

LIFE INSURANCE AND LINKED POLICIES

UNDER ITALIAN CASE LAW

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According to several Italian judgments linked policies should not be regarded as insurance contracts.

Some Courts affirm that linked policies are atypical contracts with a hybrid content (“contratti misti”). They mix elements of life insurance contracts and of financial products. Such agreements should be evaluated according to the criterion of prevalent content, on the basis of which, where multiple types of contract are included in a single compound (hybrid or complex) transaction, the law governing the prevalent content applies (Parma High Court, 10.8.2010, in *NGCC*, 2011, 189; Trani High Court 11.3.2008, *ibid.*, 2009, I, 130).

According to the case law developed by Italian Tribunals, prevalence is determined on the basis of legal and economic keynotes.

Keynotes of the prevalent financial nature of the policies are as follows:

- The payment of a single premium (Parma High Court 19.8. 2010; Cagliari High Court 2.11.2010).
- The fixed duration of the product for the entire life of the insured (Parma High Court 19.8. 2010; Cagliari High Court 2.11.2010).
- The profitability based on financial factors and not on demographic elements (Parma High Court 19.8. 2010; Venice High Court 24 June 2010; Cagliari High Court 2.11.2010; Turin Court of Appeal 16. 11. 2009; Trani High Court, 11 March 2008).

The latter (3) is the most relevant aspect. In this respect, it should be noted in particular that the Turin Court of Appeal, 16 November 2009 affirmed that:

“ <Unit-linked> or <index-linked> policies involve the purchase of a financial instrument where the risk (relating to the performance of that instrument) is run by the investor and

depends not on the time factor, but on the dynamics of the financial markets, the return on the investment and the solvency of the issuer.”

The Trani High Court, 11 March 2008, hold:

“Unit-linked insurance policies, where the contractual insurance services are directly connected to the value of units in an investment fund, without any capital guarantee of a result in the policyholder’s favour, regardless of what they are called, involve the purchase of a financial instrument, namely a proportion of a unit trust; the bank, which has acted as intermediary in the subscription of unit-linked policies, must comply with the information obligations laid down by Legislative Decree no. 58/1998 and Consob Regulation no. 11522/1998”.

The Cagliari High Court, 02 November 2010, stated that:

“The contract whereby the insurer, on payment of a premium paid in full at the time of signature, undertakes to pay an amount, connected with predetermined reference indexes, on a “whole life” basis, is covered by the general terms of Article 2 of the Insurance Code relating to ‘linked’ policies, but does not constitute a life insurance policy because it lacks the demographic risk factor, and therefore cannot be held to be subject to the terms of Article 1923 of the Civil Code.”

On the contrary a recent Italian literature assesses that, according to art. 1882 of the Italian Civil Code, the definition of life insurance is not inclusive of the concept of demographic risk (Giovanna Volpe Putzolu, *Le polizze linked tra norme comunitarie, tuf e codice civile*, Assicurazioni, 2012, p. 399).

In a such framework one should also mention the judgement of the European Court of Justice (Fifth Chamber) dated March 1 st 2012 in re C-166-11, *Ángel Lorenzo González Alonso v Nationale Nederlanden Vida Cía. de Seguros y Reaseguros, S.A.E.* It states that “contracts which are ‘unit-linked’ or ‘linked to investment funds’, such as that concluded by Mr González Alonso, are common in insurance law. Thus, the European Union legislature took the view that that type of contract falls within a class of life assurance, as is clear from Annex I, point III to the Life Assurance Directive, read in conjunction with Article 2(1)(a) of that directive.”.

It could be easy to accept a compromise solution between the two extreme solutions above (financial *versus* insurance nature of linked policies), but following Isaac Asimov “when people thought the Earth was flat, they were wrong. When people thought the Earth was spherical they were wrong. But if you think that thinking the Earth is spherical is just as wrong as thinking the Earth is flat, then your view is wronger than both of them put together”.