

RAFFAELE LENER

The Securities and Financial Ombudsman. A brief comparison with the Banking and Financial Ombudsman

1. Legislative Framework.

The Banking and Financial Ombudsman (*Arbitro Bancario Finanziario* – ABF) and the Securities and Financial Ombudsman (*Arbitro per le Controversie Finanziarie* – ACF) both originate from articles 27 and 29 of Law no. 262 of 28 December 2005 (Law on Savings).

Article 29 of Law no. 262 introduced article 128-*bis* to the Consolidated Banking Law, which is the primary legislative source for the Banking and Financial Ombudsman and is supplemented by secondary legislation: CICR (Interministerial Committee on Credit and Savings) resolution no. 275 of 29 July 2008 and the Bank of Italy Provisions on alternative dispute resolution systems for banking and financial transactions and services of 18 June 2009.

As regards investment services and activities, instead of amending the Consolidated Finance Law, article 27 of Law no. 262 empowered the Government to set up (through Legislative Decree no. 179 of 8 October 2007) a conciliation and arbitration chamber at Consob.

However, following the issue of Directive 2013/11/EU on alternative dispute resolution for consumer disputes and the poor track record of the conciliation and arbitration chamber, it became clear that another solution was required.

Consequently, Legislative Decree no. 130 of 6 August 2015, which transposed the aforementioned Directive, introduced paragraphs 5-*bis* and 5-*ter* to article 2 of Legislative Decree no. 179/2007, which established the new Securities and Financial Ombudsman. At the same time, article 1, paragraph 47 of Law no. 208 of 28 December 2015 (Stability Law of 2016) repealed the provisions regarding the conciliation and arbitration chamber at Consob, to coincide with the start of operations at the ACF.

Following the introduction of the ACF, the *Giurì Bancario* Ombudsman, which had been set up at the Banking Ombudsman, ceased all activities since its area of competence had been gradually taken over by the ABF and ACF.

2. Legal nature.

The ABF and ACF are both recognised as “alternative dispute resolution mechanisms” pursuant to Title II *bis* of the Consumer Code. Appeals lodged with these bodies meet the admissibility requirement envisaged by article 5, paragraph 1-bis of Legislative Decree no. 28 of 4 March 2010, since they are considered to be equivalent to mediation systems.

The legal nature of the ABF has been discussed at length.

Pursuant to article 128-*bis* Consolidated Banking Law, the ABF is a decision-making body and fulfils the criteria of impartiality, representativeness, rapidity, cost-effectiveness and efficiency required by customer protection legislation.

The ABF cannot be defined as a judicial body in terms of its powers to examine and rule on disputes and the (non-binding) effects of its decisions. Even though the ABF’s name in Italian includes the word “*arbitro*”, it also cannot be defined as an arbitration panel: its decisions are of a different nature from “awards” and, above all, the panel’s powers are not based on an agreement between the parties.

The ABF certainly belongs to the category of ADRs, but it also differs from mediation and conciliation in that it does not merely facilitate the reaching of an agreement by the parties, it also issues its own decisions, although these are not binding.

The ACF has the same characteristics as the ABF. In particular: (i) its procedure constitutes an alternative to other remedies; (ii) the intermediary is obliged to participate in the system; (iii) the procedure results in a decision issued in accordance with the law; (iv) its decisions are not binding. Consequently, the above conclusions will also apply to the ACF.

Obviously, the ACF has nothing in common with the model previously adopted by the Conciliation and Arbitration Chamber, whose procedure was regulated by the rules on arbitration contained in the Italian Code of Civil Procedure.

3. Jurisdiction.

The ACF may examine and rule on disputes between investors and intermediaries relating to investment services and activities and the collective asset management service envisaged by Part II of the Consolidated Finance Law. More specifically, the rules refer to disputes regarding breaches by intermediaries of their duties of diligence, fairness, information and transparency to investors.

THE ACF may also examine and rule on cross-border disputes and disputes subject to the regulation on online dispute resolution for consumer disputes (EU Regulation no.

524/2013).

It must be said that its jurisdiction is not restricted to disputes with consumers. Indeed, its jurisdiction extends to “investors” in general and, therefore, only excludes eligible counterparties and professional clients, as defined by the Consolidated Finance Law. Instead, the rules on the ABF refer to “customers”, thereby excluding persons who are engaged on a professional basis in the banking, financial, insurance, pension and payment services sectors, unless they are acting for purposes which are outside their professional activities.

Therefore, it is correct to say that the ACF’s jurisdiction is (somewhat) more limited than that of the ABF.

However, while the maximum value of claims referred to the ACF is 500,000 Euro, the ABF may only examine and rule on disputes with a value of up to 100,000 Euro.

The ACF is not competent to rule on non-economic losses and any losses which are not an immediate and direct consequence of the default or breach. This provision is identical to that envisaged for the ABF, which also clarifies that the latter is not competent to examine issues relating to material goods or services other than the banking and financial products and services regulated by the agreement.

As regards the disputes which are covered by the two bodies, it may well be difficult to establish the boundary between the ABF’s jurisdiction and that of the ACF. This is particularly true in the case of mixed products and borderline cases (e.g. banking/financial products or banking contracts with derivative components, such as a swap linked to a loan agreement). In this regard, the ACF rules provide that the ACF will collaborate with other ADR bodies, including for the purposes of defining their respective jurisdictions. Moreover, the ABF has always considered itself competent exclusively in relation to disputes concerning agreements whose economic function is primarily of a banking nature.

3.1. In particular: the ACF’s jurisdiction over unlawful acts committed by financial advisors.

The ACF’s jurisdiction over in relation to unlawful acts committed by financial advisors is a delicate issue, especially and above all where criminal proceedings are also pending on the same dispute referred to the ACF.

In the first place, it is worth noting that article 4 of Consob Regulation no. 19602/2016 provides that the ACF has jurisdiction over “disputes between investors and intermediaries ...”. Moreover, the definition of “intermediaries”, contained in article 2 of the same regulation expressly includes “any activities performed on their

account by financial advisors authorised to make off-premises offers pursuant to article 31 of the Consolidated Finance Law”.

As a result, there is no doubt that the ACF has, at least in principle, jurisdiction over unlawful acts committed by financial advisors. Indeed, according to the provisions of the Consolidated Finance Law, which were further clarified by Consob in the *Results of the Consultation* (see page 11), the advisor’s conduct is directly attributable to the intermediary and the intermediary itself is jointly and severally liable to third parties for any loss suffered by the advisor, including in cases in which “such losses are a consequence of an offence resulting in a conviction” (see article 31, paragraph 3, Consolidated Finance Law).

Indeed, many have pointed out that acts which are (*inter alia*) covered by criminal law require a more comprehensive evidentiary phase than the rapid, document-based procedure envisaged for the ACF, since there could well be a need to hear witness evidence (at least from the customer and the dishonest advisor), to obtain evidence to which only criminal courts have access (telephone records etc.), to assess an unlawful act committed by another member of the team, who would not be entitled to be a party to the ACF procedure, and so on. This could result in a restriction on the parties’ rights of defence and decisions being issued which conflict with the subsequent criminal judgement.

Moreover, it has also been said that the provisions that are breached in this case are not strictly speaking rules of conduct, but rather prohibitory provisions which give rise to a criminal penalty, such that in these cases the inversion of the burden of proof should not be permitted.

However, although these observations are accurate and may certainly *urge* the ACF to decide with the utmost caution, the provisions of the preliminary and secondary legislation cannot be ignored.

Decision no. 3961 of 23 November 2012 by the Coordinating Panel of the ABF is interesting in this respect: it states that no appeals may be lodged with the ABF where criminal proceedings are pending, regardless of whether or not the customer has filed a civil claim in such proceedings. However, the decision also clarifies that once a final ruling has been handed down in the criminal proceedings, an appeal may be filed with the ABF, provided that the additional admissibility conditions are met.

However, the ABF’s decision is directly based – at least in part – on the Bank of Italy’s Provisions of 18 June 2009 (updated in November 2016) on the rules regulating the ABF.

In particular, article 4 of the Provisions envisages that: “no appeals pertaining to disputes already referred to the judicial authorities may be lodged”.

Therefore, the ABF rules expressly state that pending judicial proceedings preclude the lodging of an appeal before the ABF. Indeed, the significant point of the decision is the fact that it is *irrelevant* whether or not the customer has filed a civil claim in the criminal proceedings and the fact that such restriction also applies to related actions and there is no need for the disputes to be absolutely identical.

However, no such condition of admissibility is envisaged for the ACF and article 13 of regulation no. 19602/2016 merely states that the procedure will be terminated following the start of judicial proceedings. Indeed, pending judicial proceedings do not preclude the lodging of an appeal with the ACF. As Consob has clarified in the *Results of the Consultation* (see page 16), the absence of any such provision was a *legislative policy decision* by Consob, which considers that it is useful to allow appeals to the ACF even if judicial proceedings are pending.

In particular, the document containing the results of the consultation clarifies that: “... we believe that it is appropriate to let the complainant file an appeal with the ACF even if judicial or arbitration proceedings are pending, bearing in mind the possible advantages in terms of the rapid resolution of the dispute as a result of the appeal to the ACF. An entirely matter is the case envisaged by article 13, paragraph 3, letter *a*), [start of legal proceedings as termination event], in which, having started an ACF procedure, the complainant decides to refer the matter to arbitration or to the judicial authorities, thereby explicitly manifesting his/her intention not to proceed with the ACF procedure”.

Therefore, at least as a first approximation, we cannot conclude that the start of criminal proceedings (which occurs when the public prosecutor enters the reported crime in the relevant register) precludes an appeal to the ACF. As mentioned, this cannot be claimed in light of the different rules provided on this point for the two bodies. Instead, the Consob regulations would appear to consider the start of legal proceedings and a subsequent appeal to the ACF to be the most *normal scenario*, in which the two procedures would run in parallel.

However, this conclusion (which, as things stand, is the only one possible) would not be exempt from the risks which the ABF highlighted in its decision (see pages 5-6), regarding the danger of duplications of remedies and conflicts of decisions between the judicial authorities and the ACF. The only possible way to prevent this problem may be found in article 16 of regulation no. 19602/2016 on the enforcement of the ACF’s decisions, which expressly states that the intermediary may at any time ask for information regarding the start of legal proceedings concerning the same facts

involved in the appeal or the outcome of such proceedings to be published on the ACF's website.

Therefore, intermediaries may ask for rulings in their favour that were handed down subsequent to the ACF's decision to be published on the ACF's website. This would resolve, at least in part, the problem of conflicting decisions between legal proceedings and the ACF procedure.

However, the question then arises as to whether the ACF has an obligation to report crimes to the judicial authorities pursuant to article 331 Italian Code of Criminal Procedure and article 357 Italian Criminal Code.

In fact, article 331 Italian Code of Criminal Procedure provides that public officials and those appointed to provide a public service have an obligation to report crimes which may be prosecuted *ex officio* and of which they become aware during the exercise or as a result of their functions or service. Pursuant to article 357 Italian Criminal Code, the definition of "public official" includes anyone who exercises an administrative public function, i.e. a function regulated by public law ("external limit") and characterised by the formation and manifestation of the will of the public administration or by the fact that it is exercised through authoritative or certifying powers ("internal limit").

Since there are no precedents, it is at the very least unlikely that the ACF is required to report crimes which may be prosecuted *ex officio* to the judicial authorities.

4. The criteria for appointing the members of the panel.

The ACF panel consists of a president and four members. The president and two members are appointed directly by Consob. The other two members are appointed, respectively, by: (i) the most representative national trade associations of intermediaries; and (ii) the National Council of Consumers and Users.

The composition is similar to that of the ABF. However, only consumers are involved in the appointment of the investors' member of the ACF panel, whereas traders may also be involved in the equivalent appointment to the ABF panel. As a consequence, the rule envisaged for the ABF whereby the composition of the body in respect of the parties' members is determined on the basis of the type of intermediary involved, the subject matter of the dispute or the trade to which the customer belongs does not apply to the ACF.

ABF and ACF have virtually the same rules regarding: (i) term of office and renewal of members; (ii) appointment of temporary members, although in the case of the ABF

temporary members may also be appointed to replace members who have been removed and in the case of inaction by the parties' members; (iii) appointment of alternate members, to replace members if they are absent, unable to attend or have a conflict of interests/an obligation to abstain and - in the case of the ACF - also "when deemed necessary"; (iv) removal of members; (v) replacement of the president in accordance with the principle of seniority.

Moreover, the principle that the members of the panel must be independent from the parties and trade associations is similar, if not identical, for both bodies. It should be noted that only the ABF rules exclude the appointment of persons holding political office.

Finally, the requirements of professionalism, expertise and integrity of the members are exactly the same.

5. The procedure.

The procedure before the ACF is subject to two conditions of admissibility:

- (i) the filing of a complaint, not more than one year before the appeal is lodged;
- (ii) the absence of any other pending alternative dispute resolution procedures.

Where a complaint has been filed, the investor may lodge an appeal if the response received is unsatisfactory or if no response has been received within sixty days of the date on which the complaint was filed.

The filing of a prior complaint – not more than twelve months previously - with the intermediary for which the response was unsatisfactory or no response was received within the shorter term of thirty days is also a condition of admissibility for the lodging of an appeal with the ABF.

The appeal may be filed personally, through a consumer association or through an attorney on the ACF's website. As a transitional measure, for the two years following the commencement of the ACF's activities, investors not using a consumer association or an attorney may also file the appeal and the relevant documentation in paper form. As regards the ABF, the appeal is normally filed by post, fax, certified e-mail or in paper form and must be addressed to the panel or the relevant branch of the Bank of Italy.

The system does not require the assistance of a lawyer either for the ABF or for the ACF procedure, since in both bodies have been established as mechanisms for the simple and rapid resolution of disputes.

However, experience has shown that often the matters referred to the ABF are

complex and, in this case, the assistance of a lawyer, and even an expert in corporate accounting and finance, is often appropriate.

After careful consideration, the ABF now considers that professional assistance fees may be recognised as a component of the loss suffered by the customer, provided that they were also requested in the complaint, proven and effectively of use for the complaint.

The matters that will be referred to the ACF may also be more complex than those referred to the Banking Ombudsman and, as mentioned, the limit as to the amount of the claim is considerably higher.

Therefore, the ACF will certainly also have to address the problem of covering such fees and the approach adopted by the ABF on this point will be a useful guide.

Returning to the contents of the appeal to the ACF, the rules envisage that it must contain at least: (i) the determination of the subject matter of the claim, (ii) a description of the facts on which the claim is based, (iii) the pleas. Any appeal which does not fall within the jurisdiction of the ACF will be inadmissible. Similarly, any appeals lodged with the ABF which are manifestly incomplete, in breach of the rules or untimely are inadmissible.

The technical secretariat of the ACF assesses whether the appeal is admissible and may ask the complainant to provide additional information or clarification within seven days of the date of the request. The same applies to the ABF, although the time limit is set by the president of the panel. If the secretariat decides that the appeal is inadmissible, it will send it to the president with a technical report. The president may declare it to be inadmissible or, on the contrary, he/she may send it back to the secretariat. If the president fails to declare the inadmissibility of the appeal, the panel will do so. In any case, the time limit for the declaration of inadmissibility is twenty-one days from the date on which the appeal was filed or from the deadline for the provision of additional information and clarification. There is no explicit limit in the case of the ABF.

The intermediary must file its arguments within thirty days of receiving the appeal, together with all the documentation relating to the agreement. The deadline for filing arguments and documentation is the same for the ACF and the ABF.

The procedure for filing the documentation with the panel is identical for both bodies, at least in the transitional phase. In fact, the intermediary is normally required to send the documentation to the ABF through a trade association and, only if the intermediary decides not to use a trade association, directly to the technical secretariat. As regards the ACF, the requirement to send the documentation through trade associations was introduced as a transitional measure for the first two years of its activities. Subsequently, intermediaries will have to file the arguments and documentation directly with the technical secretariat.

Moreover, it should be noted that, within two systems which are essentially identical,

there is an additional (possible) phase of the procedure for the ACF. In fact, the complainant may file supplementary arguments in response to the intermediary's arguments within fifteen days and, within the next fifteen days, the intermediary may respond to the complainant's supplementary arguments.

The technical secretariat of the ACF is required to compile the case file and produce a report on the facts of the dispute for the panel. This provision appears to be the same as that envisaged for the ABF, since – according to the Provisions of the Bank of Italy - the secretariat “draws up a report to be made available to each member of the panel before the meeting at which the appeal is discussed”. Therefore, in principle, it would appear that the ACF technical secretariat's role in the preparation of the documentation for the panel is neither broader or narrower than that of the ABF.

The ACF panel may ask the parties to provide additional information within a mandatory time limit of not less than seven days. This rule also applies to the ABF, for which it is envisaged that the time limit for the decision may be suspended (starting from the receipt of the counterarguments or the expiry of the deadline for filing them) so that additional evidence may be requested from the parties.

Moreover, if it is found that the agreement is null and void, the ACF panel will ask the parties to submit comments. This serves *inter alia* to ascertain whether or not the investor wishes to enforce the nullity of the agreement, where such nullity arises from the need to protect consumers (*nullità di protezione*).

It is now firmly established practice that the evidentiary phase of the ABF procedure is limited to the production of documents by the parties. Moreover, the parties cannot intervene in the procedure and there is no public hearing. There is no indication that different principles will apply to the ACF. The wording of the provisions and the short time limit envisaged for the decision would also appear to rule out expert witness evidence, any intervention by the parties in the procedure and a public hearing in this case.

There are some differences between the two bodies with regard to the time limit for the decision: the ACF decides within ninety days of the completion of the file and such term may be extended by a further ninety days in the case of matters that are particularly complex or new or – at the request of the parties – in order to attempt conciliation. The same deadlines also apply to the declarations of interruption and termination of the procedure. Instead, the deadline for the decision in cases before the ABF is sixty days from date of receipt of the counterarguments or, in their absence, from the expiry of the deadline for filing them. The sixty-day time limit may also be suspended several times during the preparatory phase, in order to remedy formal irregularities of the appeal or to request additional information from the parties.

6. Disputes of particular complexity.

The ABF has a coordinating panel which intervenes in disputes where there are matters of particular importance or if the matter could give rise to conflicting decisions, in order to ensure uniformity. Disputes may be referred to the coordinating panel by the local panel or, if the matter has not yet been referred to the panel, by the president. The decisions of the coordinating panel are binding on the local panels, unless there are specific reasons in a particular case which require a different solution. No such structure is envisaged for the ACF, since at present it only has a single panel. However, as mentioned, in the case of matters that are particularly complex or new, it is possible to extend the deadline for the decision by ninety days.

Obviously, there is no place in the ACF for the (singular) special procedure initiated at the request of the *prefetto* pursuant to article 27-*bis*, paragraph 1-*quinquies*, of *Decreto Legge* no. 1 of 24 January 2012, envisaged for the ABF in cases of incorrect assessment of a customer's creditworthiness.