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DOOR-TO-DOOR SELLING OF FINANCIAL INSTRUMENTS:

RECENT CLARIFICATIONS BY THE COURT OF CASSATION

1. INTRODUCTION

The interpretation of the scope of application of the investor's right to withdraw from any contracts for the placement of financial products entered into door-to-door[1] has again captured the attention of all players following the judgment No. 7776 of 3 April 2014 of the Third Division of the Court of Cassation (the "**Judgement**") .

The Judgment appears to put an end to an age-old case law controversy between two diametrically opposed stances throughout time. In particular, one stance was aimed at a restrictive interpretation, whilst the other stance was aimed at a broad interpretation of the right to withdraw.
Article 30, paragraph 6, of the TUF sets forth that '*the enforceability of contracts for the placement of financial instruments or for the management of individual portfolios concluded door-to-door shall be suspended for a period of seven days effective as of the date of subscription by the investor (...) Failure to mention the right of withdrawal on the forms shall cause the relevant contracts to be null and void, which may solely be claimed by the client*'.

In essence, the case law controversy has focused on the interpretation of the term 'placement'.

Pursuant to the restrictive interpretation, said term needs to be understood in a technical way as the investment service governed under article 1, paragraph 5, letters c) and c)-*bis*, of the TUF whilst, pursuant to the broad interpretation, the term at issue needs be understood in a non-technical way, thus including any activity related to the 'sale' of financial instruments made within the scope of any of the investment services provided for under the TUF, including the dealing, the execution of orders, and the collection and transmission of orders.

2. THE PREVIOUS JUDGMENT NO. 13905 OF THE COURT OF CASSATION (JOINT DIVISIONS) OF 3 JUNE 2013 AND THE LEGISLATIVE AMENDMENT OF AUGUST 2013

Through judgment No. 13905 of 3 June 2013, the Court of Cassation (joint divisions) had already taken sides for the broad interpretation, by stating the principle according to which the client's right to withdraw applies to the door-to-door selling of financial instruments made within the scope of any type of investment service, thus not only

[1] Provided for by article 30, paragraph 6, of the Italian Financial Consolidated Act (TUF).

to placement. Therefore, all contracts entered into failing to mention the right of withdrawal in writing would be null and void.

In August 2013, the legislator decided to limit the effects of the ruling of the said decision of the Court of Cassation[2] by providing that, for those contracts signed effective as of 1 September 2013, the right of withdraw also apply to the dealing for own account[3].

Following the above legislative amendment, sector players tacitly deemed that, prior to 1 September 2013, the right to change one's mind solely applied to the placement service (and to the service of individual management of portfolios).

3. THE JUDGMENT

Without there being any need to go into the analysis of the merits of the case[4], the Court of Cassation, on the one hand, confirmed the correctness of the broad interpretation previously given by the Court of Cassation (joint divisions) in June 2013 and, on the other hand, it clarified that in no way may said interpretation be deemed jeopardised by the legislative amendment of 2013.

In short, by the Judgment the Court of Cassation ruled that:

- The right to withdraw applies to any contract for the sale of financial instruments entered into within the scope of any of the investment services[5], since the provision is aimed at ensuring that the investor may proceed to an '*adequate consideration*' of the contract he/she is about to sign. Even if the restrictive textual interpretation is acceptable, article 38 of the Charter of Fundamental Rights of the European Union (which guarantees a high level of protection for consumers) legitimates the adoption of a non-technical concept of placement of financial instruments, in order to include any investment service within which a sale of financial instruments in a broad sense is effected;
- The law provision[6] claimed by the intermediary bank to support the theory pursuant to which, until 30 August 2013, the right withdraw did not apply to the door-to-door selling of financial instruments made within the scope of an investment service other than placement and the individual management of portfolios, is not a rule of authentic interpretation and, thus, may solely rule for the future but not for the past. Indeed, according to the Judgment: (i) the rule at issue solely states that the right of withdrawal also applies to those trading contracts entered into after said date, but does not exclude the application of said right also prior to 1 September 2013. On the other hand, in no way may article 56-*quater* of Decree Law No. 69/2013 be deemed a rule of authentic interpretation, since the main assumption 'authorising' the issuing of any such rule is lacking, that is the uncertainty of the law; (ii) the previous decision of the Court of Cassation (joint division) of June 2013 had precisely removed this uncertainty; (iii) based on the preparatory parliamentary work, the legislator's will to issue a rule of authentic interpretation of article 30, paragraph 6, of the TUF is never clearly expressed.

In conclusion, pursuant to the Judgment, investment contracts entered into door-to-door prior to 1 September 2013 and lacking to mention the investor's right of withdrawal in writing are entirely null and void.

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[2] By introducing article 56-*quater* of Decree Law No. 69/2013, which integrated article 30, paragraph 6, of the TUF.

[3] Under article 1, paragraph 5, letter a), of the TUF.

[4] The Judgment was handed down at the end of proceedings on an investor's dispute with his own credit institution as to the validity of a complex contract, foreseeing the granting of a loan for the purchase of zero coupon bonds, issued by the same lender bank and not listed on any regulated market, and at underwriting the units of a share investment fund managed by an asset management company (SGR) belonging to the bank's group. The contract also provided that the bonds and the funds' units, purchased thanks to the loan granted by the intermediary bank, were pledged as security for redemption of the loan.

[5] Listed by article 1, paragraph 5, of the TUF.

[6] i.e. Article 56-*quater* of Decree Law No. 69/2013.

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