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Omission of supervision: Consob must indemnify the savers

Ettore Lombardi - DLA Piper Studio Legale Tributario Associato

Banche

According to the Italian Supreme Court, the conduct of omitted supervision and control by Consob integrates an omission in correlation with the illegal conduct of the intermediary company. For this reason, the Authority was ordered to pay damages to savers for failure to supervise. In particular, Consob would have failed to adopt incisive measures against the brokerage company despite the violations, the doubts about the financial situation of the company, that had emerged during the inspections. This is what is read in judgement n. 22164 of 5 September 2019.

By decision no. 22164 of September 5, 2019, the Italian Supreme Court rejected the appeal filed by Consob (the Italian Companies and Stock Exchange Commission) against the sentence of the Court of Appeal of Rome which had confirmed its condemnation to pay four million five hundred thousand euros to savers who, in the period from 1990 to 1992, had been cheated by company G., a brokerage company, and definitively condemned Consob for inadequate supervision.

The background of the ruling of the Italian Supreme Court saw the applicants pay a substantial sum to Girardi, in execution of a **securities trading contract**, which was then distracted by the latter, due to unscrupulous financial transactions resulting from the conducts put in place by Consob and the directors of Girardi which, according to both the Court of Appeal and the Supreme Court, were the causes of the damaging fact.

According to the savers, in fact, Consob would have firstly failed to adopt **incisive measures** against Girardi which would have prevented her from operating, despite the violations that had emerged during the inspections, the doubts that had been raised on the company's financial situation, the **improper use of the money** that it had received from the savers, and the repeated complaints submitted to the judicial authorities, and then, after 1991, authorized the registration of the company in the Register of SIMs, without carrying out an adequate check on the form and substance requirements, obtaining, if necessary, additional information.

The omissions attributable to Consob would therefore have facilitated the

Sullo stesso argomento



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perpetration of the **damage to the savers** which was allegedly caused by the **specific material facts** put in place by the intermediary which, because repeated, could have been easily investigated by the authority and could have represented, at the same time, a useful tool for assessing the nature of the conduct attributable to the intermediary company, which would therefore have resulted, firstly, in the adoption of the **disqualifying measures**, and, then, in the **control** on the **requirements to be met** for being legitimately enrolled in the appropriate register.

Sharing the approach followed by the territorial court, the Italian Supreme Court, in examining the first reason of appeal, stated that Consob's activity should be subjected not only to the limitation of power set out by the regulations governing its functions but also to the compliance with the general principle of **neminem laedere** as expressed in Article 2043 of the Italian Civil Code.

The **conduct of Consob, which omitted to supervise and control**, has thus integrated an omissive offense in connection with the conducts contra legem put in place by the intermediary company, especially because the system of controls and sanctions at the disposal of Consob is precisely aimed at ensuring that financial intermediaries act correctly, and at avoiding any prejudice that could affect the market.

This decision is particularly relevant also for the affirmation of a principle of law inherent in the extensive effect (in the present case against Consob) of the **interruption of the prescription** which was made it possible by the joining as civil parties in the criminal proceeding against some directors of Girardi.

The Supreme Court has, in fact, considered that in the presence of a right to receive compensation for a damage resulting from an unlawful act attributable to various injurers and determining a joint obligation ex Article 2055 of the Italian Civil Code, the nature of the liability on which the compensation claim is based, conditions, on the one hand, the identification of the term of duration of the prescription contemplated in the various declinations of Article 2947 of the Italian Civil Code, and, on the other hand, implies a diversity of titles and rights that does not affect the interruption of the relevant limitation period in the individual case, according to Article 1310, paragraph 1, of the Italian Civil Code, being it necessary and sufficient the existence of a compulsory joint and several obligation arising from the assumption of the uniqueness of the damaging fact pursuant to Article 2055, paragraph 1, of the Italian Civil Code which, unless otherwise derogated, involves the application of the system that regulates the solidarity obligations provided for in Article 1292 and ff of the Italian Civil Code.

Hence, if according to Article 2043 of the Italian Civil Code (action of the subject causing the event), there is an **obligation to compensate** whether an intentional or negligent event has been committed, according to Article 2055 of the Italian Civil Code (position of the subject suffering the damage), the damaging fact is to be considered for the purpose of the **joint solidarity in the relevant compensation**. As a consequence, the **joint liability** of the perpetrators should not be considered in absolute terms, but must be understood in a relative way in relation to the single injured party, so that such liability exists even if the damage derives from several actions or omissions constituting separate illicit facts, provided that the individual actions are mutually interdependent and have contributed efficiently to the generation of the damage.

Article 2055 of the Italian Civil Code, therefore, imposes an **unitary consideration** of the **damaging fact**, attributable to several illegal behaviors, to be considered in the context of extra-contractual liability as damage indemnifiable as unjust and therefore detrimental to a right or interest protected by law.

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