Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (*ACF*)

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Summary: *1. Introduction – 2. The Italian Financial Ombudsman (ACF) – 3. The role of ACF in the private enforcement of MiFID – 4. Restitutory vs compensatory remedies – 5. Proof of causation – 6. Limitation period – 7. Conclusions*

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1. *Introduction*

The publication of the book of Federico Della Negra "MiFID II and Private Law"[1] gives me the opportunity to make some reflections on the role of the Italian Financial Ombudsman (*Arbitro delle Controversie Finanziarie* or ACF) in the private enforcement of MiFID I and II (MiFID). In the following, I will briefly discuss: *i*) the competence of ACF, how does it work and the nature of its decisions; *ii*) the remedies that may be sought by retail clients and their effects on the distribution of risk of losses between clients and investment firms; *iii*) proof of causation; *iv*) length and starting day of limitation periods. I will then conclude on the desirability of a future harmonization at EU level also of the remedies available to clients of investment firms for infringements of MiFID.

2. *The Italian Financial Ombudsman (ACF)*

ACF is competent to decide on claims of retail clients against investment firms for infringements of conduct of business rules in the provision of financial services (art. 4, par. 1, ACF Regulation). Retail clients may seek from ACF compensation of losses up to € 500.000,00 (art. 4, par. 2). However, ACF may award compensation only of such losses that are a direct and immediate consequence of the infringement alleged by the client (art. 4, par. 3). In addition, the competence of ACF to award compensation of non-pecuniary damages is specifically excluded (art. 4, par. 3).

ACF decides cases brought by clients on the base of a summary judgment. In particular, it may not hear testimonies or appoint experts. Therefore, ACF assumes its decisions only on the base of the allegations of the parties and of the documentation filed by them (art. 15, par. 1). In this respect, it should be noted that investment firms resisting claims are specifically required to deposit all relevant contractual documentation with the client concerned (art. 11, par. 4). As a consequence of these limitations on the kinds of evidence that may be submitted by the parties, ACF makes a large use of presumptions.

The summary nature of the judgement of ACF contributes to explain why its competence is limited to € 500.000,00. In addition, it explains why ACF may only award compensation of losses that are a direct and immediate consequence of the infringement and may not award compensation of non-pecuniary damages. Indeed, infringements of rules of conduct by investment firms may cause to retail clients damages consisting in the loss of value of the investment (what we may call "direct damages"), as well as further damages, consisting for example in the disruption of the organization of the retail client (what we may call "indirect damages" or "consequential

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[1] Della Negra, F., *MiFID II and Private Law Enforcing EU Conduct of Business Rules,* Oxford, 2019.

damages”). Occasionally, such infringements may even cause non-pecuniary damages (for example, the pain and suffering caused by the sudden loss of all savings of a life time). However, the verification and evaluation of these further indirect or non-pecuniary damages would require a full trial (including the hearing of testimonies or the appointment of experts), which is not admissible in front of ACF. Therefore, the retail client that seeks compensation of such indirect or non-pecuniary damages may not claim such damages in front of the ACF, but has the burden of suing the investment firm in court.

ACF decides on the base of the applicable law (art. 15, par. 1). Therefore, its decisions are not taken *ex aequo et bono*. In particular, ACF pays all due deference to the case law of the Italian Supreme Court, and especially of its Full Chamber, which in recent years had several opportunities to provide clear guidance on the national rules applicable to private enforcement of infringements of conduct of business rules in the provision of financial services.

The decisions of ACF are not binding on the parties (art. 16). In particular, investment firms that have resisted the claims are not obliged to perform in favor of the claimant what has been awarded by ACF. However, if the investment firm decides not to perform the decision of ACF, it must give notice thereof on its website (for a period of at least six months) and on two national newspapers at its own expenses (art. 16, par. 3). Therefore, not performing a decision of ACF has both reputational and financial costs for investment firms. Until today, the rate of performance of the decisions of ACF has been very high. As one would expect, investment firms tend not to perform decisions relating to “mass” infringements (*i.e.* decisions on infringements that affected a high number of clients, such as decisions on self-placing of shares or subordinated bonds by some Italian cooperative banks), while they tend to perform decisions on “individual” infringements (relating to what we may call the “ordinary business” of investment firms).[2] Considering that performance of one single decision may cost to investment firms up to half a million euros, it is noteworthy that the rate of performance by investment firms does not seem to be affected by the magnitude of the award established by ACF. In this respect, it should be acknowledged that Italian investment firms generally adopted a very cooperative approach with ACF and ultimately with their clients.

It should always be kept in mind that ACF is not a judge. It merely predicts how the case will be decided by a judge, should it ever reach a court. Not being a judge, ACF may not make a reference for a preliminary ruling to the

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[2] In 2019 the rate of performance by investment firms of decisions of ACF not relating to “mass” infringements has been equal to 80% (ACF, *Annual Report 2019*, p. 22, available in Italian language at *www.acf.consob.it*).

Italian Constitutional Court[3] or to the Court of Justice of the European Union (CJUE).[4] Of course, this does not mean that ACF should apply law provisions that are against the Italian Constitution or EU law. Rather, in such cases, ACF should simply refuse to apply such law provisions. This follows straightly from two different arguments: first, not having the possibility to make a reference for preliminary ruling, ACF should simply predict how the issue would be decided by either the Italian Constitutional Court or the CJUE;[5] second, it must be held that no Italian adjudicator, be it a judge or an ADR, should ever apply a law provision that is either against the Italian Constitution or EU law.

3. The role of ACF in the private enforcement of MiFID

It is generally accepted that MiFID introduced maximum harmonization of the conduct of business rules applicable to investment firms. In other words, Member States are not free, as a general rule, to impose on investment firms further requirements in addition to those established by MiFID (art. 24, par. 12, MiFID II).[6] However, it is lively disputed if the scope of application of MiFID covers only public enforcement or also private enforcement of infringements of such conduct of business rules. In particular, while it is settled that national supervisory authority may not apply administrative sanctions for breaches of conduct of business rules that are not stipulated by MiFID, it is still unsettled if also national judges are subject to the same limitation when applying private law remedies, such as compensation of damages caused to retail clients.

Dealing with pre-MiFID cases, the Italian Supreme Court have imposed on investment firms a standard of care that is higher than the standard of care

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3 Cf. Italian Constitutional Court, order n. 218/2011. This decision refers specifically to the *Arbitro Bancario Finanziario* (ABF), but its arguments apply also to ACF, because of the identical nature of these two ADR.

4 The admissibility of a reference for preliminary ruling from an ADR such as ACF has never been decided by the CJEU. However, the inadmissibility of such reference follows from the fact that ACF lacks the element of "compulsory jurisdiction" required by the case law of CJEU, both because the parties are under no obligation, in law or in fact, to refer theirs disputes to ACF and because its decisions are not binding on them. *cf* CJEU, 12 June 2014, case C-377/13, *Ascendi*, paras. 27 ff.

5 Cf. Consolo, C., Stella, M., *Il ruolo prognostico-deflattivo, irriducibile a quello dell'arbitro, del nuovo ABF, "scrutatore" di torti e ragioni nelle liti in materia bancaria*, in *Corriere giuridico*, Vol. 28, No 12, December 2011, pp. 1652 ff.

6 Cf. also art. Art. 4, par 1, of Commission MiFID I Directive. For a detailed analysis see Della Negra, *MiFID II and Private Law*, cit., pp. 48 f; Cherednychenko, O.O., *Full Harmonisation of Retail Financial Services Contract Law in Europe: A Success or a Failure?*, in *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting*, ed. by S. Grundmann, Y.M. Atamer, Alphen aan den Rijn, 2011, pp. 243 ff. This view has been recently challenged by Wallinga, M., *Why MiFID & MiFID II Do (not) Matter to Private Law: Liability to Compensate for Investment Losses for Breach of Conduct of Business Rules*, in *European Review of Private Law*, Vol. 27, No 3, 2019, p. 521.

later adopted by MiFID. In particular, while MiFID stipulates that investment firms shall provide to clients only information on the nature and risks of the "specific type" of financial instrument concerned, the Italian Supreme Court has found investment firms liable for not having provided to their clients information also on the riskiness of the "individual" financial instrument concerned.[7] For example, in pre-MiFID cases dealing with the purchase of bonds Italian courts would typically have expected investment firms to provide to their clients information also on the rating of the issuer, which is not an information pertinent to the "specific kind" of financial instrument, but rather to the "individual" financial instrument concerned. At present, due to the length of Italian proceedings, it is not clear yet if the Italian Supreme Court will continue to apply this case law also to MiFID cases or if it will change. In this respect, it is significant that the courts of some Member States proved not to be willing to lower the standard of care requested from investment firms in order to bring it in conformity with MiFID.[8]

In my opinion, it should be held that, while MiFID did not harmonize the remedies available to clients for infringements of conduct of business rules by investment firms, the maximum harmonization of conduct of business rules carried out by MiFID is binding also on judges of Member States adjudicating private law remedies for such infringements.[9] This has been implicitly confirmed by the CJEU in its decision *Genil vs Bankinter*, where the Court stated that the private law remedies for infringements of conduct of business rules stipulated by MiFID are subject to the national law of Member States, provided that they are not such as to render practically impossible or excessively difficult the exercise of the rights of clients.[10] By extending the principle of effectiveness of EU law also to private law remedies made available to clients by the national law of Member States, the CJEU has implicitly admitted that the maximum harmonization of conduct of business rules set forth by MiFID is binding also for private enforcement.

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[7] Cf. Cass., sez. I, 26 January 2016, n. 1376; Cass., sez. I, 25 June 2008, n. 17340.

[8] Cf. Wallinga, *Why MiFID & MiFID II Do (not) Matter to Private Law*, cit., pp. 528 ff. For a critical assessment see Grundmann, S., *The Bankinter Case on MiFID Regulation and Contract Law*, in *European Review of Contract Law*, Vol. 9, No 3, September 2013, pp. 275 ff.

[9] This is also the opinion of Busch, D., *The Private Law Effect of MiFID: the Genil Case and Beyond*, in *European Review of Contract Law*, Vol. 13, No 1, April 2017, pp. 75 ff.; Mülbert, P.O., *The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective*, in *Investor protection in Europe: corporate law making, the MiFID and beyond*, ed. by G. Ferrarini, E. Wymeersch, Oxford, 2006, pp. 299 ff. For the opposite opinion see Wallinga, *Why MiFID & MiFID II Do (not) Matter to Private Law*, cit., pp. 522 ff.; Cherednychenko, O.O., *European Securities Regulation, Private Law and the Investment Firm-Client Relationship*, in *European Review of Private Law*, Vol. 17, No 5, October 2009, pp. 925 ff.; and also Della Negra, *MiFID II and Private Law*, cit., p. 176 f.

[10] Cf. CJEU, case C-604/11, *Genil vs Bankinter*, para. 57 (2013). On this decision see Grundmann, *The Bankinter Case on MiFID Regulation and Contract Law*, cit., pp. 267 ff.

Therefore, in my opinion, it should be held that national judges of Member States, in applying the private law remedies provided by their national law, are not free to impose on investment firms, in the dimensions of care regulated by MiFID, a standard of care that is higher than the standard adopted by MiFID. In other words, investment firms that are sued in court by clients for compensation of damages caused by infringements of rules of conduct in the provision of financial services should be able to defend themselves by proving that, in the specific dimension of care concerned, they adopted the standard of care stipulated by MiFID. The availability of such defense in Italian law is confirmed by Article 23 of the Italian Financial Act, were it states that "*In judgements for compensation of damages caused to clients within the provision of investment services or ancillary services, it is the burden of investment firms to prove that they acted with the specific level of diligence required*". By making reference to the notion of "specific diligence", as opposed to the notion of "generic diligence", the Italian Financial Act makes clear that investment firms may escape liability by proving that they conformed their conduct of business to the standard of care "specifically" provided for by the applicable law and regulations (*i.e.* the Italian Financial Act and the Regulation on Brokers and Dealers of the Italian Securities and Exchange Commission).

Of course, the availability of such "regulatory compliance defense" is without prejudice of the possibility for clients of investment firms to enforce against them rights that are not covered by MiFID, such as the right to avoid the contract because of fraud or mistake or the right to seek compensation of damages caused by an unfair commercial practice of the investment firm. In addition, it should be stressed that the availability of this defense is also without prejudice of the duty of national judges (and of ACF in its "predicting" capacity) to held investment firms liable for lack of diligence in dimension of cares not specifically regulated by MiFID, by making application of the general obligation of investment firms to act honestly, fairly and professionally in accordance with the best interest of their clients (art. 24, par. 1, MiFID II). Indeed, the function of this general clause is to make sure that clients are always offered by investment firms an appropriate level of protection under all relevant circumstances.[11] Actually, it may be held that the very existence of this general clause confirms that MiFID is concerned also with private enforcement of conduct of business rules, because it is not clear to what extent a national supervisory authority could justify the application of an administrative sanctions to an investment firm only on the base of the infringement of such a general clause, which by its nature is indeterminate.

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[11] Cf. Enriques, L., Gargantini, M., *The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case*, in *The Italian Law Journal*, Vol. 3, No 2, 2017 (available at *www.theitalianlawjournal.it*); Bush, *The Private Law Effect of MiFID*, cit., pp. 81 f.

4. *Restitutory vs compensatory remedies*

Provided that MiFID is relevant also for private enforcement of the conduct of business rules, the remedies granted to clients of investment firms by Italian law (as by the national law of any other Member State) must be respectful of the principles of effectiveness and proportionality. Therefore, they should not be such as to render practically impossible or excessively difficult the exercise of the rights that MiFID grants to clients of investment firms. On the other hand, they should not go beyond what is necessary for the objectives pursued and should not be disproportionate to the gravity of the infringement.[12]

In principle, the claimant may seek from ACF any remedy granted by Italian law, provided that the limits of its competence are not exceeded.[13] In particular, the claimant may seek restitution of what invested in the financial instrument or compensation of damages caused by the breach of the conduct of business rule.[14] Not being a judge, ACF may not avoid or terminate a contract. However, nothing prevents ACF from predicting that, should the case ever reach the court, the judge will avoid or terminate the contract. Therefore, it is now settled in its decisions that ACF may verify "incidentally" if all requirements for invalidation or termination of the contract are satisfied, in order to decide on the claim for restitutions of what has been performed on the base of that contract.[15]

As far as the choice of the appropriate remedy is concerned, ACF applies consistently the case law of the Italian Supreme Court, and in particular the well-known twin decisions of its Full Chamber of 19 December 2007.[16] Therefore, it is *ius receptum* in the decisions of ACF that the mere breach of a conduct of business rule by an investment firm does not determine as such the nullity of the specific transaction concerned. Rather, the client is entitled to restitution of what he has invested in the financial instrument only when the law expressly provides that the specific infringement alleged by the claimant determines the nullity of the contract. Most notably, this is the case when the transaction has been carried out without an investment contract agreed to in writing by the client,[17] or when – in case of transactions concluded outside the business premises

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[12] Cf. Tison, M., *The Civil Law Effects of MiFID in a Comparative Law Perspective*, in *Festschrift Für Klaus Hopt Zum 70. Geburtstag Am 24. August 2010: Unternehmen, Markt Und Verantwortung*, ed. by S. Grundmann, Bern-New York, 2010, p. 2635.

[13] Guizzi, G., *Un anno di ACF tra risultati raggiunti e qualche incognita*, in *Corriere giuridico*, Vol. 35, No 1, January 2018, pp. 5 ff.

[14] For an overview of the several remedies available to retail clients in case of breach of conduct of business rules by investment firms, see Roppo, V., *La tutela del risparmiatore fra nullità, risoluzione e risarcimento (ovvero, l'ambaradan dei rimedi contrattuali)*, in *Contratto e impresa*, Vol. 21, No 3, 2005, pp. 896 ff.

[15] ACF, n. 36/2017. Guizzi, *Un anno di ACF tra risultati raggiunti e qualche incognita*, cit., pp. 5 ff.

[16] Cass., sez. un., 19 December 2007, n. 26724-5.

[17] Cass., sez. un., 16 January 2018, n. 898; Cass., sez. un., 4 November 2019, n. 28314.

of the investment firm – the client was not informed in writing of its right of withdrawal.[18] In addition, according to the case law of the Italian Supreme Court, the client is entitled to restitutions in case of: *i*) avoidance of the contract, if the breach of the conduct of business rule amounted to fraud or if it has caused an essential mistake that should have been recognized by the investment firm;[19] or *ii*) termination of the contract, if the breach of the conduct of business rule amounts to a severe breach of contract.[20] For any other infringement by investment firms, clients are only entitled to compensation of the damages that have been caused by such infringement.[21]

It is forcefully disputed in the Italian legal literature, which is the most appropriate remedy in case of breach of a conduct of business rule by an investment firm, if compensation of damages or restitutions. In my opinion, as a general rule, compensation of damages is superior to restitutions, because it enables to disentangle risks that should stay on the client from risks that should be shifted to the investment firm.[22] Let us take the example of a client that alleges that the investment firm has induced him to invest in a financial instrument that is unsuitable to him. Let us assume that the client has invested in this transaction € 100.000,00 and that at the time he has discovered that the transaction was unsuitable to him the value of the financial instrument concerned has decreased to € 70.000,00. At the time the client files its claim the value of the financial instrument concerned, which the client decided to hold, has decreased further to € 50.000,00. In such a case, it is settled in the case law of the Italian Supreme Court that the client may only claim compensation of damages equal to the difference between the initial investment and the value of the financial instrument at the time he discovered or ought to have discovered that the transaction was unsuitable to him (*i.e.* € 30.000,00). After this date, the client that decides to hold the investment acts at his own risk.[23] As one may put it, "the investment firm is not the insurer of its client". The client has the burden of mitigating his loss by disinvesting as soon as possible.[24] In other words, any further loss incurred by holding the financial instrument is not an immediate and direct consequence of the infringement of the investment firm, but rather is a consequence of an autonomous investment decision of the client. For sure, exceptions to this rule

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18 Cass., sez. un., 3 June 2013, n. 13905.

19 Cf. Gentili, A., *Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite*, in *Contratti*, No 4, 2008, pp. 393 ff.

20 Cass., sez. I, 23 May 2017, n. 12937. For more details see Afferni, G., *Sulla risoluzione dei singoli ordini di investimento*, in *Le Società*, Vol. 37, No 5, May 2018, pp. 620 ff.

21 According to Imbruglia, D., *La regola di adeguatezza e il contratto*, Milano, 2017, pp. 498 ff., after the implementation of MiFID, also the recommendation of an unsuitable investment would cause the nullity of the transaction. This opinion is followed by Della Negra, *MiFID II and Private Law*, cit., p. 189.

22 See also Perrone, A., *Less is more. Regole di comportamento e tutele degli investitori*, in *Banca Borsa Titoli di Credito*, Vol. 63, No 5, 2010, pp. 537 ff.

23 Cass., sez. I, 29 January 2011, n. 29864. ACF, n. 21/2017.

24 Cf. Della Negra, *MiFID II and Private Law*, cit., p. 193.

are admissible when it was impossible for the client to disinvest (*e.g.* because the financial instrument is illiquid),[25] or when the client may not be expected to act promptly (*e.g.* an elderly without any knowledge or experience in the field of financial instruments).[26] On the other hand, in particular cases, the decision of the client to hold the financial instrument concerned after he became aware of his nature and risks or of the fact that at the time of the transaction it was unsuitable for him may even lead to the rejection of his claim, on the base of the argument that he has implicitly ratified the transaction or that he has implicitly showed that the financial instrument concerned was not unsuitable to him after all. Indeed, the remedy of damages is flexible and may be adapted to all relevant circumstances of the case in order to reach a decision that is sensible.

On the contrary, the remedy of restitutions does not allow the disentanglement of the negative consequences of the investment that should be shifted on the investment firm, being a direct and immediate consequence of the infringement, from the negative consequences of the investment that should stay on the client, being a direct and immediate consequence of his decision to hold the investment. This is due to the fact that, by resorting to this remedy, the client may claim at any time restitution of what he invested by offering restitution of the financial instrument concerned, irrespective of its present value and of the moment in time when the loss actually occurred. Indeed, from a financial point of view, granting to the client that has acquired full knowledge of the financial instrument concerned an unlimited remedy of restitutions is equivalent to granting him an option to sell (a "put option"). After the client has discovered the breach of the conduct of business rule by the investment firm, he may choose freely between holding the financial instrument concerned and claim damages, on the one side, and offering restitution of the financial instrument concerned against restitution of the capital invested, on the other side. We should expect that the client will rationally choose compensation of damages, if at the time he files the claim the value of the financial instrument has increased, while he will choose restitutions, if at that time its value has decreased further.

Of course, also the remedy of restitutions could allow for such disentanglement of risks, if the investment firm was allowed to set-off what it must reimburse to the client with the further loss of value that the client would have avoided by reselling promptly the financial instrument concerned. However, the availability of such a defense, which is generally accepted in the national law of some Member States, is not well established in Italian case law, as in the national law of other Member State.[27]

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[25] ACF, n. 71/2017.

[26] Cf. Della Negra, *MiFID II and Private Law*, cit., p. 193.

[27] It is significant that such defense was included in the proposal of the Commission on the new directive on the sales of consumers goods, but was finally excluded from the definitive text of directive 2019/771/EU. Confront art. 13, par. 3, of the Proposal with art. 16, par. 3, of the Directive.

Indeed, in some specific cases, the remedy of restitutions may be superior to compensation of damages.[28] Typically, this is the case when the level of damages or their very existence are uncertain. For example, it may be impossible to verify the actual existence of damages, when the client has been miss-sold bonds that were not admitted to trading on a regulated market. In such cases, even when it is foreseeable that the issuer will not repay the bond when it becomes due, this circumstance may not be completely excluded either. In addition, the fact that the bond has not being admitted to trading on a regulated market prevents the evaluation of the actual damage suffered by the client in terms of loss of market value of the financial instrument concerned. On the other hand, if the client has been miss-sold shares that were not admitted to trading on a regulated market, it may be possible to presume that the present value of these shares is lower than the nominal value at which they were sold to the client, but it may be impossible to verify the entity of the actual losses suffered by the client. For sure, in such cases, where the present existence of damages is certain, but their level is uncertain, ACF may evaluate the level of damages suffered by the claimant *ex aequo et bono*.[29] However, any evaluation of damages based on fairness entails the risk of under or over estimation of damages actually incurred by the client. In such cases, the remedy of restitutions avoids the risk of any unjust enrichment of either the claimant or the defendant, because the client is restored to the position in which he would have find himself if the investment firm had not committed the infringement.

Finally, I would like to mention that, in those specific cases were restitutory remedies should be granted, it is preferable to grant a remedy that allows to hold that the transaction concerned has been ratified by the client, rather than a remedy that does not. For example, in the decisions of ACF it has been hold that when the investment firm has offered its services without a contract agreed to in writing by the client, the consequence of such infringement is not the nullity of the transaction, but rather the application of Article 1771 of the Italian Civil Code on agency.[30] According to this provision, when the agent has concluded a contract exceeding the limits of his mandate, the effects of the contract remains on the agent, unless the principal has explicitly or implicitly ratified the contract. The application of this remedy to the case were a contract agreed to in writing by the client is lacking, rather than the remedy of nullity, which does not allow for ratification or validation,[31] allows the ACF, under appropriate circumstances, to reject the claim on the base of the argument that the client has implicitly ratified the transaction, for example because he held the financial instrument concerned for a sufficiently long period of time after he became aware of the

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[28] Guizzi, *Un anno di ACF tra risultati raggiunti e qualche incognita*, cit., pp. 5 ff.

[29] ACF, 71/2017.

[30] ACF, n. 532/2018; n. 309/2018. This provision has been applied also in cases where the client claimed that he did not consent to the transaction (ACF, n. 2142/2020) and where the transaction was unsuitable to the client (ACF, n. 163/2017; n. 184/2018).

[31] Cass., sez. I, 11 July 2017, n. 25335, par. 1.1.

breach of the conduct of business rule. Again, the goal here is not to encourage the opportunistic behavior of clients, who otherwise would be induced to hold the financial instrument, in order to take advantage of future gains, while reserving the right to claim restitutions if the transaction turns out to be a loss.[32]

5. Proof of causation

In order to award compensation of damages, ACF must verify: *i*) the infringement, *i.e.* that the investment firm has incurred into a breach of a conduct of business rule; *ii*) causation, *i.e.* that the infringement has caused harm to the client; and *iii*) the level of damages, *i.e.* the damages actually suffered by the client.

According to the case law of the Italian Supreme Court, while it is the burden of the investment firm to prove that it acted with the "specific diligence" required (Article 23 of the Italian Financial Act), it is the burden of the client to prove causation and the level of damage.[33] Therefore, in proceedings in front of ACF the client has the burden of alleging (*i.e.* describing) the infringement that he blames on the investment firm and to prove that such infringement has caused damages to him and the level of such damages.[34]

In the case law of the Italian Supreme Court, it is settled that in case of unsuitability causation must be presumed.[35] More specifically, provided that the investment firm must refrain from advising transactions that are unsuitable to the client, it will be presumed that, if the investment firm acted with the specific diligence required, the client would not have made the transaction concerned. In some recent decisions of the Italian Supreme Court it has been held that causation should be presumed also when the investment firm has breached the obligation to provide to the client information on the nature and risks of the specific type of the financial instrument concerned.[36] In my opinion this recent case law is wrong and should not be followed by ACF.

At the outset, it should be noted that this case law argues also on the base of an analogy with the presumption of causation that is applied in case of an

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[32] It may also be noted that, compared to termination of contract, the remedy of holding the transaction non-binding for the client has the advantage of being applicable irrespective of the contractual or non-contractual nature of the transaction and of whether the consideration has been paid to the investment firm or to a third party. Cf. Guizzi, *Un anno di ACF tra risultati raggiunti e qualche incognita*, cit., pp. 5 ff.

[33] Cass., sez. I, 24 April 2018, n. 10111; Cass., n. 25335/2017, par. 3; Cass., sez. I, 21 March 2016, n. 5514.

[34] See also ACF, n. 217/2018.

[35] Cf. Cass., n. 25335/2017, par. 3.

[36] Cass., sez. I, 28 February 2018, n. 4727; Cass., sez. I, 16 February 2018, n. 3914.

infringement of EU competition law by means of the participation to a cartel.[37] As is well known, in actions for damages brought by victims of cartels, it shall be presumed that the cartel has caused an overcharge, *i.e.* an increase in the price paid by the clients of the undertakings that participated to the cartel (art. 17, par 2, dir. 104/2014/UE). Actually, this case law could have remained in the area of liability for false information in financial markets, by making the same analogy with the well-known Fraud-on-the-Market-Theory. According to this theory, in efficient markets, when a claimant has purchased a security on the base of false information provided by the defendant, it shall be presumed that the claimant has paid a higher price for the security because of the inflating effect of the false information.[38]

However, in my opinion, the issue of causation in cases of infringements of rules of conduct by investment firms should be treated differently from the issue of causation in cartel or Fraud-on-The-Market cases. This is due to the fact that, in the latter cases, courts must verify the existence of "loss causation", *i.e.* that the cartel or the Fraud-on-The-Market has caused an increase in prices paid by the claimant. On the other hand, in the case of an infringement of MiFID, courts must verify the existence of "transaction causation", *i.e.* that the client would not have purchased the financial instrument concerned if the investment firm had acted with the specific diligence required. The fact that "loss causation" may be presumed does not necessarily imply that also "transaction causation" should be presumed. Indeed, in cartel cases or in Fraud-on-The-Market cases claimants do not allege that without the cartel or the false information they would have not purchased the good or service offered by the defendant; rather, they allege that without the cartel or the false information they would have paid a lower price. On the other hand, in MiFID cases, claimants do not allege that if the investment firm had acted with all due care they would have paid a lower price for the financial instrument concerned; rather, they allege that without the infringement they would not have purchased at all the financial instrument concerned. Typically, while the issue of "loss causation" is common to all members of the class of the victims of the infringement, the issue of "transaction causation" is individual to each member of the class, since it requires a verification of what that specific member of the class would have done "but for" the infringement. Therefore, it seems to me that, as a general rule, the claimant is in a better position than the investment firm to prove what investment decision he would have taken if he had been correctly informed of the characteristics and risks of the specific type of financial instrument concerned.

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[37] Cass., n. 3914/2018, par. 11.

[38] This theory has been implicitly adopted by the Italian Supreme Court in the following decision: Cass., sez. I, 11 June 2010, n. 14056. For a comment to this decision see Afferni, G., *Responsabilità da prospetto: natura, danno risarcibile e nesso di causalità*, in *Danno e responsabilità*, Vol. 16, No 6, June 2011, pp. 625 ff.; Id., *Recent Developments on Prospectus Liability in Italian Law*, in *European Banking and Financial Law Journal*, 2011, pp. 470 ff.

However, investment firms defending themselves in front of ACF should not forget their obligation to file all relevant contractual documentation. More specifically, in order to escape liability, investment firms may not merely oppose lack of proof of causation by the claimant. Rather, investment firm should file in the proceedings all relevant contractual documentation, so to put ACF in the position to evaluate if, given the infringement, the client would have purchased or subscribed the financial instrument concerned even if the investment firm had acted with all due care (for example, because the client had already repeatedly invested in that specific type of financial instrument). In other words, it may be held that, in judgments in front of ACF, the retail client only bears the burden of providing those evidence, which are relevant for the verification of his profile as investor, and which may not be found in the contractual documentation held by the investment firm.

Concluding on this issue, it may be held that, when the client alleges the infringement of a conduct of business rule by an investment firm, different from the rule of suitability, the principle of effectiveness does not require that the burden of proving causation is shifted to the defendant, as provided for by EU competition law in case of cartels.[39] In addition, leaving the burden of proof of causation on the client seems more respectful of the principle of proportionality, because it diminishes the risk of opportunistic behavior on the side of the client, which may try to take advantage of a minor informational breach by the investment firm to shift on the latter the negative consequences of an investment that turned out to be a loss because of a risk, of which the client was perfectly informed at the time of the investment decision.

6. Limitation period

According to Italian law, the right of the client to compensation of damages caused by a breach of a conduct of business rule by an investment firm is subject to the ordinary limitation period of ten years. It is disputed when this limitation period should begin to run: from the day of the infringement, which typically corresponds to the day of the investment, or from the day the client knows or could reasonably be expected to know that the investment firm has infringed the law and that such infringement has caused damages to him. ACF takes the position that this ten-years limitation period begins to run from the day of the infringement and that the circumstance that the client could not reasonably be aware of the infringement, and of the damages that it has caused to him, do not prevent the limitation period from beginning to run.[40]

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[39] A different view is held by Bush, D., Van Dam, C., *A Bank's Duty of Care: Perspectives from European and Comparative Law – Part II*, in *European Business Law Review*, Vol. 30, No 3, June 2019, pp. 394 ff., who do not seem to distinguish between transaction and loss causation.

[40] ACF, n. 1870/2019.

It may be questioned if this rule on the beginning of the limitation period, as applied by ACF, is respectful of the principle of effectiveness of EU law. In particular, it may be argued that in some cases the client may discover that the investment firm has infringed the law, and that such infringement has caused damages to him, only after his right to compensation of damages was already extinguished because of prescription. In addition, it may be argued that typically in EU law limitation periods of private law remedies do not begin to run until the victim gains all relevant information to enforce his rights. For example, in case of infringement of EU completion law, the limitation period of the right to compensation of damages begins to run from the day on which the claimant knows or can reasonably be expected to know: *i*) the existence of the infringement; *ii*) the fact that the infringement has caused damages to him; and *iii*) the identity of the infringer (art. 10 dir. 2014/104/UE). Similarly, in case of liability for defective products, the limitation period of the right to claim compensation of damages begins to run from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer (art. 10, par. 1, dir. 85/374/EEC). In addition, it may be argued that, in cases where the limitation periods of action for damages caused by infringements of EU law are left to the national law of Member States, the CJEU has consistently ruled that a short limitation period that begins to run before, or is not suspended until, the claimant is aware of the infringement, of the fact that it has caused damages to him and of the identity of the infringer, is contrary to the principles of effectiveness of EU law.[41] Finally, it may be argued that allowing the limitation period to begin to run, not from the day of the infringement, but from the day the claimant knows or could reasonably be expected to know all information he needs to file his claim, is coherent with the case law of the Italian Supreme Court that gradually postponed to that day the beginning of the limitation period for damages, pecuniary or non-pecuniary, that typically may be discovered many years after the infringement occurred (so-called “long-latent damages”).[42]

However, in my opinion, the decisions of ACF on the starting day of the ten years limitation period is perfectly coherent with the principle of effectiveness of EU law. At the outset, it should be considered that the ten years limitation period that applies to infringements of MiFID is a “long” period. On the other hand, the rights of the claimant to seek compensation of damages caused by a defective product or by an infringement of EU competition law are subject to a “short” limitation period: three years for claims for compensation of damages caused by defective products (art. 10, par. 1, dir. 85/374/EEC); and five years for claims for compensation of damages caused by infringement of EU competition law (art. 10, par. 3, dir. 2014/104/EU). In addition, it should be considered that the right to compensation of damages caused by a defective product is subject

[41] CJEU, 28 March 2019, case C-637/17, *Cogeco Communications*, paras. 35 ff.; 13 July 2006, joined cases from C-295/04 to 298/04, *Manfredi*, par. 73 ff.

[42] Cass., sez. III, 2 February 2007, n. 2305 (on damages caused by cartels); sez. III, 21 February 2003, n. 2645 (on damages caused by blood transfusions).

to a “long stop” limitation period. More precisely, this right is extinguished upon the expiry of a period of ten years from the date on which the producer put into circulation the defective product (art. 10, par. 2, dir. 85/374/EEC). Directive 2014/104/EU allowed Member States to introduce or maintain a “long stop” limitation period also for the right to compensation of damages caused by infringements of competition law, provided that the duration of such “long stop” period does not render practically impossible or excessively difficult the exercise of this right (whereas n. 36). The Italian legislator did not take advantage of this possibility in implementing the directive on private enforcement of EU competition law. However, in the light of the directive on liability for defective products, it must be held that the introduction of a ten years “long stop” limitation period that begins to run from the day of the infringement of EU competition law (or from the day the infringement ended) would have been respectful of the principle of effectiveness. Finally, it should also be considered that the case law of the European Court of Justice preventing limitation periods from beginning to run from the day of the infringement refers to “short” and not to “long” limitation periods.

In conclusion, it must be held that making the right to compensation of damages caused by breach of conduct of business rule in the provision of financial services subject to a ten years limitation period that begins to run from the day of the infringement is perfectly coherent with the EU standard of limitation periods and most importantly with the principle of effectiveness of EU law. Actually, such a limitation period may even be considered too long, not been coupled with a short limitation period that begins to run when the claimant is or should be considered to be perfectly informed. Indeed, in some cases, one may wonder why compensation of damages should be awarded to claimants that allege that they were misled by investment firms to invest in certain financial instruments, when the same claimants have held these financial instruments in their portfolio for almost ten years.

7. Conclusions

In my personal experience as a member of ACF, I soon came to realize that the difficult part of contributing to decide a case dealing with the infringement of MiFID is not to understand the technical characteristics of the specific type of financial instrument concerned, but rather to identify the appropriate remedy in private law that should be granted to the claimant. In this respect, it should be recalled that members of ACF have the great advantage of being able to rely on the technical advice of the staff of its “Technical Secretariat”, which has a huge experience in financial instruments, been made of officials of the Italian Securities and Exchange Commission (*Consob*). In turn, the choice of the remedy that should be granted to the claimant in case of infringement of MiFID significantly affects risk allocation between the parties and, therefore, the costs of investment firms in providing their services. In this respect, we should expect that the application of different kind of remedies in the national laws of the

different Member States prevents or at least discourages some investment firms to offer their services across the entire EU market.[43] Therefore, it may be held that, in order to establish and ensure the proper functioning of a EU market of financial services, not only conduct of business rules, but also remedies available to retail clients in case of breach of such rules should be fully harmonized. The harmonization of private enforcement of MiFID would be desirable from at least two different perspectives. On the one side, it could contribute significantly, at least in some Member States, such as Italy, to clarify and make more predictable both for retail clients and investment firms which remedies are available to retail clients under the relevant conditions in case of breaches of conduct of business rules in the provision of financial services. On the other side, such harmonization process would offer the opportunity to grant to retail clients those remedies that are more respectful under all relevant conditions of the principles of effectiveness and proportionality of EU law. I may conclude then by making the easy prediction that "MiFID II and Private Law" by Federico Della Negra will be the starting point of all future work in this area.

[43] Cf. Tison, *The Civil Law Effects of MiFID in a Comparative Law Perspective*, cit., pp. 2635 ff.