption of SFDR, the European legislator has also introduced specific transparency measures in the disclosure of financial products (including

*Sustain*, 16874–16890 (2021), available at <https://tinyurl.com/y3rzu5uy> (last visited 30 September 2024); F.G. Nogueira et al, ‘Sustainable insurance assessment: towards an integrative model’ 43 (2) *Geneva Paper on Risk Insurance*, 275–299 (2018).

<sup>2</sup> See R. Cesari, ‘Sustainability and Insurance’, available at <https://tinyurl.com/3rc4vh2b> (last visited 30 September 2024). See also United Nations Environment Programme FI: The global state of sustainable insurance-understanding and integrating environmental, social and governance factors in insurance (2009), available at <https://tinyurl.com/2p93kp5t> (last visited 30 September 2024); United Nations Environment Programme FI: PSI-Principles for Sustainable Insurance—a global sustainability framework and initiative of the United Nations Environment Programme Finance Initiative (2012), available at <https://tinyurl.com/yc5zvnju> (last visited 30 September 2024) and United Nations Environment Programme (UNEP): Sustainable insurance—the emerging agenda for supervisors and regulators (2017), available at <https://tinyurl.com/mrwx9ck> (last visited 30 September 2024). See IVASS, ‘Rischi da catastrofi naturali e di sostenibilità: monitoraggio annuale’, available at <https://tinyurl.com/3mdbebxv> last visited 30 September 2024), where we can read ‘Most companies declare that they take sustainability risks into account, both in their investment policies and in their underwriting policies. However, there are numerous companies that have implemented sustainability strategies only as part of their investment policies. Two thirds of companies declare that they have adopted one or more international standards on the matter. The most cited standards are the United Nations Principles for Responsible Investments (UNPRI, adopted by 49% of companies), the United Nations Global Compact (33% of companies) and the United Nations Principles for Sustainable Insurance (UNPSI, 17% of companies). Other companies have explicitly declared that they align themselves with the objectives of the Paris Agreement, the United Nations Framework Convention on Climate Change at COP 27 and COP 26’ (Author’s translation).

<sup>3</sup> See EIOPA, ‘Prudential Treatment of Sustainability Risks’, discussion paper, EIOPA-bos-22-527, 29 November 2022 available at <https://tinyurl.com/y237c8xc> (last visited 30 September 2024).

insurance products with financial content, so-called IBIPs, <sup>4</sup> and social security products) to make the disclosures relating to the consideration of sustainability factors and risks in the products themselves comparable to end investors.

In addition, in this context, insurers are also particularly interested in Regulation (EU) 2020/852 (hereinafter Taxonomy), which establishes the criteria for determining whether an economic activity can be considered environmentally sustainable, both in their capacity as institutional investors and as risk underwriters. In this context, in fact – especially in certain branches of activity – they can be ‘enablers’/enablers of (potentially) sustainable activities, substantially contributing to the objective of adaptation to climate change.<sup>5</sup>

Therefore, the adoption of the above-mentioned EU legislation on sustainable finance has also led to alignment with the European provisions of the Solvency II framework<sup>6</sup> and the regulations on the distribution of insurance products provided for by the EU Directive 2016/97 ‘Insurance Distribution Directive’ (hereinafter IDD).<sup>7</sup>

<sup>4</sup> P. Marano, ‘The Product Oversight and Governance: Standards and Liabilities’, in Id and I. Rokas eds, *Distribution of Insurance-Based Investment Products* (Cham: Springer, 2019) available at <https://tinyurl.com/bddv5nwn> (last visited 30 September 2024) and M. Siri, ‘Insurance-Based Investment Products: Regulatory Responses and Policy Issues’, in P. Marano and K. Noussia eds, *Insurance Distribution Directive. A Legal Analysis* (Cham: Springer, 2021).

<sup>5</sup> M. Scholer and L. Cuesta Barbera, ‘The EU Sustainable Finance Taxonomy from the Perspective of the Insurance and Reinsurance Sector’, available at (last visited 30 September 2024), 88-103 (2020). See also M. Kraft, ‘Nachhaltigkeitsrisiken in Versicherungsunternehmen. Regulatorische Entwicklungen, Szenarioanalysen und Stress-Tests’ 111 *ZVersWiss*, 89-125 (2022) available at <https://tinyurl.com/33z6eh26> (last visited 30 September 2024).

<sup>6</sup> In the opinion of EIOPA ‘Solvency II, as a forward-looking risk-based framework, can effectively enable insurers to manage sustainability risks alongside other prudential risks. Many of the existing prudential tools for risk measurement and mitigation can be applied to address sustainability risks as well. For instance, EIOPA’s application guidance on climate change materiality assessments and climate change scenarios in the ORSA illustrates how climate-related materiality assessments and scenario analysis of climate risks can be incorporated in this existing prudential tool, not only in the short term, but also in the long-term.<sup>9</sup> Moreover, EIOPA is currently evaluating the potential for a dedicated prudential treatment of sustainability risks, <sup>10</sup> and is initiating the re-assessment of the standard formula for natural catastrophe risk in Solvency II’. See EIOPA, ‘Growing recognition of sustainability risks in the insurance and IORP sectors’, 13 September 2023, available at last visited 30 September 2024). See, M. Siri, ‘Corporate Governance of Insurance Firms after Solvency II (July 10, 2017)’, in P. Marano and M. Siri eds, *Insurance Regulation in the European Union: Solvency II and Beyond* (London: Palgrave Macmillan, 2017), available at <https://tinyurl.com/4j24eajb> (last visited 30 September 2024); M. Andenas et al eds, ‘Solvency II: A Dynamic Challenge for the Insurance Market’ (Bologna: il Mulino, 2017); T.J. Boonen, ‘Solvency II Solvency Capital Requirement for Life Insurance Companies Based on Expected Shortfall’ 7(2) *European Actuarial Journal*, 405-434 (2017), available at <https://tinyurl.com/6j8cjfkr> (last visited 30 September 2024); C. Brömmelmeyer, ‘The Solvency II System of Governance - Minimum Requirements for Key Functions’ 70 *Festschrift für Christine Windbichler zum Geburtstag am 8 December 2020*, available at <https://tinyurl.com/3m8r4vya> (last visited 30 September 2024); S. Dell’Atti et al, ‘The effects of solvency II on corporate boards: a survey on Italian insurance companies’ 16 (1) *Corporate Ownership & Control*, 1-134 (2018).

<sup>7</sup> See T. Köhne and C. Brömmelmeyer, ‘The New Insurance Distribution Regulation in the EU-A Critical Assessment from a Legal and Economic Perspective’ 43 *Geneva Paper on Risk*

It is for this reason that Commission Delegated Regulation (EU) 2021/1256<sup>8</sup> amended Delegated Regulation (EU) 2015/35 as regards the integration of sustainability risks into the governance of insurance and reinsurance undertakings. Commission Delegated Regulation (EU) 2021/1257<sup>9</sup> amended Delegated Regulations (EU) 2017/2358<sup>10</sup> and (EU) 2017/2359 as regards the integration of sustainability factors respectively sustainability risks and sustainability preferences in the control and product governance requirements for insurance undertakings and distributors of insurance products and sustainability risks and sustainability preferences in the rules of conduct and advice on insurance investments.

Therefore, in this research study, when we talk about the assessment of ESG factors in insurance risks in the European Union legislation, we wish to refer to two different profiles: one is the corporate governance of insurance and reinsurance undertakings; the other concerns insurance products, and here, we can consider not only the product governance and oversight (also known as POG) but also the rules of conduct.<sup>11</sup>

*Insurance*, 704-739 (2018), available at <https://tinyurl.com/yc4y37t2> (last visited 30 September 2024). See also P. Marano, 'Quale mercato per l'intermediazione assicurativa? Riflessioni sulle possibili modifiche all'IMD' *Assicurazioni*, 207 (2011) e Id, *L'intermediazione assicurativa. Mercato concorrenziale e disciplina dell'attività* (Torino: UTET Giuridica, 2013). More recently, see A. Candian, 'Il recepimento della IDD in Italia: primo commento al decreto di attuazione approvato in esame preliminare dal Governo', available at <https://tinyurl.com/2t5cyk28> (last visited 30 September 2024); M. Hazan, 'L'assicurazione "responsabile" e la responsabilità dell'assicuratore: quali prospettive dopo IDD?' *Danno e responsabilità*, 630-640 (2017); S. Landini, 'Distribuzione assicurativa da IDD al decreto attuativo passando per EIOPA e IVASS' *Diritto del mercato assicurativo e finanziario*, 183-194 (2018) and V. Sanasi D'Arpe, 'Riflessioni sul governo e controllo del prodotto nel mercato assicurativo' *Diritto del mercato assicurativo e finanziario*, 59-75 (2018); C.G. Corvese, 'La tutela dell'investitore in prodotti finanziari assicurativi tra il ritorno alla vigilanza settoriale e la necessità di livellare il piano di gioco fra il mercato mobiliare ed il mercato assicurativo', in M. Mancini et al eds, *Regole e Mercato* (Torino: Giappichelli, 2016), 478-524; P. Marano, 'Customer protection and product oversight and governance of insurance products, in the EU', in *Reforms and New Challenges in Insurance Law* (Belgrado: AIDA Serbia, 2016), 260-266; Id, 'La Product Oversight Governance' *Il nuovo Regolamento IVASS sull'accesso agli atti - La distribuzione assicurativa*, Quaderno IVASS, 91-100 (2017); P. Corrias, 'La direttiva UE 2016/97 sulla distribuzione assicurativa: profili di tutela dell'assicurato' *Assicurazioni*, 9-24 (2017) and S. Landini, 'Appropriatezza, adeguatezza e meritevolezza dei contratti di assicurazione' *Assicurazioni*, 39-58 (2017).

<sup>8</sup>OJ L 277, 2.8.2021, 14.

<sup>9</sup> *ibid* 18.

<sup>10</sup> See M. Frigessi di Rattalma, 'Gli atti delegati nel diritto comunitario e nella direttiva IDD' *Assicurazioni*, 25-38 (2017).

<sup>11</sup> In relation to the insurance sector, on 28 November 2018, EIOPA launched a public consultation on the draft technical advice on the integration of sustainability risks and factors in the delegated acts under Solvency II and the Insurance Distribution Directive IDD, with specific reference to organisational requirements, operating conditions, risk management, and target market assessment for the IDD only. On 30 April 2019, EIOPA published its final technical advice EIOPA: *Technical Advice on the integration of sustainability risks and factors in the delegated acts under Solvency II and IDD*, EIOPA-BoS-19/172 30 (April 2019). Moreover, in August 2018, the EU Commission mandated EIOPA for the draft of an opinion on sustainability within Solvency II, with specific reference to climate change mitigation, to then be considered

## II. The Integration of *Sustainability Risks* into the Corporate Governance of Insurance and Reinsurance Undertakings and the Prudent Person Principle

### 1. Premises

The changes made to Delegated Regulation (EU) 2015/35 by the Commission Delegated Regulation (EU) 2021/1256 have been necessary because the first Delegated Regulation did not explicitly refer to sustainability risks. For that reason and to ensure that the system of governance has been properly implemented and adhered to,

‘it was necessary to clarify that the system of governance of insurance and reinsurance undertakings and the assessment of those undertakings’ overall solvency needs should reflect sustainability risks’ (see recital 3 of Commission Delegated Regulation (EU) 2021/1256)<sup>12</sup>.

There are three profiles through which the EU intends to consider sustainability within corporate governance:

first, insurance undertakings that disclose principal adverse impacts on sustainability factors in accordance with SFDR should also adapt their processes, systems and internal controls with respect to those disclosures (recital 4);

second, given the ambitions of the Commission to ensure that climate and environmental risks are managed and integrated into the financial system and the importance of remuneration policies in ensuring that the staff of insurance and reinsurance undertakings effectively manage risks identified by the risk management system, the remuneration policies of insurance and reinsurance undertakings should contain information on how those policies take into account the integration of sustainability risks in the risk management system (recital 5);

third, the prudent person principle laid down in Art 132 of Solvency II requires that insurance and reinsurance undertakings only invest in assets the risks of which they can identify, measure, monitor, manage, control and report properly. To ensure that climate and environmental risks are effectively managed by insurance and reinsurance undertakings, the implementation of the prudent person principle should consider sustainability risks and insurance and reinsurance undertakings should reflect in their investment process the sustainability preferences of their customers as taken into account in the product approval process (recital 6).

for the preparation of the EU Commission’s report on the Solvency II Directive *Letter from DG FISMA on sustainability within Solvency II* (28 August 2018) available at <https://tinyurl.com/49xb3pr7> (last visited 30 September 2024).

<sup>12</sup> See P. Marano and M. Siri eds, *Insurance Regulation* n 6 above, *passim* and N. Gatzert and H. Wesker, ‘A Comparative Assessment of Basel II/III and Solvency II’ 37 *Geneva Paper on Risk Insurance*, 539-570 (2012).

## 2. Definitions

To achieve the abovementioned goals, the changes made to Delegated Regulation (EU) 2015/35 concern briefly the introduction of the definitions of ‘sustainability risk’, sustainability factors and sustainability preferences Art 1(55); sustainability risks, which are integrated into the risk management policies (Art 260); the risk management function, which must identify and limit the sustainability risks (Art 269) necessary to assess the overall solvency needs of the company; the actuarial function, called upon to render an opinion in the context of the underwriting policy, also taking into account sustainability risks (Art 272); the remuneration policy, which includes information on the integration of sustainability risks into risk management (Art 275) and the integration of sustainability risks into the so-called ‘prudent person’ principle (Art 275-*bis*).

As regards the definitions of ‘sustainability risk’, ‘sustainability factors’ and ‘sustainability preferences’, the points 55c to 55e are inserted in Art 1 of Delegated Regulation (EU) 2015/35: ‘sustainability risk’ means an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential negative impact on the value of the investment or the value of the liability (55 c); ‘sustainability factors’ means sustainability factors as defined in Art 2, point (24), of SFDR id est ‘sustainability factors’ mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (55 c).

Finally, ‘sustainability preferences’<sup>13</sup> mean a customer’s or potential customer’s choice as to whether and, if so, to what extent one or more of the following financial instruments should be integrated into his or her investment: a financial instrument for which the customer or potential customer determines that a minimum proportion shall be invested in environmentally sustainable investments as defined in Art 2, point (1), of Taxonomy;<sup>14</sup> a financial instrument for which the customer or potential customer determines that a minimum proportion shall be invested in sustainable investments as defined in Art 2, point (17), of SFDR<sup>15</sup> and

<sup>13</sup> L. Della Tommasina, ‘Insurance Industry and Sustainability Preferences: Contracts and Products’, in L. Spataro et al eds, *ESG Integration and SRI Strategies in the EU*. Palgrave Studies in Impact Finance. (Cham: Palgrave Macmillan, 2023) available at <https://tinyurl.com/ana5fuzn> (last visited 30 September 2024).

<sup>14</sup> In particular, the Securities and Markets Stakeholder Group (SMSG) stated that ‘the lack of agreed definitions and labels at the EU level is a substantial shortcoming and seriously hampers the implementation of a harmonized approach on sustainable finance. This should not prevent firms from making progress in order to incorporate sustainability risks and factors, but this should be taken into account by regulators and supervisors’. See Securities and Markets Stakeholder Group (SMSG). Advice to ESMA (ESMA Consultation Papers On integrating sustainability risks and factors in MIFID, the UCITS Directive and AIFMD) (6 March 2019). See also, recently ESMA, *Concepts of sustainable investments and environmentally sustainable activities in the EU Sustainable Finance framework*, November 2023 available at <https://tinyurl.com/7s68mxj3> (last visited 30 September 2024).

<sup>15</sup> Sustainable investments are now defined as those investments ‘in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on

a financial instrument that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration is determined by the customer or potential customer.<sup>16</sup>

### 3. The Changes in Corporate Functions and Remuneration Policy

The other important changes<sup>17</sup> concern corporate governance and, specifically, risk management areas and, inside them, the risk management function, the actual function and, finally, the remuneration policy.

We must remember that the Chapter IX of Delegated Regulation (EU) 2015/35 provides rules concerning the system of governance of insurance and reinsurance undertakings, and particularly Section 1, modified by the Commission Delegated Regulation (EU) 2021/1256, contains the rules regarding the elements of the system of governance.

Here, it is not possible to dwell *funditus* on the whole part that has been modified, but we can only limit our considerations to indicate the modifications and changes that take the form of the insertion of the ‘sustainability risks’ into the following parts: risk management function (Art 269), actuarial function (Art 272), remuneration policy (Art 275) and prudent person principle (Art 275a).

For the first three profiles, we consider, first of all, the changes concerning risk management areas 18, which have led to the changes of Art 260(1) in points (a), (i), (c), and (vi) and have allowed the introduction of para 1a.

In point (a), point (i) of Art 260(1) now the risk management areas, as referred to in Art 44(2) of Solvency II, shall include all of the following policies: (a) Underwriting and reserving: (i) actions to be taken by the insurance or reinsurance

the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance’ (see SFDR, Art 2, point 17). See M.E. Salerno, ‘Adding Sustainability Risks and Factors to the MiFID II - Suitability and Product Governance Requirements’ 8 *The Italian Law Journal*, 807, 803-819 (2022). The connection with MiFID2 is so strong that the term ‘mifidisation of insurance law’ was coined see P. Marano, <https://tinyurl.com/4zjk4czp> (last visited 30 September 2024). See also A. Antonucci, ‘Le regole del mercato finanziario: la tutela del risparmiatore tra passato, presente e futuro’ *Janus* (2019); M.E. Salerno, ‘L’enforcement della disciplina in materia di tutela del contraente debole nei mercati finanziari’, available at <https://tinyurl.com/ytd4s57j>.

<sup>16</sup> See EIOPA, ‘Guidance on the integration of the customer's sustainability preferences in the suitability assessment under IDD’, EIOPA-BOS-22-391 available at <https://tinyurl.com/4vprd664> (last visited 30 September 2024) and for first critical remarks on the directive, see T. Köhne and C. Brömmelmeyer, ‘The New Insurance Distribution Regulation in the EU - A Critical Assessment from a Legal and Economic Perspective’ 43 *Geneva Paper on Risk Insurance*, 704-739 (2018) available at <https://tinyurl.com/yc4y37t2> (last visited 30 September 2024).

<sup>17</sup> See above para 2.

undertaking to assess and manage the risk of loss or of adverse change in the values of insurance and reinsurance liabilities, resulting from inadequate pricing and provisioning assumptions but also the assumptions due to internal or external factors, including sustainability risks.

In point (c), point (vi) of Art 260(1) is added: actions to be taken by the insurance or reinsurance undertaking to ensure that sustainability risks relating to the investment portfolio are properly identified, assessed and managed.

Para 1a is inserted into Art 260, on the basis of which the insurance and reinsurance undertakings shall integrate in their policies the areas referred to in points (a) and (c) of para 1 and, where relevant, policies on the other areas referred to in para 1, sustainability risks.

As regards the risk management function, the change concerns Art 269 and, specifically, (a) in para 1, point (e) is replaced by the following: '(e) identifying and assessing emerging risks and sustainability risks.'; the following paragraph 1a is inserted: '1a. Emerging risks and sustainability risks, as referred to in paragraph 1, point (e), and identified by the risk management function shall form part of the risks referred to in Art 262(1), point (a)'.

The change to actuarial function regards Art 272(6), that states regarding the underwriting policy, the opinion to be expressed by the actuarial function in accordance with Art 48(1)(g) of Solvency II shall at least include conclusions regarding some considerations listed from lett a) to lett c). The change concerns only the lett b) that now considers the sustainability risks and that letter is replaced by the following:

'(b) the effect of inflation, legal risk, sustainability risks, change in the composition of the undertaking's portfolio, and of systems which adjust the premiums policy-holders pay upwards or downwards depending on their claims history (bonus-malus systems) or similar systems, implemented in specific homogeneous risk groups'

Just a few considerations: no changes are provided for the compliance and internal audit functions! Are there no questions about the importance of sustainability and those functions? I do not think so! I think that the EU legislator considers only the functions that are more relevant to sustainability risks.<sup>18</sup>

Among the changes we are discussing, para 4, added to Art 275 (remuneration

<sup>18</sup> This is really important if we think it is EIOPA opinion that 'At least the four functions included in the system of governance, namely the risk management, the compliance, the actuarial and the internal audit function, are considered to be key functions and consequently also important or critical functions. Furthermore, persons with key functions are those who perform functions of specific importance for the undertaking in view of its business and organisation. These additional key functions, if any, are identified by the undertaking, but the determination of whether such functions should be considered key or not may be challenged by the supervisory authority' EIOPA, 'Guidelines on system of governance' at <https://tinyurl.com/bdhnzvuh> (last visited 30 September 2024), para 1.4, 2.



policy), deserves particular attention. The remuneration policy shall include information on how it considers the integration of sustainability risks in the risk management system.<sup>19</sup>

It is a general opinion in doctrine that remuneration policy is the most important topic for corporate governance not only for insurance undertakings and other financial intermediaries but for all companies. I think the EU legislators do not have a clear idea how to regulate the link between remuneration policy and sustainability<sup>20</sup>.

#### 4. The Prudent Person Principle

The last important change introduced by the Delegated Regulation (EU) 2021/1256 regards the ‘prudent person principle’.

As we know Art 132 of Solvency II introduces the ‘prudent person principle’ which includes provisions on how undertakings should invest their assets. This is because the absence of regulatory limits on investments should not mean that undertakings can make investment decisions without any regard to prudence and the interests of policyholders.<sup>21</sup>

The requirements of Solvency II and of the Delegated Regulation (EU) 2015/35 specify in detail some of the key aspects of the prudent person principle, such as asset liability management, investment in derivatives, liquidity risk management and concentration risk management.

The Guidelines on the prudent person principle which are part of the EIOPA Guidelines on the System of Governance emphasise that

‘Article 132 of Solvency II introduces the ‘prudent person principle’ which

<sup>19</sup> For legal implications coming along with it see L. Böffel, ‘Group-wide Remuneration Structure and Governance’ 111 *ZVersWiss*, 55-88 (2022), or Id, ‘Remuneration Requirements in the Insurance Sector-An Example of EU Law Deficiency in the Practice of Adopting Delegated Acts’ available at <https://tinyurl.com/4cr7wffv> (last visited 30 September 2024).

<sup>20</sup> This conclusion is supported by other EU rule related to the remuneration policy and we wish to refer to Art 15 ‘Combating climate change’ of Corporate Sustainability Due Diligence (CSDDD) and, in particular, to the para 3 of that Art where we can read ‘Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 (the transition to the sustainable economy and the action to combat climate change) when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability’.

<sup>21</sup> To understand better the meaning of prudent person principle, we may consider Bank of England, ‘Supervisory Statement | SS1/20 Solvency II: Prudent Person Principle’, May 2020 available at <https://tinyurl.com/2ujhb9x4> (last visited 30 September 2024). Compliance with the PPP must be considered on a case-by-case basis, as what is prudent for one firm, based on its particular business strategy and risk profile, may not be prudent for a different firm. When applied to a particular firm’s circumstances, the PPP’s standards are likely to allow for a range of reasonable investment strategies. In line with the PRA’s supervisory approach to insurance regulation, the PRA will exercise its independent judgement, and where it concludes that a firm is not meeting the PPP’s standards it will expect the firm’s senior managers responsible for investment to take action’ (para1.4, 1).

includes provisions on how undertakings should invest their assets. The absence of regulatory limits on investments does not mean that undertakings can take investment decisions without regard to prudence and policyholders' interests. The requirements of Solvency II and of the Commission Delegated Regulation 2015/35 comprehensively cover some of the key aspects of the prudent person principle, such as asset-liability management, investment in derivatives, liquidity risk management and concentration risk management. Therefore, the intention of these Guidelines is not to further develop these aspects, but to focus on the remaining aspects of the prudent person principle'.<sup>22</sup>

The Delegated Regulation (EU) 2021/1256 provides an insertion into Delegated Regulation (EU) 2015/35, a new Section 6 named Investments into Chapter IX of Title I.

The new Art 275a Integrates sustainability risks in the prudent person principle and provides that when identifying, measuring, monitoring, managing, controlling, reporting and assessing risks arising from investments, as referred to in the first sub para of Art 132(2) of Solvency II, insurance and reinsurance undertakings shall take into account sustainability risks.<sup>23</sup>

To reach these purposes, insurance and reinsurance undertakings shall take into account the potential long-term impact of their investment strategy and decisions on sustainability factors<sup>24</sup> and, where relevant, that strategy and those decisions of an insurance undertaking shall reflect the sustainability preferences of its customers taken into account in the product approval process referred to in Art 4 of Delegated Regulation (EU) 2017/2358 which we will consider in the below paragraph.

### **III. The Integration of Sustainability Factors, Risks and Preferences into the Product Oversight and Governance Requirements for Insurance Undertakings and Insurance Distributors**

#### **1. Premises**

In this paragraph we wish to consider another profile: the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors as made by the Art 1 of the Commission Delegated Regulation (UE) 2021/1257.

Indeed, the proper implementation of the Action Plan encourages investors'

<sup>22</sup> See EIOPA, 'Guidelines on system of governance', EIOPA-BoS-14/253EN, para. 1.11, 3 and Section 5, 13, available at <https://tinyurl.com/bdhnzvuh> (last visited 30 September 2024).

<sup>23</sup> See EIOPA, 'Guidelines on system of governance' n 19 above, Section 5, Guideline 29 - Security, quality, liquidity and profitability of the investment portfolios, 13-14.

<sup>24</sup> OECD, 'Investment governance and the integration of environmental, social and governance factors' (2017), <https://tinyurl.com/3zd82avd> (last visited 30 September 2024).

demand for sustainable investments. Therefore, the EU legislator aimed to reach some objectives.

First, it is, therefore, necessary to clarify that sustainability factors and sustainability-related objectives should be considered within the product governance requirements set out in Commission Delegated Regulation (EU) 2017/2358 (recital 4).

Second, insurance undertakings and insurance intermediaries manufacturing insurance products should consider sustainability factors in the product approval process of each insurance product and in the other product governance and oversight arrangements for each insurance product that is intended to be distributed to customers seeking insurance products with a sustainability-related profile (recital 5).

Third, considering that the target market should be set at a sufficient granular level, a general statement that an insurance product has a sustainability-related profile should not be sufficient. It should rather be specified by the insurance undertaking or insurance intermediary manufacturing the insurance product to which group of customers with specific sustainability-related objectives the insurance product is supposed to be distributed (recital 6).

Fourth, to ensure that insurance products with sustainability factors remain easily available also for customers who do not have sustainability preferences, insurance undertakings and insurance intermediaries manufacturing insurance products should not be required to identify groups of customers with whose needs, characteristics and objectives an insurance product with sustainability factors is not compatible (recital 7).

Finally, the sustainability factors of an insurance product should be presented in a transparent manner to enable insurance distributors to provide the relevant information to their customers or potential customers (recital 8).

For all these reasons, the Commission found it necessary to amend the Commission Delegated Regulations (EU) 2017/2358 regulating:

the process of product creation and control – the changes concern: the design of insurance products, which must also consider, among customers' expectations, their objectives relating to sustainability (Art 4);

the definition of 'Target Market' (TM) which now considers sustainability factors. In particular, it is envisaged that customers or potential customers who do not have sustainability preferences should not be included in the negative TM identified, by subtraction, with respect to sustainable products (Art 5).

The integration of sustainability objectives within the framework of the rules relating to: product testing (Art 6); the monitoring and review process (Art 7); the scope of the information contained in the information flows between producer and distributor (Art 8); distribution mechanisms (Art 10) which must ensure, *inter alia*, that any sustainability-related objectives are duly taken into account and the information that the distributor must report to the manufacturer, if

the product is no longer in line, over time, with the sustainability objectives set out in the TM (Art 11).

## **2. The Insertion of ‘Sustainability Factors’ and ‘Including Any Sustainability-Related Objectives’**

If we wish to resume the changes in just one phrase, it would be ‘including any sustainability-related objectives’; this expression has been introduced in some Arts of Delegated Regulation (EU) 2017/2358.

First, the new Art 4, point (3), point (a) provides that the product approval process shall ensure that the design of insurance products meets the following criteria ‘(i) it takes into account the objectives, interests and characteristics of customers, including any sustainability-related objectives’.

Second, in Art 5, dedicated to the ‘Target market’, it is provided, first, that the product approval process shall for each insurance product identify the target market and the group of compatible customers. The target market shall be identified at a sufficiently granular level, taking into account the characteristics, risk profile, complexity and nature of the insurance product, as well as its sustainability factors<sup>25</sup> as defined in Art 2, point (24), of SFDR Art 5(1).

The other important rules of Art 5 concern the obligation of manufactures that may, in particular with regard to insurance-based investment products (hereinafter IBIPs), identify groups of customers for whose needs, characteristics and objectives the insurance product is generally not compatible, except where insurance products consider sustainability factors as referred to in para 1 Art 5(2).

Manufacturers shall only design and market insurance products compatible with the needs, characteristics and objectives, including any sustainability-related objectives, of the customers belonging to the target market. When assessing whether an insurance product is compatible with a target market, manufacturers shall consider the level of information available to the customers belonging to that target market and their financial literacy Art 5(3).

Finally, manufacturers shall ensure that staff involved in designing and manufacturing insurance products has the necessary skills, knowledge and expertise to properly understand the insurance products sold and the interests, objectives, including any sustainability-related objectives, and characteristics of the customers belonging to the target market Art 5(4).

Third, also in Art 6 dedicated to ‘Product testing’ we may find important rules regarding manufactures that shall test their insurance products appropriately, including scenario analyses where relevant, before bringing that product to the market or significantly adapting it, or in case the target market has significantly changed. That product testing shall assess whether the insurance product over

<sup>25</sup> In the point quoted in the text, ‘sustainability factors’ mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

its lifetime meets the identified needs and objectives, including any sustainability-related objectives and characteristics of the customers belonging to the target market. Manufacturers shall test their insurance products in a qualitative manner and, depending on the type and nature of the insurance product and the related risk of detriment to customers, quantitative manner Art 6(1).

Moreover, manufacturers shall not bring insurance products to the market if the results of the product testing show that the products do not meet the identified needs, objectives, including any sustainability-related objectives, and characteristics of the target market Art 6(2).

Fourth, as provided by the new Art 7(1), manufacturers shall continuously monitor and regularly review insurance products they have brought to the market, to identify events that could materially affect the main features, the risk coverage or the guarantees of those products. They shall assess whether the insurance products remain consistent with the needs, characteristics and objectives, including any sustainability-related objectives, of the identified target market and whether those products are distributed to the target market or are reaching customers outside the target market.

Fifth, also the rules concerning the distribution channels have been changed. In particular Art 8(3) has been replaced and now it states that the information referred to in para 2 shall enable the insurance distributors to understand the insurance products; comprehend the identified target market for the insurance products; identify any customers for whom the insurance product is not compatible with their needs, characteristics and objectives, including any sustainability-related objectives; carry out distribution activities for the relevant insurance products in accordance with the best interests of their customers as prescribed in Art 17(1) of IDD.

Sixth, as regards the product distribution arrangements, Art 10(2) is replaced by the following:

‘2. The product distribution arrangements shall aim to prevent and mitigate customer detriment; support a proper management of conflicts of interest; and ensure that the objectives, interests and characteristics of customers, including any sustainability-related objectives, are duly taken into account’.

Last, regarding the relationship between manufacturers and distributors, Art 11 is replaced. Now, it states that insurance distributors becoming aware that an insurance product is not in line with the interests, objectives and characteristics of the customers belonging to its identified target market, including any sustainability-related objectives, or becoming aware of other product-related circumstances that may adversely affect the customer, shall promptly inform the manufacturer and, where appropriate, amend their distribution strategy for that insurance product.

#### **IV. The Integration of ‘Sustainability preferences’ into the Rules on Business Conduct and Investment Advice for IBIPs**

##### **1. The Reasons for the Changes**

In this last para, we consider the modifications made by Art 2 of the Commission Delegated Regulation (EU) 2021/1257 to the Delegated Regulation (EU) 2017/2359.

To better understand the modifications, we must pay attention to some recitals of the Commission Delegated Regulation 2021/1257, especially recitals from 9 to 15.

The impact assessment underpinning subsequent legislative initiatives published in May 2018 also demonstrated the need to clarify that sustainability factors should be considered by insurance intermediaries and insurance undertakings distributing IBIPs as part of their duties toward their customers and potential customers (recital 9).

To maintain a high standard of investor protection, insurance intermediaries and insurance undertakings distributing IBIPs should, when identifying the types of conflicts of interest, the existence of which may be detrimental to the interests of a customer or potential customer, include those types of conflicts of interest arising from the integration of a customer’s sustainability preferences. For existing customers, for whom a suitability assessment has already been undertaken, insurance intermediaries and insurance undertakings should have the possibility to identify the customer’s individual sustainability preferences at the next regular update of the existing suitability assessment (recital 10).

Insurance intermediaries and insurance undertakings that provide advice on IBIPs should be able to recommend suitable IBIPs to their customers or potential customers and should, therefore, be able to ask questions to identify a customer’s individual sustainability preferences. In line with the obligation to conduct distribution activities in accordance with the best interest of costumers, recommendations to customers or potential customers should reflect both the financial objectives and any sustainability preferences expressed by those customers. It is, therefore, necessary to clarify that the inclusion of sustainability factors in the advisory process should not lead to mis-spelling practices or to the misrepresentation of IBIPs as meeting sustainability preferences where they do not. To avoid such practices or misrepresentations, insurance intermediaries and insurance undertakings providing advice on IBIPs should first assess the other investment objectives and individual circumstances of a customer or potential customer, before asking about their potential sustainability preferences (recital 11).

To date, IBIPs have been developed with varying degrees of sustainability ambition. To enable customers or potential customers to understand the different levels of sustainability and to make informed investment decisions in relation to sustainability, insurance intermediaries and insurance undertakings that distribute IBIPs should explain the distinction between, on the one hand, IBIPs that pursue, in whole or in part, sustainable investments in economic activities that qualify as

environmentally sustainable according to the taxonomy, and, on the other hand, IBIPs that take into account significant adverse impacts on sustainability factors that may be eligible for investment, sustainable investments as defined in Art 2, point (17), of SFDR and IBIPs that take into account principal adverse impacts on sustainability factors that may be eligible for recommendation as meeting individual sustainability preferences of customers, and, on the other hand, other IBIPs without these specific features which should not be eligible for recommendation to customers or potential customers that have individual sustainability preferences (recital 12).

It is necessary to address concerns about ‘greenwashing’, ie the practice of gaining an unfair competitive advantage by recommending an IBIP as environmentally friendly or sustainable when, in fact, the IBIP does not meet basic environmental or other sustainability-related standards.

To prevent misselling and greenwashing, insurers and insurance intermediaries providing advice on IBIPs do not recommend IBIPs as meeting individual sustainability preferences where those products do not meet those preferences. Insurance intermediaries and insurance undertakings distributing IBIPs should explain to their customers or potential customers the reasons for not doing so and keep records of those reasons<sup>26</sup> (recital 13).

It is necessary to clarify that IBIPs that do not meet individual sustainability preferences can still be recommended by insurance intermediaries and insurance undertakings distributing IBIPs, but not as meeting individual sustainability preferences. To allow for further recommendations to customers or potential customers where IBIPs do not meet a customer’s sustainability preferences, the customer should have the possibility to adjust the information on their sustainability preferences. In order to prevent mis-selling and greenwashing, insurance intermediaries and insurance undertakings distributing IBIPs should keep a record of the customer’s decision together with the customer’s explanation of the reasons for the adjustment (recital 14).

The provisions of this Regulation are closely linked with each other and with the provisions of SFDR, as they establish a comprehensive system of disclosure of sustainability aspects. To allow for a consistent interpretation and application of these provisions and ensure that they are fully understood and easily accessible by market participants, competent authorities and investors, it is desirable to incorporate them into a single legal act (recital 15).

## **2. The Importance of the Provision of ‘Sustainability Preferences’**

The concept of ‘sustainability preferences’ is particularly relevant to the conduct of business and investment rules for IBIPs.

<sup>26</sup> See EIOPA, ‘Consultation on the opinion on sustainability claims and greenwashing in the insurance and pensions sectors’, available at <https://tinyurl.com/2seya7pw> (last visited 30 September 2024).

Indeed 'sustainability preferences' means the choice of a customer or potential customer choice as to whether, and if so, to what extent, one or more of the following financial products should be included in his or her investment for which the customer or potential customer specifies that a minimum proportion shall be invested in environmentally sustainable investments as defined in Art 2, point (1), of the Taxonomy; the customer or potential customer determines that a minimum proportion shall be invested in sustainable investments as defined in Art 2, point (17), of SFDR and that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration are determined by the customer or potential customer.

It is important to remember the new Art 3(1) that now states:

‘1. For the purposes of identifying, in accordance with Article 28 of IDD, the types of conflicts of interest that arise in the course of carrying out any insurance distribution activities related to insurance-based investment products and which entail a risk of damage to the interests of a customer, including his or her sustainability preferences, insurance intermediaries and insurance undertakings shall assess whether they, a relevant person or any person directly or indirectly linked to them by control, have an interest in the outcome of the insurance distribution activities, which meets the following criteria:

(a) it is distinct from the customer's or potential customer's interest in the outcome of the insurance distribution activities;

(b) it has the potential to influence the outcome of the distribution activities to the detriment of the customer.

Insurance intermediaries and insurance undertakings shall proceed in the same way for the purposes of identifying conflicts of interest between one customer and another’.

As well as into the adequacy assessment required to place an IBIP, Arts 9 and 14, providing, *inter alia*, that: 1) an insurance intermediary or insurance company does not recommend IBIPs as meeting a customer's sustainability preferences if these products do not meet the actual preferences. The insurance intermediary or company must explain the reasons for this choice and keep the documentation; 2) If no IBIPs satisfy the customer's sustainability preferences and if the customer decides to adapt their sustainability preferences, the insurance intermediary or company keeps a record of this decision and the related reasons; 3) The periodic adequacy assessment also takes into account the sustainability preferences expressed.

As regards the information to be obtained for the purposes of the assessment of suitability, Art 9 is amended as follows: in para 2, point (a) is replaced by the following: '(a) it meets the investment objectives of the customer or potential customer



in question, including that person's risk tolerance and any sustainability preferences' Art 9(2)(a); para 4 is replaced by the following:

'4. The information regarding the investment objectives of the customer or potential customer shall include, where relevant, information on the length of time for which the customer or potential customer wishes to hold the investment, his or her preferences regarding risk taking, the risk profile, the purposes of the investment and, in addition, his or her sustainability preferences. The level of information gathered shall be appropriate to the specific type of product or service being considered' Art 9(4);

(c) para 6 is replaced by the following:

'6. When providing advice on an insurance-based investment product in accordance with Article 30(1) of IDD, an insurance intermediary or insurance undertaking shall not make a recommendation where none of the products are suitable for the customer or potential customer. An insurance intermediary or insurance undertaking shall not recommend insurance-based investment products as meeting a customer's or potential customer's sustainability preferences where those insurance-based investment products do not meet those preferences. The insurance intermediary or insurance undertaking shall explain to the customers or potential customers the reasons for not doing so and keep records of those reasons. Where no insurance-based investment product meets the sustainability preferences of the customer or potential customer, and the customer decides to adapt his or her sustainability preferences, the insurance intermediary or insurance undertaking shall keep records of the decision of the customer, including the reasons for that decision' Art 9(6).

About the suitability statement, Art 14 is amended as follows: Art 14(1)(b)(i) is replaced by the following:

'(i) the customer's investment objectives, including that person's risk tolerance, and whether the customer's investment objectives are achieved by taking into account his or her sustainability preferences';

and in the Art14(4) the following subparagraph is added:

'The requirements to meet the sustainability preferences of customers or potential customers, where relevant, shall not alter the conditions laid down in the first subparagraph.'

To facilitate the correct interpretation and uniform application of the new provisions, EIOPA has published in July 2022 a Guidance that illustrates and specifies the contents of the new provisions, about the integration of sustainability

preferences in the context of the adequacy assessment.<sup>27</sup>

## **V. The Implementation of New European Rules in the Italian Legal System: The IVASS Provision no131/2023**

The adoption and consequent entry into force of the European legislation on sustainable finance have made it appropriate to align and adapt the Italian Authority on insurance companies (hereinafter IVASS) regulatory provisions directly affected by the new rules.

This adjustment, made by IVASS Provision 10 May 2023 no131 (hereinafter IVASS Provision 131/2023), mainly concerns the IVASS regulatory provisions impacted by the amendments and additions made, at the sectoral level, to the Solvency II rules (Delegated Regulation 2015/35) and the IDD Delegated Acts (Delegated Regulation 2017/2358 and Delegated Regulation 2017/2359).

The adaptation of the IVASS Regulations affected by these new European provisions in the insurance sector adopted on sustainable finance aims to promote consistency in the application between the national regulatory rules currently in force and the new European regulations, to facilitate their implementation by market operators.

In brief, the measures, consisting of 5 Arts, regulate four areas, each dedicated to the introduction of amendments to the following Regulations.

First, IVASS Regulation no 24 of 6 June 2016 lays down provisions on investments and assets covering technical provisions, which is amended in order to align Arts 2, 4, 5, 18, and 24 with the amendments and additions made by Delegated Regulation (EU) 2021/1256 to Delegated Regulation (EU) 2015/35 on the integration of sustainability risks into the investment activities of insurance and reinsurance undertakings.

The second amended Regulation is IVASS Regulation no38 of 3 July 2018 laying down provisions on the corporate governance system, which is amended in order to align Arts 2, 4, 17, 19, 32, 38, 40, 56, 57, 80 and Annex 1 with the amendments and additions made by Delegated Regulation (EU) 2021/1256 to Delegated Regulation (EU) 2015/35 on the integration of sustainability risks into the risk management system and remuneration policies of companies insurance and reinsurance undertakings;

The third amended regulation is IVASS Regulation no 40 of 2 August 2018 laying down provisions on insurance and reinsurance distribution, which is amended in order to align Arts 2, 55, 68-ter, 68-novies, 68-decies, 68-terdecies with the amendments and additions made by Delegated Regulation (EU) 2021/1257 to Delegated Regulation (EU) 2017/2359 on conflicts of interest and rules of conduct relating to investment advice for the 7 placement IBIPs that

<sup>27</sup> See EIPOA, 'Guidance' n 16 above, 19-23.

complement policy holders' sustainability preferences, with particular regard to the suitability assessment;

The last amended regulation, IVASS Regulation no 45 of 4 August 2020 laying down provisions on governance and control requirements for insurance products,<sup>28</sup> which is amended in order to align Arts 2, 6, 8, 11, 12, 13, 14 and Annex 1 with the amendments and additions made by Delegated Regulation (EU)2021/1257 to Delegated Regulation (EU) 2017/2358 – with regard to products that take into account customers' sustainability objectives – with regard to the identification of the target market, including the negative market, as well as in terms of product testing, monitoring and review and information flows between manufacturer and distributor.

Overall, the main changes include the need to collect the customer's sustainability preferences; the need to compare products with sustainability requirements; the assessment of the adequacy of the product with respect to the sustainability objectives expressed by the customer and in the monitoring of the characteristics of the product in order to verify its consistency with these objectives; the acquisition of new professional skills by the distribution network aimed at understanding the sustainability factors and sustainability objectives of the reference market.

Considering the regulatory sources covered by Provision 131/2023, the amendments' impacts affect the activities of insurance product manufacturers and/or distributors. Having said that, I will briefly discuss the substance of the amendments under discussion.

Focusing on the changes that have an impact on insurance companies, first of all, the amendments to IVASS Regulation 24/2016 are substantiated, in addition to the introduction of the definitions of preferences, risks and sustainability factors, also in the need to review investment policies, so that they take into account sustainability risks, potential long-term impacts on the sustainability factors of investment strategies and decisions, as well as customers' sustainability preferences.

In addition, the management policies for assets and liabilities, liquidity risk and concentration risk will also be revised to give relevance, where relevant, to sustainability risks.

Finally, it is planned to amend how investment decisions are made, the methodology for assessing and verifying investments and the investment risk management system to include the assessment and verification of their impact on sustainability factors.

In addition, IVASS Provision 131/2023 has a far-reaching amending impact concerning IVASS Regulation 38/2018, impacting the corporate governance and risk management system (including at group level, when the ultimate parent company is an Italian company) so that sustainability risks are covered, where

<sup>28</sup> See C.G. Corvese, 'La disciplina del 'governo e controllo' dei prodotti assicurativi ed i suoi riflessi sul governo societario di imprese di assicurazione e di intermediari' 34 *Diritto della banca e del mercato finanziario*, II, 146-181 (2020).

relevant, in the development of the related objectives and strategies, processes and procedures and are included in the cataloguing of all risks.

Changes are also made that impact various internal regulations and operational safeguards of insurance companies. Underwriting, reserving, reinsurance policies, and risk mitigation techniques must also cover sustainability risks, where relevant.

Remuneration policies must be integrated with information on the inclusion of sustainability risks in the risk management system. In addition, such policies must require companies to ensure that compensation and incentives, including with regard to the remuneration policies of outsourced service providers, are also consistent with the integration of sustainability risks into the risk management system.<sup>29</sup>

Guidance policies must identify how the company takes sustainability risks into account in the process of designing a new insurance product and calculating its premium. On this point, IVASS specified, during the results of the public consultation, that the consideration of sustainability risks in the development of new insurance products does not differ according to the type of product.

Finally, the amendments to Regulation 38/2018 entail the integration of the scope of competence of the risk management and actuarial functions which, in particular, must consider first, sustainability risks, where relevant, in the definition of the risk management policy and in the criteria and methodologies for measuring the risks themselves; second, the possible impact of sustainability risks in the opinion issued on the global underwriting policy.<sup>30</sup>

<sup>29</sup> Art 2, para 7, of the IVASS Provision 131/2023 amends Art 40 of the Regulation no 38 of 3 July 2018 Regulation, concerning the general principles of remuneration policies, with the introduction of para 1-*bis*. Specifically, it is envisaged that, for the purposes of Art 5 of the SFDR and Art 275(4) of Delegated Regulation (EU) 2015/35, remuneration policies shall contain information on how it considers the integration of sustainability risks into the risk management system.

Art 2, para 8, of the IVASS Provision 131/2023 amends Art 56, para 1, of the Regulation, about the remuneration policies of insurance and reinsurance intermediaries, providing that companies take care to ensure that compensation and incentives are also consistent with the integration of sustainability risks into the risk management system. The integration is necessary to ensure systematic consistency with the amendments made to Art 40 of the same Regulation and is in line with the additions provided for in Arts 260 and 275 of Delegated Regulation (EU) 2015/35 by EU Reg 2021/1256, so as to ensure that companies pay intermediaries consistent fees and incentives, as well as with the principles of sound and prudent management, with the integration of sustainability risks into the risk management system.

Art 2(9) of the Measure amends Art 57(1) of the Regulation on outsourced service providers, providing that the company must adopt remuneration policies that are also consistent with the integration of sustainability risks into the risk management system. This integration is consistent with the provisions of Art 275(1)(c) of Delegated Regulation (EU) 2015/35.

<sup>30</sup> Art 2, para 11, of the Provision 131/2023 makes amendments to Annex 1 of Regulation no 38 of 2018, containing the provisions on the minimum content of the policy policies defined by the administrative body. Specifically: - letter a) provides that in the section 'For aspects related to underwriting and reservation risks' in Annex 1, after letter e), a new letter e-bis is inserted, which provides that the policy identifies the ways in which the company takes into account, in the process of designing a new insurance product and calculating the related premium, sustainability risks; - letter b) provides that in the section 'For aspects related to the operational risk management

As regards the impacts on insurance distribution, Art 3, para 5, of the Provision 131/2023 amends Art 68-decies of the IVASS Regulation 40/2018, which regulates declarations of compliance with requests and needs and adequacy in the field of IBIPs.

First of all, it should be noted that on the basis of the division of competencies established by Art 5(1)(b)(1) of Law no 163/2017, Consob is competent to supervise the distribution of IBIPs by entities registered in section D of the Single Register of Insurance and Reinsurance Intermediaries, while IVASS is competent to supervise the distribution of IBIPs carried out directly by insurance companies or other insurance intermediaries (such as insurance agents and brokers). In this context, Regulation 40/2018 therefore regulates the distribution of IBIPs by this second category of entities as well as the distribution of insurance products by all categories of distributors.

Given that, Provision 131/2023 provided for substantial additions to Regulation 40/2018 after similar amendments had been made to Regulation no 20307 of 15 February 2018 ('Intermediaries Regulation') with regard to the distribution of IBIPs by the aforementioned entities supervised by Consob.

The amendments made by Provision 131/2023, in addition to the introduction of new definitions such as risks, preferences and sustainability factors, consist of the indication in the pre-contractual disclosure of the sustainability risks associated with the IBIP and, where relevant, the information required by Regulation (EU) 2019/2088 on sustainability-related disclosures (SFDR) and Regulation (EU) 2020/852 (Taxonomy).

With regard to the rules on conflicts of interest, the amendments provide that distributors must take into account any sustainability preferences of customers. On this point, it should be noted that the integration of the client's sustainability preferences in the context of the identification of conflicts of interest is necessary when offering IBIPs, while it is only possible in the case of non-life insurance products.

With regard to the suitability assessment, any sustainability preferences of the client are included in the disclosure of IBIPs and the related policies and procedures must be integrated to ensure that the IBIP's sustainability factors, if any, are effectively understood. In this regard, it should be noted that IVASS has specified, in the results of the public consultation, that this integration does not affect current contracts, but rather the policies and procedures aimed at ensuring that distributors are able to understand any factors of sustainability of the product.

Finally, the adequacy statements must include information on the correspondence between the IBIP and any sustainability preferences of the client. If no product meets the customer's sustainability preferences, the customer may adapt its sustainability preferences for the purpose of concluding the contract

policy' referred to in Annex 1, letter a) is supplemented by providing that any sustainability risks are also taken into account in the context of operational risks.

and the adaptation must be indicated in the declaration of adequacy.

Changes in the governance and control of insurance products.

Due to their relevance, the amendments to IVASS Regulation 45/2020 impact insurance companies and/or their distributors of insurance products.

First, the Regulation now provides that the definition of the reference market must indicate the sustainability objectives and factors.

The identification of the negative reference market is exempted only in relation to regard only to sustainability factors. In this respect, IVASS has specified in the results of the public consultation that the customer who has no sustainability preferences does not belong to the negative reference market of a product that takes into account sustainability factors, simply because they do not have such preferences, but must be considered neutral with regard to them; therefore, for products that include sustainability factors, selling to customers who have not expressed sustainability preferences is possible. Conversely, if the customer does not adjust their sustainability preferences, a product that does not have the required sustainability elements cannot be recommended.

Regarding the POG, the interventions carried out concern: the assessment, during the testing phase of insurance products, also of the compatibility of their costs with sustainability objectives; the need for the product approval process to ensure the functionality of product sustainability factors; and finally, the monitoring activity, which must also take into account any market sustainability objectives.

As for the distribution mechanisms, it is expected that they will also consider any sustainability objectives and the compliance of the product with them, as well as the (if any) objectives related to the sustainability of the reference market. In addition, these distribution mechanisms must include safeguards aimed at ensuring the compliance of products marketed by insurance companies with registered office in the European Union operating under the regime of establishment or freedom to provide services in Italy, with any sustainability objectives of the identified actual reference market.

In addition, the exchange of information between distributors and producers must include information on any sustainability objectives of the target market.

Finally, in terms of staff training, the acquisition of skills regarding the sustainability factors and objectives of the products and reference markets is envisaged.

In conclusion, we can say that sustainability, understood in a broad sense, has been a major focus of the EU and the European Union's financial regulators over the last six years. As we can see before, ESG factors and sustainable finance impact all business processes of insurance undertakings, with the most significant effect being on corporate governance about risk management, investment activity, product management especially in case of insurance based-investment products.

These policies already affect the activities of the insurance and reinsurance undertakings in the EU especially because customer preferences include ESG

principles and the adoption of those ESG principles in the business processes of insurers is necessary.

With regard to the importance of sustainability preferences, it is relevant to remember the recital 14 of the Commission Delegated Regulation (EU) 2021/1257 amended Delegated Regulation (EU) 2017/2359 that states

‘It is necessary to clarify that insurance-based investment products that are not eligible for individual sustainability preferences can still be recommended by insurance intermediaries and insurance undertakings distributing insurance-based investment products, but not as meeting individual sustainability preferences. In order to allow for further recommendations to customers or potential customers, where insurance-based investment products do not meet a customer’s sustainability preferences, the customer should have the possibility to adapt information on his or her sustainability preferences. In order to prevent mis-selling and greenwashing, insurance intermediaries and insurance undertakings distributing insurance-based investment products should keep records of the customer’s decision along with the customer’s explanation supporting the adaptation’.

At this stage it is difficult to assess the effectiveness of the changes introduced by European legislators regarding sustainability in the insurance business and for insurance products. This is just a first step that had to be taken because it is no longer possible to postpone the introduction of sustainability both in the corporate governance of insurance companies and in the design of insurance products and in the rules of conduct that insurance companies and intermediaries must respect.