BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Private and public enforcement of EU investor protection regulation

Conference papers

Banca d'Italia, Rome, 4 October 2019

edited by Raffaele D'Ambrosio and Stefano Montemaggi

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The series "Quaderni di Ricerca Giuridica", edited by the Legal Services Directorate, publishes the studies conducted by the Bank of Italy's lawyers or by internal and external experts.

The series is focused on legal matters of specific interest to the Bank.

The research papers are selected by an editorial committee which assesses originality, clarity, reasoning consistency, completeness of the information provided.

The opinions expressed and conclusions drawn are those of the authors and do not necessarily reflect the views of the Bank of Italy.

ISSN: 0394-3097 (print)
ISSN: 2281-4779 (online)
Printed by the Printing and Publishing Division of the Bank of Italy

SUMMARY

Foreword

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I. EU law has increasingly regulated financial transactions but it has done so without harmonising the national private law which is applicable to these transactions.

That leaves challenges on many levels.

Federico Della Negra's *MiFID II and Private Law: Enforcing EU Conduct of Business Rules.* (2019)[1] is the most important scholarly response so far. He analyses the legal issues that arise as a consequence of the EU legislation that regulate financial transactions without expressly harmonising the national private law applicable to transactions, and his critical analysis provide the best foundation for resolving the pressing problems of law and policy.

Dr. Della Negra's book was the starting point for a seminar organised by the Legal Department of Banca d'Italia in Rome at the end of 2019 under the heading 'MiFID II and private law, Enforcing EU conduct of business rules'. It provides powerful support for Dr. Della Negra's analysis, and takes it forward in different respects. This publication in the series of *Quaderni di Ricerca Giuridica della Consulenza Legale* collects several papers from the seminar.

MiFID I, adopted in 2004, harmonised regulation of investment services and replaced the Investment Services Directive (ISD) of 1993 which introduced, for the first time in the EU, rules on conduct of business between investment firms and their customers. In 2014 MiFID II replaced MiFID I, expanding and developing its conduct of business rules. MiFID II, like its predecessor, is a form of public interest regulation in the area of financial services. Klaus Hopt has called the directives and their transposition into national law the 'constitution' or '*Grundgesetz*' of capital market law in Europe, and Stefan Grundmann has developed this approach and its consequences for private law at a general level.[2] At the Banca d'Italia seminar, Filippo Annunziata developed the role of MiFID II, and his chapter in this publication has the title 'MiFID II as a Template. Towards a General Charter for the Protection of Investors and Consumers of Financial Products and Services in EU Financial Law'. He explains how extensive EU financial law based on the conduct of business rules has become, but at the same time how sectoral and fragmented this has left financial law on the private/commercial law that accompanies conduct of business rules. Filippo Annunziata argues that there is a need for coordination and cross-sectorial approaches to be developed on the basis of MiFID II and also further promoted by the EU as a legislator. I think all the contributors to this issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* will agree.

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1 Della Negra, F., *MiFID II and Private Law Enforcing EU Conduct of Business Rules,* Oxford, 2019. Dr. Della Negra has contributed to this issue with a new and important essay, *The civil effects of MiFID II between private law and regulation*, published in this Quaderno, pp. 81 ff.

2 Grundmann, S., *Privatrecht und Regulierug*, in Auyer *et al.*, *Privarechtsdogmatik im 21. Jahrhundert. Festschrift für Claus-Wilhelm Canaris,* Berlin, 2017, 907.

Within a wider framework of market regulation, the focus of the conduct of business rules is on the protection of investors. MiFID I and II provide for enforcement of the conduct of business rules by supervisory authorities and harmonise the powers of these authorities but the directives do not expressly or directly harmonise private law duties and remedies. Are the conduct of business rules administrative law without any consequences for private law or without any private law remedies? It is clear that conduct of business rules are supervised by financial market regulators, but less clear how far the duties of the regulators go. This cannot exclude any impact of conduct of business rules on private law or the availability of remedies in private law.

EU law does not rely on domestic distinctions between public and private law. Such a dichotomy may be unconvincing on a general conceptual level. Jürgen Habermas challenged the distinction between public and private law already in his 1962 *Habilitationsschrift* on the public sphere, the *Strukturwandel der Öffentlichkeit*, perceptively making use of the criticism in legal scholarship to find another false dichotomy between the private and the public. Domestic lawyers disagree on where to draw the line and the consequences of it. And the line and consequences are not seen in the same way in the different national jurisdictions. So to apply this dichotomy would be practically very difficult in EU law. It would not render the conduct of business rules effective in the way that EU law requires.

There is increasing scholarship on the horizontal direct effect of EU law, and the way in which this limits the autonomy of national procedural and private law. Principles such as that of the effectiveness of EU law assist national courts in giving effect to EU law. The conduct of business rules that are the subject of this book originates in national private law. Those principles at the national level interact with the merging principles at the EU level. The relationship can be seen as a complex one. On the other hand, when the common origin and aims of the principles are explored, it turns out to be much easier to make use of them in the clarification and development of the law. This is for the ECJ and national courts, and also to some extent for the domestic legislators where EU legislation leaves gaps.

Also legal disciplines interact in complex ways. They lay claim to autonomy. We know it from the ways in which EU law claims autonomy, and national law from EU and other law from outside the national jurisdiction. The same goes on within national jurisdictions, for instance private law from public law, or commercial law from private law or the other way round. National private law may base its claims of autonomy on most of these grounds. That creates a challenge for scholars on topics as that of Dr. Della Negra's book. The challenge is to move freely over the boundaries, which seem to divide these fields of law and bring out the underlying unities. They are to be found in the principles which these fields of law are based on.

This issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale*, the 2019 Banca d'Italia seminar and Federico Della Negra's book are primarily about the private law impact of conduct of business rules. The relationship between public interest regulation and private law lies at the heart of this publication and Federico Della Negra's book. The conceptual framework builds on the extensive literature that has investigated the regulatory effects of general private law, including Hugh Collins' seminal work,[3] my own work with Guido Alpa[4] and Hans-W. Micklitz's contributions.[5] Dr. Della Negra wrote his book within a research project directed by Hans-W. Micklitz on European regulatory private law.[6] This book provides one of the most important contributions to this project, 'testing' by means of an impressive number of judgments, decisions of ADR bodies and acts of supervisory authorities the impact of regulation on private law. The EU conduct of business rules, designed as a 'self-sufficient', public law regime may, by virtue of general principles of EU law, influence the interpretation of general private law and contribute to a Europeanisation of national private law.

This publication, and the 2019 Banca d'Italia seminar of which this publication in the *Quaderni di Ricerca Giuridica della Consulenza Legale* is an extension, had a good foundation in the way in which Dr. Della Negra had demonstrated his exceptional command on the literature, and demonstrated a deep knowledge of and insight in and attention to practical issues. He knows the academic literature and manages to make use of it for his analysis. This also applies to his command of the case law and other materials from a number of national legal systems. The fragmented literature is difficult to deal within a book on this topic. Dr. Della Negra has placed his book in the context of the literature on financial market regulation, including my own work, in particular in *The Foundations and Future of Financial Regulation*[7] with Iris Chiu and with Francesco Capriglione[8] and with Duncan Fairgrieve,[9] and also the contributions by Olha Cherednychenko,[10] and Danny Busch.[11] Dr. Raffaele D'Ambrosio's work on liability of regulators and the liability regimes within the Single Supervisory Mechanism and Single Resolution Mechanism are important works in their respective fields but also

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3 Collins, H., *Regulating Contracts*, Oxford, 1999.

4 Alpa, G., Andenas, M., *Fondamenti del diritto privato europeo*, in *Trattato di Diritto Privato*, ed. by G. Iudica, P. Zatti, Milano, 2005.

5 See, in particular, Micklitz, H.-W., *The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, Vol. 28, No 1, January 2009, pp. 3-59.

6 Micklitz, *The Visible Hand of European Regulatory Private Law*, cit., https://blogs.eui.eu/erc-erpl/project-description/.

7 Andenas, M., Chiu, I., *The Foundations and Future of Financial Regulation*, London, 2013.

8 With contributions to Capriglione, F. and Alpa, G., *Diritto bancario comunitario*, Torino, 2002 and many other publications, seminars and lectures.

9 For instance, Andenas, M., Fairgrieve, D., *Misfeasance in public office, Governmental Liability and European Influence*, in *Tort Liability of Public Authorities in Comparative Perspective*, ed. by Andenas, M., Bell, J., London, 2002.

10 See, in particular, Cherednychenko, O.O., *Contract Governance in the EU: Conceptualising the Relationship between Investor Protection Regulation and Private Law*, in *European Law Journal*, Vol. 21, No 4, July 2015, pp. 500-520. Most recent: *Financial Regulation and Civil Liability in European Law*, ed. by Cherednychenko, O.O., Andenas, M., London, 2020.

11 See, in particular, *A Bank's Duty of Care*, ed. by Busch, D., van Dam, C., Oxford, 2017.

makes important contribution to the understanding of the general conceptual framework for dealing with EU law and civil or administrative liability.[12] This further includes the papers by Stefan Grundmann,[13] Christos Hadjiemmanuil[14] and Fabian Möslein[15] focussing on the impact of the European Banking Union and Single Rulebook on the relationship between private parties. These publications discuss the new powers conferred on the ECB within the SSM and the "private autonomy" of market participants. Although Dr. Della Negra's book focuses on the civil law effects of conduct of business regulation, his book provides valuable insights on the civil law effects of the Single Rulebook (i.e. CRR, CRD IV and BRRD), and how its implementation by national legislators may effectively shape the private law relationships between market participants in general.

At another level, financial market law becomes a field for testing out the relationship between primary EU law and private law concepts.[16] The field becomes ever more important by the promulgation of legislation, case law and scholarship, and also in terms of transactions and practical importance.

II. Harmonisation in EU law does often not provide for remedies and procedures. However, when EU law confers rights on individuals, national law must ensure that individuals have effective and equivalent remedies to enforce these rights. The scope and content of the right needs to be assessed having regard to the protective purpose of the rule at stake. Dr. Della Negra's book shows under what conditions MiFID II's disclosure, distribution and product governance obligations confer rights on individual investors and therefore require national courts to interpret general private law in light with the principles of equivalence and effectiveness. The EU requirements that domestic law gives effect to EU law, is met by claims to the autonomy of domestic law, and with particular strength in procedural law

[12] Most recently D'Ambrosio, R., *The liability regimes within the SSM and the SRM*, in *Law and Practice of the Banking Union and of its governing Institutions*, Quaderni di Ricerca Giuridica della Consulenza Legale, No 88, April 2020.

[13] See Grundmann, S., *The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook*, in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 345-367.

[14] See Hadjiemmanuil, C., *The Banking Union and Its Implications for Private Law: A Comment*, in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 383-400.

[15] See Möslein, F., *Third Parties in the European Banking Union: Regulatory and Supervisory Effects on Private Law Relationships Between Banks and their Clients or Creditors* in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 547-574.

[16] See Micklitz, H.-W., Sieburg, C., *Primary EU Law and Private Law Concepts*, Cambridge, 2017. The most important part of this is in terms of the substantive content of the private law concepts, but also the direct or indirect effect of primary EU law on private law concepts, and their interaction in general. The direct effect of primary EU law and EU legislation on private law was a central focus of Alpa, Andenas, *Fondamenti del diritto privato europeo*, cit.

and private law. This accounts for some of the challenges. It also explains why Dr. Della Negra has had to explore EU and domestic law sources in such detail.

Private law and private enforcement in the post-crisis EU retail financial regulation is undergoing a transformation. The process and outcome, also on the normative level, remains understudied, uncertain and is highly controversial. In an inchoate form this is reflected in a scholarship which remains fragmented along different lines. EU retail regulation, as Niamh Moloney argue, may have become more paternalistic, transforming the retail client, from an investor to a consumer.[17] But this approach has not included a harmonisation of the civil law effects of breaches of its conduct of business rules. Private law and private enforcement remain in the shadow of the administrative law aspects of EU conduct of business regulation and subject to national legislative choices.

The design of private law remedies for breaches of conduct of business rules remain crucially dependent on the interpretative approach of national courts. It is striking to see, as Dr. Della Negra's analysis shows, that while in continental Europe, courts tend to converge on the need to ensure civil law effects to conduct of business rules, in the UK courts are much more careful about importing regulatory concepts into private law adjudication, especially in non-advised transactions.

Indeed, lack of express and direct private law harmonisation is problematic for investors, in particular for retail or private investors. It may appear unclear whether breach of conduct of business rules give rise to a private law remedy. It may be even more unclear if a private law remedy granted will be different across member states. So far, the Court of Justice of the European Union (CJEU) has provided limited guidance to solve these issues. The *Genil v Bankinter* judgment[18] addressed the issue of the civil law effects of MiFID I, but left unanswered the crucial question on what type of remedies would be in line with the principle of equivalence and effectiveness, and what are the criteria to assess compliance with these principles.

III. The aim of financial market regulation, and in particular conduct of business rules, are to protect the investor, and the private investor above all. The financial services industry is often concerned with the costs and risks involved with contractual and tort liability, and often lobbies for a lower level of protection. Central banks and financial market regulators may be open to the interests of the financial services industry, and see the need for margins so that financial

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[17] Moloney, N., *The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?*, in *European Business Organization Law Review*, Vol. 13, No 2, June 2012, p. 169.

[18] C-604/11, *Bankinter*, ECLI:EU:C:2013:344.

institutions may build own funds. They are also increasingly concerned by the systemic risk that contractual and tort liability may entail.[19]

At the 2019 seminar at Banca d'Italia the discussion also broached a related issue. In some cases the introduction of EU conduct of business rules have been claimed to supersede and set aside the duties that national provide law had developed to protect investors. Dr. Della Negra had discussed this in his 2019 book, and I had another look at a judgment from 2012 in the Scottish courts. Lord Hodge in Court of Session, Scotland accepted a new way of limiting liability for breach of conduct of business rules in *Grant Estates Ltd v Bank of Scotland Plc* on misselling of swaps.[20] Grant Estates Ltd alleged the Bank of Scotland had given unsound advice in breach of the regulatory rules in the Conduct of Business Sourcebook (the COBS rules) issued by the Financial Services Authority. Grant Estates Ltd sought damages resulting from the alleged breach of the COBS rules, breach of contract, and misrepresentation. The swaps protected GEL from the risk of rising interest rates; but it also prevented the company from benefitting from falling interest rates.

After 2007/8 rates remained low. GEL had to pay considerably more as interest (or its equivalent) on its loan than it would have if it had had a floating rate of interest. Lord Hodge dismissed the claim: GEL had no right to pursue a civil action in the courts for the breach of the COBS rules. Instead it should seek remedies for breach of those rules through the Financial Services Authority (FSA). Lord Hodge held that (i) RBS had not broken its contract, (ii) it had no duty of care at common law to give proper investment advice, and (iii) it not been guilty of fraudulent or negligent misrepresentation.

The contract with RBS which governed their relationship and that that agreement excluded its common law claims. This agreement did not impinge on GEL's right to seek a remedy from the FSA. The COB rules would provide further rights but had no impact on the contract and the contractual limitations. The existence of regulatory rules and remedies became an argument against co-extensive common law rights and remedies. In the background were systemic concerns with large RBS exposures that this outcome would reduce.

The open textured and general duties in the common law could as easily be made to accommodate the COB rules. The regulatory rules had developed since the 1980s and 1990s, and COB in such misselling cases would give further rights to the customer/investor. The current COB rules were based on EU legislation, ISD, MIFID I and II. Their origin in were

[19] This is one of the cross-cutting themes of Dr. Della Negra's 2019 book. See also Hadjiemmanuil, *The Banking Union and Its Implications for Private Law: A Comment*, cit.

[20] *Grant Estates Ltd v Bank of Scotland Plc* [2012] CSOH 133, Outer House, Court of Sessions, Scotland. The Bank of Scotland is a commercial bank which was taken over by a banking group and restructured with state support after the banking crisis in 2008-2009. The systemic concerns were thus brought to the foreground.

fiduciary duties developed through the common law. Allowing the interaction to continue would enable the modernisation of the traditional categories of national private law and develop an appropriate remedial response to breaches of regulatory standards, achieveving the underlying EU policy objectives.[21] Using the existence of regulatory rules and remedies to exclude co-extensive common law rights and remedies, run against these policy objectives.

IV. If *Grant Estates Ltd v Bank of Scotland Plc* limits the reach of private law duties by means of regulatory rules, this is not altogether surprising.[22]

In the UK there has long been pressure from the financial services industry to use regulatory rules to limit fiduciary duties to the investor. There has also been a sustained campaign on many levels to convince courts to allow providers of financial services to limit their fiduciary duties by contract, or in other ways to emaciate the regime of fiduciary duties from the early 1990s onwards.[23]

As mentioned, many of the regulatory rules sprung out of the common law and fiduciary duties. In the UK regulatory and 'self-regulatory' regimes of the 1950s to the 1980s, some of the purpose was to enforce fiduciary duties.

One consequence of the separation between conduct of business rules developing and private law duties retracting, is that private law enforcement of EU and domestic regulatory rules become more important.

V. Federico Della Negra's book and essay to this issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* show the fundamental divergences between civil and common law countries.

There could be many reasons for this. There are national traditions and different levels of costs of litigation. In the UK sophisticated investors go to courts, private investors not. Basic private law concepts vary. The wide recognition and limited court review of contractual disclaimers from liability and doctrine of

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21 See Andenas, M., *Commercial Law, Investor Protection, EU and Domestic Law*, in *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspective*, ed. by M. Heidemann, J., Lee, Berlin, 2018, pp. 437-467.

22 EU law could have had such an effect under certain circumstances (which are present here). Full harmonisation in the EU would limit private law duties and rights under certain directives (such as the Product Liability Directive). However the conduct of business rules do not harmonise remedies.

23 Chiu, I., *Is there Scope for Reforming the Emaciated Concept of Fiduciary Law in Finance? Critically Discussing the Potential Achievements of Reform*, in *European Business Law Review*, Vol. 28, No 6, January 2017, pp. 937-966.

estoppel sets the UK apart from the EU jurisdictions and EU law, with their recognition of pre-contractual good faith.

To understand the implications of these divergences we need to explore substantive law, institutional law and investor protection.

– *Substantive law:* UK law implies significant deviations from MiFID. In this field, it has in practice created a primacy of common law over EU law. Investors are free to derogate suitability and appropriateness provisions as in the *Springwell Navigation Corporation v JP Morgan Chase Bank* case.[24] The only defence for investors is to stipulate advisory contracts but these are costly and, in any case, banks can introduce disclaimers from liability. This is in my view against the letter and spirit of MiFID provisions, and the doctrine of horizontal effects and principle of effectiveness. Civil law systems are more in line with MiFID. Federico Della Negra has argued that not all that glitters is gold: in civil law countries we have significant divergences as to the remedies (compensation or avoidance). For that reason, we need national courts to be more careful about general EU law principles in particular effectiveness and the CJEU case law.

– *Institutional law:* In civil law countries courts have afforded high level of investor protection via contract law. In Italy and Spain access to court is still cheap so that this really helps retail investors. In the UK retail investors go to the ombudsman (FOS). However, the FOS does not create real jurisprudence – it is a case by case assessment avoiding the clarification of the law that courts would be more willing to undertake. This helps the investor in the concrete case but risks increasing uncertainty in decision-making for new disputes; in turn, this could weaken the deterrent effect of conduct of business rules.

– *Investor protection:* UK law has become the law of sophisticated investors. Banks and firms stipulate derivative contracts under ISDA Master Agreement[25] which, by default, selects common law and UK courts as law applicable and jurisdiction. MiFID seems to be absent from this dispute resolution. Only common law matters. For some this is positive because it increases legal certainty. We could agree with that for larger and very professional investors: if JP Morgan enters into derivatives with Unicredit we can presume that both of them are very knowledgeable to cover their legal risks. But what happens for

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24 *Springwell Navigation Corpn v JP Morgan Chase Bank & Others* [2010] EWCA Civ 1221.

25 The ISDA Master Agreement by the International Swaps and Derivatives Association is the most commonly used master service agreement for over-the-counter (OTC), or not standardised but individually negotiated, derivatives transactions internationally. See https://www.isda.org/a/23iME/Legal-Guidelines-for-Smart-Derivatives-Contracts-ISDA-Master-Agreement.pdf

> small and medium enterprises and small and medium banks? In the UK these actors encounter serious problems: courts apply common law, and not even the Financial Ombudsman Service is accessible in many cases due to amount limits.[26]

Two final points:

There are doubts about the extent to which a private law remedy can be based on Article 47 of the Charter, in the absence of express provisions or case law by the CJEU. This is not a claim in Federico Della Negra's book. He has argued that if a conduct of business rule is right-conferring then the principle of effectiveness and equivalence kick-in (based on the *Rewe* case law).[27] Crucially, the principle of effectiveness is different than the fundamental right of Article 47. In his view,[28] which I share, the principle of effectiveness provides for a higher protection than the fundamental right because the latter requires a higher threshold to become applicable, essentially, a breach of a procedural requirement or a defense right. This argument is confirmed by case law on consumer as well as competition law where art. 47 Charter is used in a very careful way by the CJEU.

Second, why German court are less protective vis a vis retail clients. This need further exploration. It could be based on (i) the traditional idea that conduct of business rules are public law with no private law effect, (ii) market based interpretation of private law concepts like good faith, or (iii) very developed out of court mechanisms in Germany, or a combination of all three.

VI. This issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* supports the answers provided by Dr. Della Negra in his book that, notwithstanding of the absence of any express or direct EU or national law provisions, MiFID II's conduct of business rules should be enforced by private law remedies, in parallel with the public or administrative law sanctions. Della Negra bases his argument on the doctrine of horizontal effects of EU law, the principles of equivalence, effectiveness and effective judicial protection. He argues convincingly how EU law should guide the national courts' interpretation in shaping the civil law effects of conduct of business rules. The broad scope of the analysis, which comprises four jurisdictions (UK, French, Italian and Spanish law) offers a comprehensive view on the different judicial approaches in dealing with the civil law effects of conduct of business rules.

This applies to the extra-judicial enforcement of conduct of business rules too. After the global financial crisis, Member states experienced a 'de-judicialisation' of retail client disputes that has inevitably reduced the role of courts in this type of disputes. The book devotes the necessary attention

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26 See https://www.financial-ombudsman.org.uk/

27 Della Negra, *MiFID II and Private Law*, cit., p. 178.

28 Della Negra, *MiFID II and Private Law*, cit., p. 197.

to the institutional and substantive law aspects of ADR adjudication in the four examined countries, showing that this type of dispute resolution may provide a positive outcome not only in terms of compensation but also deterrence in retail financial markets.

The civil law effects of conduct of business rules may arise also from acts adopted by EU and national supervisory authorities. The reason is that this type of acts, even if they are not legally binding (like in the case of ESMA's acts) they may nevertheless influence the interpretation of binding law applicable to financial transactions. The book innovatively shows the link between the new powers granted by EU law to the European Supervisory Authorities and the civil law effects stemming from these powers in relation to MiFID II's conduct of business rules.

In the current EU financial regulatory context, where soft-law and forms of administrative rule-making have gained increasing importance in shaping the content of EU regulatory requirements, technical expertise of ESMA and national supervisory authorities could facilitate the private (judicial and extra-judicial) enforcement of conduct of business rules. A challenge for these authorities will be to balance investor protection and financial stability. Building on the case law of the CJEU, Della Negra takes a clear stand on the relationship between investor protection and financial stability, and argues that the latter only under very specific circumstances can restrict the former.

This context makes even more important the regulatory developments in the financial services regulations, in particular the Markets in Financial Instruments Regulation (MiFIR) and Packaged Retail and Insurance-based Investment Products Regulation (PRIIP). These provide for an extended role of the regulators in contractual terms of services and products. Raffaele D'Ambrosio and Stefano Montemaggi's contribution to this issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* is on 'Connecting public and private enforcement'.

Raffaele D'Ambrosio analyses the European regulators' intervention powers, Stefano Montemaggi the relationships between the public authorities' assessment and the private enforcement regime.

D'Ambrosio and Montemaggi point out that the ESAs' intervention powers now go beyond ensuring the stability and the proper functioning of the financial market to include the protection of customers and investors. These forms of direct intervention by the supervisory authorities may determine the validity of the financial contracts. The authors state that this will justify and require a clarification and strengthening of the coordination mechanisms between private and public enforcement based on the principles of the CJEU's case law and the constitutional jurisprudence of the domestic jurisdictions.

VII. The creation, via courts and ADR mechanisms, of what the book calls 'hybrid private law duties and remedies', will increase the protection of investors and strengthen the deterrent effect of conduct of business rules. It also ensures that the investors' confidence in financial markets is adequately protected, avoiding situations in which losses caused by mis-selling are not compensated. Going forward, legislative harmonisation of civil law effects of conduct of business rules would be beneficial to level the playing field but would probably not increase substantially the level of protection of investors, given that national courts have already imposed on investment firms obligations that are stricter than the ones laid down in MiFID I and have enforced conduct of business rules via private law remedies.

Giorgio Afferni's essay to this issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* is on 'Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF)'. It sets out the advantages of the ombudsman system, and provides important analysis. In my view, voiced at the discussion in the 2019 Banca d'Italia seminar, may also provide support for some of the criticism: that such schemes may be too easily captured by the industry and draw a balance which is not fair from the investors' point of view.

VIII. This issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* and the book of Dr. Della Negra contributes to an emerging scholarship where different traditions struggle for the upper hand. While offering alternative perspectives, there are few scholars that manage to combine a deeper understanding of private law and the technicalities of EU financial regulation. Applying these two perspectives to an analysis of private law and enforcement in the post crisis EU retail financial markets is particularly challenging. Dr. Della Negra's strongest contribution is his analysis of how general principles of EU law developed by the CJEU can bridge traditional categories of private law and sectoral regulatory duties. Private law should be interpreted in light of EU law but its broad concepts, like good faith, duty of care and reasonableness, grant to national courts a necessary margin of manoeuvre to shape the private law remedy in light of the specific circumstances of the case.

The EU and domestic regulatory dimension is in a process of transformation, in terms of substantive law, institutions and jurisdiction. This applies no less to domestic private law, including the new forms of dispute settlement. The sources are rich but their relationship and legal weight are not settled. Working at the interfaces between these dimensions is demanding.

Private law has certainly taken a more prominent role in the reform of EU securities regulation after the 2008 financial crisis. New rules have harmonised the national tort laws rules applicable to key financial market actors as depositary institutions and credit rating agencies. MiFID II strengthens ADR/the out-of-court enforcement of the private enforcement of conduct of business rules.

National legislators, regulators, ombudsmen, ADR mechanisms and courts have to determine the civil law consequences in terms of private law remedies. National courts and out-of-court dispute resolution mechanisms/ADR have to interpret national private law in order to ensure the effective application of conduct of business rules and consequently an effective protection of clients. The wording and purpose of the conduct of business rule provide an essential guidance. The principles of effectivenesss and equivalence may assist national courts improving the consistent application of conduct of business rules in the EU, ensuring a stronger alignment between regulation and private enforcement, and strengthening the overall effectiveness and credibility of MiFID II.

Then we have the ESAs' intervention powers which may determine the validity of the financial contracts. This power will aim at a fair balance between the stability and the proper functioning of the financial market and the protection of customers and investors.

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To conclude, this issue of the *Quaderno di Ricerca Giuridica della Consulenza Legale* makes an important contribution to the law and policy of financial transactions at the cross-roads of EU and domestic law, and of regulation and private law. It has also given appropriate recognition to the book by Dr. Della Negra with which he has made an outstanding and important contribution to legal scholarship. This issue of the *Quaderno* and Della Negra's book will be a core text for scholars of EU law, private law and financial market law and also essential for supervisory authorities and practitioners dealing with MiFID II's conduct of business rules. It has been a great pleasure to be involved with both.

MiFID II as a Template.

Towards a General Charter for the Protection of Investors and Consumers of Financial Products and Services in EU Financial Law

Filippo Annunziata

1. Introduction

Overtime, some of the core provisions that traditionally identify, in the context of MiFID, the investors' protection regime, have become a template for the protection of consumers and "end-users" of financial services and products in other areas of EU Legislation. Those same provisions – whose pivot are the overreaching rules on the duty of care, suitability, conflicts of interest, inducements, best execution – gradually evolved from being specific to the investment services regime, to becoming widespread standards that inspire EU Legislation in other sectors. This paper will show, first of all, how this phenomenon actually evolved, and how MiFID standards are effectively challenging the still prevailing sectoral approach followed, in the EU, with regards to financial markets regulation. Some of the main consequences of the expansion of the MiFID regime will also be discussed, including those that relate to enforcement and judicial protection; ultimately, some conclusions will be drawn, and a few suggestions will be set out for future analysis.

2. EU Financial Legislation: sectoral & cross-sectoral approach

In the EU, legislation dealing – in a broad sense – with financial markets, services and products (herewith the "EU Financial Legislation") notoriously follows a sectoral approach. The three silos which have characterized it since its inception (banking, capital markets, insurance and pension funds) are clearly visible, even though, during the last decades, they became increasingly interconnected. As of today, and especially after the Financial Crisis, the dimension and complexity of EU Financial Legislation are staggering; however, even though markets have become more and more integrated, cutting or slimming down many boundaries from one field to the other, EU Financial Legislation remains, at least formally, highly sectoral. This is clearly visible if one looks at the main bodies of EU Financial legislation, in terms of legal sources, but also if one considers supervision and enforcement, whereby the three sectors are traceable to three distinct EU Authorities (EBA, ESMA and EIOPA), each with different competences in its field of intervention. EU Financial Legislation, based on a sectoral approach, then struggles to find ways to ensure and enhance cooperation between different regulators and/or supervisors, adding, into virtually all the main legal texts, specific provisions to achieve that objective. An increasing number of voices seems therefore to foster more integration between different areas of EU Financial Law, also in the wake of the recent pandemic crisis.[1]

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1 See, amongst the latest opinions voiced on this issue, the Final Report of the High Level Forum on Capital Markets Union, June 2020, available at: https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en.

Notwithstanding the above, in recent times various "exercises" in cross-sectoriality seem to find their way through the vast landscapes of EU Financial Legislation. A good example of this is the PRIIPs regulation, which is actually one of the first, clear attempts of the EU Legislator to introduce a set of truly cross-sectoral rules, overcoming the silos approach.[2] However, without attempting to reduce the importance or the relevance of the PRIIPs regulation, the scope of the latter, and its impact on the global structure of EU Financial Legislation is, at least in our view, marginal: first of all, because the PRIIPs regulation only tackles specific issues of disclosure and transparency and is not a truly comprehensive piece of legislation; second, because it does not substitute pre-existing sectoral rules in the fields where it applies, but rather applies in addition to those rules.[3] Also the regulation of conglomerates, and of qualified holdings in financial intermediaries, shows, for instance, some signs of the intention to go beyond sectoriality.[4]

However, sometimes, sectoriality may be the surface that conceals a slightly different reality, because certain principles, rules or standards have the capacity to circulate across different fields of EU Financial Legislation, thus challenging the cross-sectoral approach and introducing a *de facto* level-playing field between different silos. This leads to a reduction in sectoral differences, which are, in part, narrowed down, without however being entirely overwhelmed. There are several examples of this in recent EU Financial Legislation: one of the most interesting, also because of its recent evolutions, is that of remuneration policies. The standard, basic principles of remuneration policies were first established in the context of EU Banking Legislation (lastly, the CRD IV package),[5] as such applicable to credit institutions and to investment

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2 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.

3 Art. 3(1) sets out that where PRIIPs manufacturers are also subject to Prospectus regulation, both shall apply. Also, although investment funds meet the definition of PRIIPs, the UCITS Directive (2009/65/EC) contains a requirement for Key Investor Information Documents (KIID) which are similar to those of KIDs under the PRIIPs regulation. For this reason, the regulation sets out a transitional period during which they are exempt from its terms (see art. 32(1)), recently prolonged the until 2022 (see Commission Delegated Regulation (EU) 2019/1866 of July 3, 2019).

4 Directive 2002/87/EC of December 16, 2002.

5 The so-called CRD IV package notoriously includes Directive 2013/36/EU (CRD IV), and Regulation (EU) No 575/2013 (CRR). On 7 June 2019, Directive (EU) 2019/878 amending Directive 2013/36/EU (CRD V), and Regulation (EU) 2019/876 amending Regulation (EU) No 575/2013 (CRR2) were published in the Official Journal of the European Union. The new legislation entered into force on 27 June 2019 and Member States will have until 28 December 2020 to amend their local CRD remuneration rules in order to reflect the CRD V provisions. Changes to the remuneration provisions under CRR II will take effect in June 2021.

firms;[6] the same principles were subsequently transplanted, albeit with several adaptations, in the context of investment funds regulation, and, ultimately, in that of insurance undertakings.[7] A similar, albeit less evident, case is that of corporate governance rules introduced across different areas of the financial sector, where strong cross-sectoral distinction remained, not always justifiable.[8]

One of the most striking examples of the phenomenon that sees the circulation of principles, standards and rules across different sectors, is the entire body of conduct of business rules originally elaborated in the context of the regulation of investment services by the Investment Services Directive of 1993, and, lastly, by MiFID I and MiFID II. Those rules, the nucleus of which originated in the ISD Directive of 1993, have gradually become the standard-setter in the area of investor and consumer protection, providing a benchmark across different sectors: investment funds, insurance products, banking legislation, as is evident from the latest evolutions. The particular feature of this phenomenon is that it is contributing to the definition of an overreaching, general charter of the protection of consumers/ investors in the broad context of EU Financial legislation.

3. ISD Directive

Regulating financial services and providing investors' protection through conduct of business rules has not always been the typical approach followed in

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[6] Art. 74(1) CRD IV requires credit institutions to have in place a remuneration policy for all staff, which should comply with arts. 92 to 96 CRD IV and EBA Guidelines on sound remuneration policies. Remuneration requirements aim to ensure that remuneration policies are consistent with and promote sound risk management, do not encourage risk-taking and are aligned with long-term interests of the institutions. Investment firms are also subject to the regime applicable to credit institutions, to which arts. 9(3)(c) MiFID II and 27 of Regulation (EU) 2017/565 add specific requirements for persons involved in the provisions of services to clients. New, quite interesting provisions on remuneration were recently introduced by CRD V, where one of the most innovative features is the classification of investment firms into three different layers, thus allowing for a more proportionate approach, that considers the specificities of different types of entities and their effective risk profile.

[7] In relation to investment funds, the core rules on remuneration are to be found in arts. 14a and 14b of the UCITS Directive, and in art. 13 of the AIFMD. For insurance undertakings, the core rules are to be found in art. 275 of the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance (Solvency II Regulation). On remuneration in different sectors see Ferrarini, G., Siri, M., *A cross-sectoral analysis of Remuneration Policy Provisions*, in *European Financial Regulation: Levelling the Cross-Sectoral Playing Field*, ed. by V. Colaert, D. Busch, T. Incalza, Oxford, 2019, 201 ff.

[8] See Vos, T., Morbee, K., Cools, S., Wyckaert, M., *A Cross-Sectoral Analysis of Corporate Governance Provisions. About Forests and Trees*, in *European Financial Regulation,* cit., 161 ff.

the context of EU Financial legislation. The principles that, originally, shaped its evolution were totally regardless of conduct rules. The main body of EU Financial legislation, in its original setting, was basically concerned with two aspects: transparency, and prudential regulation, the first to be typically found in the area of capital markets regulation; the second, in the context of banking legislation. For example, in relation to banks, a quick look at the nature, and contents, of the First and Second Banking Directives – i.e. the Directives that originally forged the face of EU Banking laws up to the post-crisis reforms – clearly shows an approach that is indifferent towards the regulation of conduct, whereby prudential regulation is seen as the prevailing approach to the protection of the financial system and, thereby, of consumers of banking products and services.[9] This is still, actually, a core trait of EU Banking legislation even after the Financial Crisis: for example, in the context of the Single Supervisory Mechanism, the European Central Bank is entrusted with an articulated number of powers and competences, that are identified by art. 4 of Regulation 1024/2013 (the "Single Supervisory Mechanism Regulation" or "SSMR"). The latter may be seen as a compound of everything that typically falls in the perimeter of prudential regulation (and, consequently, supervision): capital requirements, risk management, internal controls, corporate governance, safe and sound internal management, etc. Albeit the boundaries of art. 4 may ultimately turn out to be not so clear as they might seem at first sight,[10] it is significant that, for example, consumer protection is one of the only two topics that are explicitly set out, by art. 4, para. 1, of the SSMR, as falling outside the scope of the ECB's Supervision on credit institutions.[11] Only in what we would respectfully call "minor areas" of EU Banking legislation has a different approach been followed: for example, in the context of consumer credit, where – due to the nature of the transactions, and the typical retail market – EU legislation was more concerned with the need to protect the consumer directly, by setting specific rules in relation to issues such as costs, contracts, transparency,

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[9] What is being said in the text is regardless of the evolution that overtime has seen EU Banking Legislation shifting from a scheme of minimum harmonisation, coupled with mutual recognition, to that of maximum harmonisation, coupled with the system of centralised supervision over credit institutions in the Euro Area.

[10] For further reference, let me allow to revert to Annunziata, F., *European Banking Supervision in the age of the ECB. Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, in *European Business Organization Law Review*, Vol. 21, No 1, January 2020, pp. 545-570.

[11] Even consumer protection and, thereby, conduct of business rules, may indirectly become relevant under the strictly prudential supervisory approach apparently contemplated by art. 4 of the SSMR: those topics, in fact, are sources of risks, and, as such, are relevant from a prudential perspective as well: see Sciarrone Alibrandi, A., Frigeni, C., *Managing Conduct Risk: From Rules to Culture*, in *Governance of Financial Institutions*, ed. by D. Busch, G. Ferrarini, G. Van Solinge, Oxford, 2019, pp. 468-488.

and information.[12] As we shall see, it is therefore not by chance that consumer credit is now one of the areas of EU banking legislation that is most directly affected by the phenomenon that sees the cross-sectoral circulation of MiFID-inspired conduct standards.

On the other hand, also considering EU capital markets legislation, the founding provisions of EU legislation in that area had very little to do with conduct regulation. Actually, for quite a long period of time, EU capital markets legislation was simply following objectives of transparency and proper disclosure, revolving around the regulation of public offerings of securities, and prospectus: the first Prospectus Directive was, indeed, a clear-cut example of a piece of legislation *only* concerned with issues of disclosure and transparency.[13] The same, actually remains true also for the second Directive on prospectus and, ultimately, for the more recent Prospectus Regulation.[14]

Prudential regulation and transparency might eventually combine together: the pioneering first UCITS Directive of 1985 was founded on a mixture of measures clearly inspired by the prudential approach, and by that on transparency. The first gave way to the definition of several rules governing the diversification of the fund's portfolio: investment limitations; composition of the portfolio; concentration, etc. The second approach was represented by the duty to publish a prospectus for the offering of the fund's units to the public.[15] Protection of the investor, in the context of the UCITS Directive, was therefore pursued by imposing specific rules on the allocation of the portfolio of the fund, as well as on its composition, and by submitting the distribution of the fund's units to a specific disclosure regime, basically replicating the prospectus approach.

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[12] Reference should be made to Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers. The Directive does not apply to credit agreements guaranteed by a mortgage, which are regulated by the so-called Mortgage Directive (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property). The Mortgage Directive includes, amongst others, the following provisions: (i) an obligation for lenders to provide clear and detailed information on loan conditions to consumers (art. 11); (ii) an obligation for lenders to assess the creditworthiness of consumers according to common EU standards (art. 18); (iii) common quality standards and business conduct principles for all EU lenders (art. 7).

[13] In 1989 the now repealed Public Offering Directive (Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public) introduced a basic disclosure framework governing offers of securities to the public. Together with the UCITS Directive of 1985, these were truly the outposts of EU Financial Legislation.

[14] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

[15] See arts. 27 to 35 of the UCITS Directive of 1985. Overtime, the prospectus was substituted by the KIID Document, which serves, however the same purposes as those of a prospectus.

It was only with the ISD Directive of 1993[16] that conduct of business rules emerged as a third pivot or, rather, as a third *objective* of EU Financial legislation, alongside transparency and prudential standards. Due to the discussions that surrounded the approval of the Directive, in 1993 the outcome proved to be quite shy, and minimalistic to say the least: as a result, at that time it would have been almost impossible to predict what happened in the following years in this particular area.[17] At that time, conduct regulation could even be, in the eyes of most, an eccentric topic, or, to say the least, a point of minor interest. This was due to a number of reasons: first of all, the ISD Directive was not really perceived, at the time of its enactment, as a truly *major* piece of EU Financial markets legislation. Due to its scope (investment services, and regulated markets) it gave the impression of being an important, but still quite confined, piece of legislation, even raising issues in relation to compliance with the principle of subsidiarity.[18] Also, the incumbency of banks within the European market was supportive to the idea of considering investment services as activities of a secondary importance. Secondly, conduct of business rules were – and still are, actually – quite debatable, at least in some Member States, as to their relationship with the general body of contract or tort law. Therefore, their effective utility, or relevance, could be questioned: at least some of the provisions introduced by the ISD were, in fact, replicating general principles already set out under the general body of private law, as could be found in most Member States. Finally, the cautious approach taken by the Directive on this topic, limited to the establishment of a handful of general principles, made it difficult to grasp its potentials for the future development of EU Financial legislation.

Conduct of business was indeed regulated, in the ISD, with a light touch, as only its art. 11 dealt with that topic, providing only some general standards that, apparently, seemed to be very loose. However, a closer look at art. 11 of the ISD could already have revealed its richness and, thereby, potential evolution. The high-level standards that were consolidated in that provision were, in fact, not the by-product of a distorted mind, but reflected the long-standing tradition and evolution of at least three major legal systems, and specifically the UK, France, and Italy, that had also anticipated, internally, most of the effects that would arise from the implementation of the ISD.[19]

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16 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.

17 During the negotiations, there emerged several divergences between Member States as recounted for by Warren, M.G., *The European Union's Investment Services Directive*, in *University of Pennsylvania Journal of International Business Law*, Vol. 15, 1994, p. 193. As a matter of fact, the topic of conduct of business rules was not even included in the first two proposals by the Commission.

18 Andenas, M., *Rules of Conduct and the Principle of Subsidiarity*, in *Company Lawyer*, Vol. 15, 1994, p. 60.

19 Please allow our reference to Annunziata, F., *Regole di comportamento degli intermediari e riforme dei mercati mobiliari*, Milan, 1993. For a shorter overview of national systems and their evolution over the past 25 years, Della Negra, F., *MiFID II and Private Law*, Oxford, 2019, 49 ff. On conduct of business rules in the wake of the ISD, and on the issue of private remedies, still useful Sartori, F., *Le regole di condotta degli intermediari finanziari. Disciplina e forme di tutela*, Milan, 2004.

Whereby the major standards that form the background of art. 11 arose out of the UK reforms of the late 1980s (the Financial Services Act of 1986), various national traditions provided their contribution to the consolidation of conduct principles in the body of EU law, stemming from the general common law and equity rules on agency relationships, fiduciary duties, rules on *mandat* (art. 1984, French *Code civil*), or *mandato* (art. 1703 Italian Civil Code), general clauses of private law (*bonne foi*/*buona fede*), and – particularly important – the contribution provided by French Courts in relation to the duty of protection to be implied in the relationship between clients and financial intermediaries (*devoir de conseil*).[20] The circulation of models, that could already be seen in art. 11 by following a typical comparatist approach, might have provided some hints as to its importance in the context of the Directive and, more generally, to the further evolution of EU Capital markets legislation.

Art. 11 was, indeed, a provision of minimum harmonization,[21] requiring Member States to adopt internal legislation that would ensure that an investment services provider complied with its high-level principles, i.e.:

– that it acts honestly and fairly in conducting its business activities in the best interests of its clients and the integrity of the market;

– that it acts with due skill, care and diligence, in the best interests of its clients and the integrity of the market;

– that it has and employs effectively the resources and procedures that are necessary for the proper performance of its business activities;

– that it seeks from its clients information regarding their financial situations, investment experience and objectives as regards the services requested;

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[20] Not limited, by the way, to strictly financial investments: see Attard, J., *Du champ d'application du devoir de conseil du banquier*, in *Revue trimestrielle de droit commercial*, No 1, 2011, p. 11.

[21] Della Negra, *MiFID II and Private Law*, cit., p. 10, points out that, amongst other elements, in the ISD the broker-dealer business model, prevalent in continental Europe, was eventually reflected in the directive. Investment advice was not included among the investment services (contrary to the view of the UK and the Commission), but among the 'non-core services', which were not pass-portable. This observation is functional to the development of the thesis of the Author according to which, when investment advice is provided, private law remedies should not only be recognised under the MiFID regime, but the consequence of the breach of the rules should be harsher, leading to the nullity of the contract. Advice began to emerge as a significant topic with MiFID I, when it was finally attracted in the list of investment services. Now, in the context of MiFID II, investment advice is probably the more intensely regulated investment service, creating a somewhat kaleidoscopic effect. On investment advice see the interesting report by Gentile, M., Linciano, N., Soccorso, P., *Financial Advice Seeking, Financial Knowledge and Overconfidence. Evidence from the Italian Market*, Quaderni di Finanza Consob, No 83, March 2016.

– that it makes adequate disclosure of relevant material information in its dealings with its clients;

– that it tries to avoid conflicts of interests and, when they cannot be avoided, ensures that its clients are fairly treated, and

– that it complies with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of its clients and the integrity of the market.

Depending on the body of general private law applicable, in the Member States, to the different kinds of relationships between intermediaries and clients (portfolio management; broker-dealer; placement, etc.), and to the evolution of the system in terms of precedents, legal doctrine, on-the-ground enforcement by supervisors, the impact of art. 11, upon implementation, could therefore be more, or less, significant:[22] substantially reiterative of rules already embedded in the system, or more innovative.[23] In certain countries, the ISD had also been anticipated by internal, overreaching reforms (the UK, Italy, France), whereby the ISD truly had a much lighter impact. Its relationship with pre-existing legislation also remained controversial: if principles analogous to those set out by art. 11 could already be found in the national legal system, under the general body of contract and private law, then what benefit could art. 11 provide? If, on the contrary, art. 11 did introduce new principles, would that also imply the private enforceability of conduct of business rules, or would those rules remain confined within the boundaries of public and administrative law (an issue, the latter, that has not been solved yet)?[24] Finally, under the ISD, conduct of business rules remained within the competence of host member States, thus increasing the risk of fragmentation and lack of harmonization[25] in this field.[26]

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[22] Wymeersch, E., *The Implementation of the ISD and CAD in National Legal Systems*, in *European Securities Markets. The Investment Services Directive and Beyond*, ed. by G. Ferrarini, London-Den Haag-Boston, 1998, p. 40.

[23] On the modest impact, in some cases, of the implementation of the ISD see Cruickshank, C., *Is there a Need to Harmonise Conduct of Business Rules?*, in *European Securities Markets*, cit., p. 132.

[24] See Della Negra, *MiFID II and Private Law*, cit., 173 ff.

[25] The ISD was also quite loose in identifying and defining the various investment services, thus leaving space for considerable discretion upon member States. See, as an example of the consequence of this approach, case C-356/00, *Testa, Lazzeri and Commissione Nazionale per le Società e la Borsa (Consob)*, ECLI:EU:C:2002:703.

[26] Andenas, *Rules of conduct*, cit., 60.

4. *MiFID I*

Art. 11, with all its ambiguities, was a seed that contained most of the developments that were due to foster further harmonization,[27] and destined to flourish in the context of MiFID I.[28] The general principles formulated therein germinated into a comprehensive body of conduct of business rules that truly shaped the face of MiFID I. Also the impact of MiFID I on the legislation of the Member States proved to be different, in relation to the development that internal legislation had reached at the time: some States had, in fact, transposed art. 11 quite comprehensively, and MiFID I was the stimulus to harmonize internal legislation to the standards required by the Directive, rather than to introduce entirely new rules and concepts.[29]

MiFID I was undoubtedly a huge step forward, as compared to the ISD, thereby giving birth to an analytical body of EU conduct of business rules in the field of investment services.[30] The main features of the MiFID I regime, *vis-à-vis* that of the ISD, are to be seen in its more extensive, and detailed approach, that effectively contributed to the setting of a common standard within the EU in relation to conduct of business standards: a confirmation of this may be found, for example, looking at the analytical rules provided for by the Directive on topics such as suitability,[31]

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[27] Cf. Köndgen, J., *Rules of Conduct: Further Harmonisation?*, in *European Securities Markets*, cit., 117.

[28] The MiFID I regime at level 1 and 2 consists of: (1) Directive 2004/39/EC of 30 April 2004; (2) Commission Directive 2006/73/EC of 2 September 2006 (MiFID I Implementing Directive); (3) Commission Regulation (EC) No 1287/2006 of 2 September 2006 (MiFID I Implementing Regulation). On MiFID I see *ex multis* Ferran, E., *Building an EU Securities Market*, Cambridge, 2004; *Investor protection in Europe: corporate law making, the MiFID and beyond*, ed. by G. Ferrarini, E. Wymeersch, Oxford, 2006; Moloney, N., *How to Protect Investors. Lessons from the EC and the UK*, Cambridge, 2010.

[29] On the Italian system after MiFID I see, amongst others, Maggiolo, M., *Servizi ed attività di investimento, Prestatori e prestazione*, in *Trattato di diritto civile e commerciale*, previously directed by A. Cicu, F. Messineo, L. Mengoni, continued by P. Schlesinger, Milan, 2012.

[30] On the rationale behind regulating of conduct of business cf. Tuch, A., *Conduct of Business Regulation*, in *The Oxford Handbook of Financial Regulation*, ed. by N. Moloney, E. Ferran, J. Payne, Oxford, 2015, p. 557.

[31] Under art. 19(4) MiFID I, if an investment firm provides investment advice or portfolio management, it should apply the suitability assessment. Where the service is provided to retail clients, the test requires firms not only to obtain information about clients' knowledge, experience and risk tolerance (so-called appropriateness assessment) but also about the financial situation and investment objectives (see arts. 35(3)-(4)-(5) MiFID I Implementing Directive). As regards professional clients, an investment firm is entitled to assume that the client has the required knowledge and experience, and, only when providing investment advice, is financially able to bear the losses. However, information still needs to be collected over the clients' risk tolerance and investment objectives (see arts. 35(1)(a) and 35(4) MiFID I Implementing Directive). On suitability, see, amongst other, Imbruglia, D., *La regola di adeguatezza e il contratto*, Milan, 2017.

conflicts of interests,[32] best execution,[33] inducements[34] and – naturally – information and transparency.[35] It should be noted that most of these rules introduced by MiFID I (including suitability)[36] were, in fact, already implied in art. 11 of the ISD, although with a more high-level approach: MiFID I, therefore, did not really introduce new concepts, but built, upon the standards of the ISD, a comprehensive harmonized approach.[37] This common set not just of principles, but of tendentially precise (if not at all self-executing) rules contained in MiFID I was essential in order to provide the proper basis for the process of expansion, and circulation, of MiFID standards in other sectors of EU Financial Legislation.

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[32] Arts. 13(3) and 18 MiFID I, and arts. 21-25 MiFID I Implementing Directive. See extensively Grundmann, S., Hacker, P., *Conflicts of interests*, in *Regulation of the EU Financial Markets: MiFID II and MiFIR*, ed. by D. Busch, G. Ferrarini, Oxford, 2017, pp. 165-204.

[33] Art. 21 MiFID I and arts. 44 and 46 MiFID I Implementing Directive set out the requirements for investment firms that provide the service of executing orders on behalf of clients for MiFID financial instruments and, indirectly via art. 45(7), for investment firms that provide the service of portfolio management, when executing decisions to deal on behalf of client portfolios. Art. 45 MiFID I Implementing Directive sets out the requirements for (i) investment firms that provide the service of reception and transmission of orders, when transmitting orders to other entities for execution and (ii) investment firms that provide the service of portfolio management, when placing orders with other entities for execution that result from decisions to deal in financial instruments on behalf of client portfolios.

[34] In MiFID I the provisions on inducements are to be seen as a specific application of the general duty of loyalty (see art. 24(1) MiFID I).

[35] Under art. 19(2) MiFID I, the information and the marketing communications addressed by an investment firm to clients or potential clients for whom it provides investment services must be fair, clear and not misleading. Art. 19(3) MiFID I adds information obligations in relation to the investment firm and its services, financial instruments and proposed investment strategies, execution venues, costs and associated charges. Also, a number of conditions must be fulfilled where information is provided to retail clients (see arts. 27(2) and 27(6) MiFID I Implementing Directive). Under MiFID I, the information obligations did not apply to eligible counterparties.

[36] In the context of art. 11, ISD, suitability could be clearly read in between the lines of the duty to seek from clients information regarding their financial situations, investment experience and objectives as regards the services requested, and, also by looking at the evolution achieved by national legal systems (again, the UK, France and Italy) before the Directive was approved. On the contrary, see F. Della Negra, *MiFID II and Private Law*, cit., 32, who notes that "The key innovation of MiFID I was the introduction of the suitability and appropriateness requirements".

[37] A partial exception concerns inducements, that stand out as an autonomous set of rules in MiFID I, regardless of whether they also imply a situation of conflicts of interest. On inducements see Silverentand, L., Sprecher, J., Simons, L., *Inducements*, in *Regulation of the EU Financial Markets*, cit., p. 205; Perrone, A., *Tanto rumore per nulla? Per un ripensamento della disciplina sugli inducements*, in *Banca Borsa Titoli di Credito*, Vol. 69, No 2, 2016, p. 129.

5. *MiFID II*

MiFID II and MiFIR, in force since January 2018, are just the peaks of a wide package of normative measures, that build on the pre-existing MiFID I rules, enlarging and deepening their scope.[38] MiFID II, with its plethora of L2 measures, and a huge body of soft law developed by ESMA, is a typical example of the post-Financial Crisis EU legislation: highly complex, interconnected at different levels with other silos, often very technical and difficult to grasp, and strongly influenced by market failures that emerged in the context of the crisis.[39]

On the whole, it can be stated – without running the risks of gross mistakes – that the MiFID II package carries with it a more comprehensive, analytical and pervasive set of conduct rules, which builds extensively on the basis already formulated by MiFID I. In all of the areas already regulated by MIFID I, with MiFID II rules become more granular and pervasive: investor protection is pursued through an increasing number of precise prescriptions, that cover all the issues involved in the provision of investment services, starting from the pre-contractual phase. Differences in the treatment between professional and retail clients – a core element of the ISD and MiFID I[40] – remain, but tend to slim down, and sometimes disappear entirely: in MiFID II, the gap between the two categories of investors, in terms of protection, narrows down in unprecedented terms. The MiFID II package intensifies the overall duty to act in the best interest of the clients, which was already a trait of MiFID I, and of the ISD.[41] However, MIFID II *still* does not deal with the topic of the civil law consequences of the breach of conduct of business rules.[42]

The comprehensive approach of MiFID II to the topic of conduct of business rules is evident in relation to all the potentially relevant areas: starting from the formation of the contract, to its execution, and the subsequent phases. In brief, with regard to the pre-contractual phase, investor protection is mainly pursued

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[38] The MiFID II regime at L1 is composed of Directive 2014/65/EU of 15 May 2014 (MiFID II), and Regulation (EU) No 600/2014 of 15 May 2014 (MiFIR). L2 is articulated in a considerable number of texts, that it is not convenient to cite here.

[39] See Moloney, N., *EU Securities and Financial Markets Regulation*, 3rd ed., Oxford, 2014, p. 35.

[40] Kruithof, M., Van Gerven, W., *A Differentiated Approach to Client Protection: The Example of MiFID*, Financial Law Institute, Working Paper 2010/07, 2010, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622682 (last accessed 10 September 2020).

[41] 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, 485 ff., where the two Authors discuss the limits of that principle within the law in action.

[42] Cf. Della Negra, *MiFID II and Private Law*, cit., 13 ff; 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. 515.

through rules on transparency and disclosure.[43] This is a topic which is certainly not new, but MiFID II affects it, by increasing the quantity and, above all, the quality of the information to be provided to the investor in the phase that precedes the execution of the contract (or, in the case of so-called framework contracts, the granting of an order). In this context, the accent also falls on the transparency of the costs of the services provided. The reference standard adopted by MiFID II in this field is much more pervasive than the previous one: the aim is to achieve total transparency on the costs of services which must be ensured *ex-ante*, in a single as well as aggregate manner. Costs, both in absolute values and in relation to the percentage invested, must be disclosed to the client, taking into account the expected duration and time-frame of the investment. This makes it possible to appreciate the overall costs that are levied on the amount invested, also taking into account implicit elements, or costs referred to the "underlying" of the investment itself (consider, for example, a portfolio management service that invests in funds units). Naturally, in the disclosure of costs, inducements are also included. In the event that the offer relates to services offered in combination with each other, transparency is also intended to ensure that the investor is aware of the cost components that refer to each of the services considered.

The phase of the *execution* of the contract sees a considerable extension of the requisite of the written form, already introduced by the ISD, and confirmed by MiFID I. Written form is now required for the provision of all investment services, as well as for ancillary services (although, in the latter case, with some exceptions): a derogation concerns investment advice that does not include the provision of a periodic suitability assessment, as this service is excluded from the general written requirement. Furthermore, written form is now also essential for contracts executed with professional clients. Waivers left in the hands of national law or supervisors are, in this area, quite limited. Without prejudice to the foregoing, MiFID II goes even further and, for the first time, sets out not only formal requirements, but also prohibitions on the execution of certain contracts: art. 16, para. 10, MiFID II, provides that "[a]*n investment firm shall not conclude title transfer financial collateral arrangements with retail clients for the purpose of securing or covering present or future, actual or contingent or prospective obligations of clients.*".

Inducements have already been mentioned with regards to transparency rules. Overtime, the conditions that justify, in the context of the carrying out of investment services, the perception (or disbursement) of inducements have become more restrictive.[44] In particular, without effectively changing the

[43] With specific regard to the selling of structured products see SCHAEKEN WILLEMAERS, G., *Client protection on European financial markets - from inform your client to know your product and beyond: an assessment of the PRIIPs Regulation, MiFID II/MiFIR and IMD 2*, in *Revue Trimestrielle de Droit Financier*, Vol. 4, No 4, 2014, pp. 1-32.

[44] See SILVERENTAND, SPRECHER, SIMONS, *Inducements*, cit., 205; PERRONE, *Tanto rumore per nulla?*, cit., 129 ff.; BUSCH, D., *MiFID II: Stricter conduct of business rules for investment firms*, in *Capital Markets Law Journal*, Vol. 12, No 3, July 2017, 340 ff.

requisites for inducements already foreseen in the context of MiFID I, MiFID II strengthens those that concern the increase in the quality of the services rendered, which, as is known, must be met as the very condition of admissibility of inducements. In fact, and according to the already consolidated formula, incentives, under art. 24, para. 9 MiFID II, are now allowed on condition that "*(a) is designed to enhance the quality of the relevant service to the client; and (b) does not impair compliance with the investment firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients."*. According to art. 24, para. 13, of the Directive, it is up to the Commission to issue detailed rules to identify the incentives allowed: the latter are to be found in the Delegated Directive (EU) 2017/593, specifically in arts. 11 ff. Providing an advisory service, on an ancillary or instrumental basis to another service, is no longer *per se* sufficient to justify the perception of inducement. In essence, the payment and/or the perception of incentives, post-MiFID II, is subject to more stringent requirements: this element, if combined with what has already been observed with regard to cost transparency, and the rules that apply to independent advice, may be read in the sense of a clear favor of the European legislator for a specific model of service connoted, on the one hand, by the absence of incentives (if not to a negligible extent) and, on the other, by the intermediary acting according to parameters of neutrality and independence.

The matter of conflicts of interest is another area where investor protection rules have been elaborated, since the ISD. MiFID II confirms the approach taken in that area by MiFID I, but at the same time introduces elements of discontinuity.[45] The general rule remains the same: conflicts must firstly be identified and, secondly, managed in order to avoid risking that they might be detrimental to customers. Disclosure remains, in the new system, a residual measure, to be used when organizational measures are not such as to ensure, with reasonable certainty, that the risk of severely damaging customers is avoided. Against this background, MiFID II now clearly states that conflicts must be not only identified and managed, but – as far as possible – avoided. Thus, in MiFID II one sees the return of a rule that – formulated in the context prior to MiFID I – had disappeared from the system, although, probably, it should have been considered immanent: the mere fact of its (renewed) exploitation is, however, significant.

Another element that shows the tendency of MiFID II towards a more stringent impact on conflicts of interest is the provision of analytical rules for the management and prevention of conflicts in particular cases: in this regard, the new provisions are quite specific in relation to advisory and placement services.[46] From those provisions – which it is not appropriate here neither to recall, nor to comment analytically – one can grasp the drastic reduction in the areas of autonomy that MiFID I still left to intermediaries in the matter of conflicts

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45 On the issue of conflicts of interest in MiFID II see GRUNDMANN, HACKER, *Conflicts of Interest*, cit., p. 165.

46 See art. 40 Commission Delegated Regulation (EU) 565/2017 as regards advisory services and arts. 38-39-40 of the same Regulation as regards placement services.

of interest: the legislator, in fact, now intervenes directly with analytical and punctual provisions, in order to regulate a process (that of identification and management of conflicts) that is no longer left to the autonomy of investment services providers. And, in the background there looms the already mentioned, and newly-clarified obligation to reduce the risk or even to avoid conflicts of interest.

Suitability (in one with its "minor sister", represented by the rule of appropriateness) has always been one of the key rules of the MiFID system. MiFID II, in continuity with the previous Directive, keeps both rules, so to speak, at the center of its system of investor protection, but once again articulates them in greater depth. The innovations are mainly two: on the one hand, among the information that is required for profiling investors, also risk tolerance and the capacity to bear losses are now foreseen, and are added to the other elements already covered by the previous legislation (experience, knowledge, financial situation, investment objectives). The general rule on suitability is enriched with specific rules that apply (once again) to investment advice. The strict requirements relating to advice given in relation to switch transactions are to be singled out: under art. 54, para. 11, Regulation no. 565/2017, "*investment firms shall collect the necessary information on the client's existing investments and the recommended new investments and shall undertake an analysis of the costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs*".

Suitability and appropriateness, notwithstanding the fact that MiFID II keeps them at the center of gravity of its investors' protection system, have – however – shown obvious limits, and have not been able to avoid evident cases of mis-selling. The limitation of those two rules, in fact, lies in the fact that they are concentrated in the phase, so to speak, terminal of the process by virtue of which a product or service is conveyed to investors; their accent falls, above all, on the role of the distributor of the product, and have not been sufficient to prevent cases of abuse. One of the most important interventions of MiFID II is, in this context, the introduction of new, complex rules on product governance.[47] Rules on product governance anticipate investor protection to the phase that precedes distribution: instruments and products must, in fact, be designed and structured according to the characteristics of a certain target market, thus reducing the risk that rules aimed at governing the mere distribution phase turn out to be insufficient. According to art. 16, para. 3, MiFID II, investment firms that produce financial instruments to be offered for sale to customers (the "manufacturers") must therefore adopt a process which, for each financial instrument, identifies the

[47] See Busch, D., *Product Governance and Product Intervention under MiFID II/MiFIR*, in *Regulation of the EU Financial Markets*, cit., 123 ff.; Silverentand, L., *MiFID II-Product Governance*, in *Tijdschrift voor Financieel Recht*, No 3, 2015, 63 ff.; Marcacci, A., *European Regulatory Private Law Going Global? The Case of Product Governance*, in *European Business Organization Law Review*, Vol. 18, No 2, July 2017, 305 ff.; Schaeken Willemaers, *Client protection on European financial markets*, cit., 11 ff.

target customers to whom the instrument may addressed. Manufacturers must ensure that the distribution of the product takes place within the reference market identified from time to time. Distributors are, in turn, required to perform a similar analysis which, on the basis of the indications received by the manufacturer, considers products in the light of the needs of the target customers, in order to ensure that they are offered or recommended when this is in the interests of the clients.

If properly applied, product governance might effectively help reduce the risk of opportunistic behavior, and of mis-selling practices. However, the new regime may not be sufficient, and more drastic measures may be necessary. MiFID II thus assigns to the Supervisory Authorities powers of genuine product intervention, as a result of which certain products may be banned *tout court*, or become subject to standards and requirements defined by the Supervisors. The powers of intervention are configured by MiFID II as exceptional: their exercise is subject to the recurrence of the reasons set forth in art. 42, para. 2, MiFIR. In fact, just a few weeks after the new system came into force, ESMA applied these provisions, setting out limitations and bans (for now, of a temporary duration) to binary options and "CFD" contracts in respect of retail clients. Product intervention is the terminal point, so to speak, of the complex system of rules and supervision that revolves around the distribution phase. The use of such extreme powers constitutes an acknowledgment of market failure and, at the same time, of the latent impotency of more traditional forms of investor protection. It also stresses the tendentially paternalistic approach, which was already implicit in most of the conduct of business rules already introduced by the ISD and MiFID I.[48]

6. Adapting MiFID conduct of business rules

Having briefly sketched – not without evident shortfalls, due to the need to privilege shortness – the landscape of the fundamental conduct of business rules in the context of MiFID II, it is now the time to consider how those rules have, in fact, become the template for the protection of end-users of services and product in EU Financial Law. This phenomenon took place basically because of two competing sets of forces: the first are *centripetal*, the second are *centrifugal*. Under its centripetal forces, MiFID has attracted within its perimeter, and scope, new topics. Under its centrifugal forces, MiFID conduct of business rules have expanded beyond its boundaries, thus contributing to the setting of a common standard for the protection of the investor and end-user in the financial sector. In addition to its centripetal and centrifugal forces, MiFID standards are also

[48] See, for several critical elements, and also proposals for reforming the MiFID II regime on these aspects, Colaert, V., *Product Governance: Paternalism Outsourced to Financial Institutions?*, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455413 (last accessed 10 September 2020).

expanding as a consequence of what we shall call a "claw-back" effect. The following paragraphs will be devoted to a brief overwiew of how these different forces operate in the context of post-MiFID II EU Financial Legislation.

6.1. Centripetal forces

Strong centripetal forces are clearly at work in MiFID II: in fact, with MiFID II, the scope of the MiFID regime has become wider, as the Directive has incorporated topics and matters that used to be outside the original scope of the regulation of investment services and activities.

The centripetal energy of MiFID II has various consequences, but the most important for our purposes here is that MiFID conduct of business rules now apply to matters that were either traditionally within different silos of EU financial legislation, or, even, entirely out of its scope. Two particular interesting cases may be singled out in this respect: the first is the approach taken by MiFID II on emissions allowances; the second is the treatment of structured deposits.

Emissions allowances are a striking example of how far MiFID standards might reach when its strong centripetal forces are at play. MiFID II, in fact, now considers and classifies emissions allowance *as such* as financial instruments: a new, specific item has been added to the relative list, clearly set out in Annex I to the Directive.[49] Whereby, according to MiFID I, emissions allowances might be included in the scope of the Directive assuming that they are the underlying asset of a derivative having a financial nature,[50] in MiFID II those allowances are, nowadays, in fact relevant *per se.* This approach marks a significant advance of capital markets legislation in the territories proper to non-financial activities, which is, in itself, worth noting. If, in the past, one could even look with astonishment at the phenomenon – resulting from international environmental regulation and, first of all, from the Kyoto Protocol – of the "negotiability" of the atmosphere (*recte*: of CO2 emissions rights),[51] with MiFID I the question had found a first arrangement by virtue of the broad notion of derivative instruments: a derivative on emissions allowances – if it possessed certain indexes of a financial nature – would, in fact, be classified as a financial instrument (and, in particular, as an "exotic" derivative). The evolution that occurred in MiFID II is, however, more radical: emissions allowances, which in themselves have – at least apparently – no financial element at all, are also now included in the category of financial instruments. The

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[49] MiFID II establishes emission allowances as a distinct category of financial instruments under point (11) of Section C of Annex I of that directive.

[50] See Annex 1 of MiFID I, Section C, n. 10.

[51] See, amongst many, Stowell, D., *Climate Trading. Development of Greenhouse Gas Market*, New York, 2005; Hahn, R.-W., Hester, G.-L., *Marketable Permits: Lessons for Theory and Practice*, in *Ecology Law Quarterly*, No 16, 1989, 361 ff.; Tietenberg, T., *Emissions Trading Programs*, Aldershot, 2001; Dudek, D.J., Palmisano, J., *Emissions Trading: Why is this Thoroughbred Hobbled*, in *Columbia Journal of Environmental Law*, Vol. 13, No 2, 1988, 217 ff.

reason for this seems to lie in the characteristics that, overtime, markets for trading of emission allowances have developed, whereby the latter have become more organized, performing liquidity and price discovery functions similar to those of the trading venues typical of the financial sector. Probably, and considering the positions expressed by the Commission in 2014, the true reason behind the new approach also lies in the need to apply, to the trading of emissions allowances, the market abuse regime.[52] The consequences are, however, noteworthy, as the centripetal force of MiFID II leads to it covering topics that, a few years ago, nobody would have conceived as being relevant for, or even of interest to capital markets legislation, and, naturally, conduct of business rules, being the cornerstone of MiFID II, will now apply to all services provided by intermediaries dealing in those peculiar assets.[53]

Also, the case of structured deposits is quite interesting. According to art. 4, para. 1, point (43), MiFID II, 'structured deposit' means a deposit as defined in point (3) of art. 2, para. 1, MiFID II which is "*fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as: (a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor; (b) a financial instrument or combination of financial instruments; (c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or (d) a foreign exchange rate or combination of foreign exchange rates*".[54] They are included in the scope of MiFID II not in their entirety, but only in relation to the application of the main conduct of business rules: this means, in practice, that structured deposits remain a typically banking product, falling within the scope of activity of credit institutions; however, as they imply the need for additional protection

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[52] See in this regard MiFID I Review Consultation, 42, where the EU Commission outlined that the carbon market "brings together not only large industrial players with requisite capacity and expertise in the financial field or financial firms operating as intermediaries and proprietary investors but also smaller compliance buyers, including SMEs, currently with relatively limited exposure to the financial markets as a whole". See also Recital No 11, MiFID II: "A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading scheme, set up by Directive 2003/87/EC of the European Parliament and of the Council […] In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Regulation (EU) No 600/2014 of the European Parliament and of the Council by classifying them as financial instruments".

[53] The point raised in the text still needs to be explored properly, assuming that the market moves in a direction that makes such a line of reasoning effectively useful. Reference is made to the fact that, since emission allowances are now *per se* financial instruments, any investment service provided in relation to those allowances will have to comply with the standards set out in MiFID II (assuming, naturally, that all other conditions are met, and that there are no cases for exemptions).

[54] Lieverse, K., *The Scope of MiFID II*, in *Regulation of The EU Financial Markets*, cit., 36 ff.

of the customer, their distribution is subject to MiFID standards.[55] The MiFID II package thus attracts, and brings within its scope – and, in particular, in the scope of conduct of business rules – items pertaining to other silos of EU financial legislations: in this case, naturally, banking.[56]

Another area where centripetal forces are clearly operating in MiFID II is that of ancillary services. Typically, ancillary services (listed in Section B of the Annex to the Directive), are outside the scope of MiFID legislation: they are not subject to licensing on the basis of MiFID, and they can be provided by non-MiFID entities. However, when those ancillary services are provided by entities subject to MiFID, conduct of business rules shall, in general, apply: the generical reference to the "services" provided by the entity, that can be found in most MiFID provisions on conduct of business standards, leads to this result.[57]

6.2. Centrifugal forces

Strong centrifugal forces are also at work in MiFID II, in the context of conduct of business rules, because standards and rules originally born in the MiFID milieu and context, designed for the protection of investors in the context of the provision of investment services, have been transposed, and therefore circulate, in other silos of EU Financial Legislation.

To cite the most evident cases, reference must be made, first of all, to product governance rules. Firstly inserted in the context of MIFID II, they have been extended to the insurance sector, and to the banking sector, whereby the idea of developing rules on product governance was born in the context of joint positions taken – by EBA, ESMA and EIOPA[58] – in the aftermaths of the very serious cases of mis-selling of financial products (not just of an investment type)

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[55] Structured deposits were therefore included into the scope of MiFID II because they present features similar to investment products (see Recital 39 MiFID II). However, MiFID II does not apply as a whole to structured deposits. Instead art. 1(4) of the Directive specifies which provisions apply to investment firms and credit institutions when selling or advising clients in relation to structured deposits, in any case on top of the general banking EU and National legislation.

[56] It should be noted that structured deposits are also subject to the PRIIPs Regulation, in coherence with the cross-sectoral approach of the latter.

[57] The fact that conduct of business rules might apply to ancillary services, when they are provided by MFID entities produces a sort of strabismic effect, since – when those same services are provided by non-MiFID entities – conduct of business rules would not apply at all. The consequence of this is that, when the services are provided by regulated entities, that *per se* would provide specific standards of protection to the consumer/investor, more stringent rules apply. On the contrary, ancillary services provided by non-supervised entities are not subject to any control or supervision, nor to a specific standard of conduct.

[58] See the Joint Position of the European Supervisory Authorities on Manufacturers' Product Oversight & Governance Processes, JC-2013-77, available at https://eba.europa.eu/eba-eiopa-and-esma-publish-joint-position-on-product-oversight-and-governance-processes.

that occurred throughout, and before, the Financial Crisis.[59] It was MiFID II that first set the benchmark, by developing a comprehensive set of provisions, targeting both manufacturers and distributors (arts. 9, 16(3), and 24 MiFID II). In 2016, it was the turn of the insurance sector, as similar principles were inserted in the text of the Insurance Distribution Directive (art. 25). In the banking sector, the 2016 EBA Guidelines on product oversight and governance arrangements for retail banking products followed a similar approach.[60] There are, obviously, material differences in the ways in which product governance principles are translated and transplanted across different areas of EU legislation, including the fact that the legal sources that deal with the topic are different in terms of nature, and enforceability. Some of those differences are justified because of the different characteristics of markets, products and end-users; others are, instead, difficult to understand, unless one simply accepts the fact that they are the by-products of negotiating the European texts among all the relevant stakeholders. Various issues of insufficient co-ordination also arise, if one tries to put together different pieces of the puzzle: however, lack of coordination between silos is a wider issue of EU Financial legislation and is not limited to the area of conduct of business rules. As a matter of fact, the common core of product governance rules *do* look pretty close across different sectors, and also their common origin is pretty clear, as they all stem from the approach that firstly MiFID II took in addressing those issue after the Joint position of the three ESAs in 2013. We believe that deficiencies in coordination between similar principles applied in different fields should not lead to the consequence of disregarding the same, common background.

Other relevant areas where the MiFID template of conduct of business rules has circulated in other sectors, include, on the one side, suitability and appropriateness, and, on the other side, conflicts of interests. Both of these topics were already embedded in the scope of investment services regulation under the ISD of 1993. After the ISD, further detailed rules were elaborated, for both of these topics, under MiFID I, and, ultimately, under MiFID II. In the meantime, collective investment management regulation and insurance products regulation also evolved by following a path clearly influenced by MiFID standards.

In relation to collective investment schemes, rules clearly inspired by the MiFID suitability standard were firstly inserted in the context of the amendments

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59 For some considerations, amongst other, on the Spanish case, Zunzunegui, F., *Mis-selling of Preferred Shares to Spanish Retail Clients*, in *Journal of International Banking Law and Regulation*, Vol. 29, No 3, 2014, p. 174.

60 See EBA, *Guidelines on product oversight and governance arrangements for retail banking products* (EBA/GL/2015/18), 15 July 2015, available at https://eba.europa.eu/sites/default/documents/files/documents/10180/1141044/d84c9682-4f0b-493a-af45-acbb79c75bfa/EBA-GL-2015-18%20Final%20report%20on%20Guidelines%20on%20product%20oversight%20and%20governance.pdf.

to the UCITS Directive, and, ultimately, in the AIFMD.[61] Suitability rules for investment funds are now set out in arts. 14(1)(a), (b) and 2(a), (b) of the UCITS Directive[62] and in art. 12 of the AIFMD:[63] MiFID standards are clearly replicated in both texts, albeit the relevant entity to be considered for the suitability assessment is the investment fund, rather than the *individual* investors therein.

Provisions on conflicts of interests, again clearly modeled on MiFID standards, are now to be found both in the context of the latter amendments to the UCITS Directive,[64] as well as in the context of the AIFMD:[65] the approach taken by the two Directives, looks pretty close, because of their common background and rationale, even though differences exist.

Another fundamental rule that was transposed from MiFID to the collective management sector, as a consequence of the centrifugal forces that are at play, is best execution. Again, the origins are clear, and may be traced back to the

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[61] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers.

[62] In the UCITS Directive the topic was inserted in 2009 by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). In particular, Member States are required to draw up rules of conduct which management companies shall observe at all times in order to ensure that they act honestly, fairly, with due skill, care and diligence, in the best interests of the UCITS it manages and the integrity of the market. Commission Directive 2010/43/EU of 1 July 2010 implementing UCITS Directive states out at art. 23(2) that "Member States shall require management companies to establish written policies and procedures on due diligence and implement effective arrangements for ensuring that investment decisions on behalf of the UCITS are carried out in compliance with the objectives, investment strategy and risk limits of the UCITS".

[63] Art. 12(1) AIFMD requires Member States to ensure that AIFMs, in conducting their activities, act with due skill, care and diligence, fairly and in the best interests of the AIFs or the investors of the AIFs they manage. According to art. 18(3) Commission Delegated Regulation (EU) no 231/2013 of 19 December 2012 supplementing AIFMD, "AIFMs shall establish, implement and apply written policies and procedures on due diligence and effective arrangements for ensuring that investment decisions on behalf of the AIFs are carried out in compliance with the objectives, the investment strategy and, where applicable, the risk limits of the AIF".

[64] See arts. 12(1)(b), 14(1)(d) and (2)(c) of Directive 2009/65/EC. Under art. 12(1)(b) UCITS shall be structured and organised in such a way as to minimise the risk of UCITS' or clients' interests being prejudiced by conflict of interests between the company and its clients, between two of its clients, between one of its clients and a UCITS, or between two UCITS. In addition, art. 14(1)(c) requires management companies to try avoiding conflicts of interests and, when they cannot be avoided, to ensure that the UCITS they manage are fairly treated.

[65] See art. 14 AIFMD, that sets out requirements AIFM must observe regarding conflicts of interests. In particular, in addition to the identification of conflict of interests, AIFM are obliged to prevent, manage and monitor conflicts in order to prevent them from adversely affecting the interests of the AIFs and their investors. As part of these obligations, AIFM are obliged to organisationally segregate tasks and responsibilities which may be regarded as incompatible or may generate conflicts of interests.

standards introduced by art. 11 of the ISD, and to the evolution that occurred in MiFID I: the wording of the best execution rule both in the UCTIS Directive, and in the AIFMD, is clearly reminiscent of the MiFID standard.[66]

Even rules on inducements have been extended from MiFID to the context of collective investment management. Art. 29 of Commission Directive 2010/43/EU of 1 July 2010 implementing UCITS Directive states that "Member States shall ensure that management companies are not regarded as acting honestly, fairly and professionally in accordance with the best interests of the UCITS if, in relation to the activities of investment management and administration to the UCITS, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit" other than those mentioned in art. 29(1)(a) – (c). The same provision can be found in art. 24 of Commission delegated Regulation No. 231/2013 of 19 December 2012 supplementing the AIFMD. The centrifugal power of MiFID also had a significant impact on the insurance sector. Directive 2016/97/EU on Insurance Distribution ("IDD") is applicable since 1 October 2018 to a vast group of insurance "distributors".[67] In relation to conduct of business rules, the IDD distinguishes between rules applicable to all insurance products and services, (Chapter V), and those applicable to insurance-based investment products (Chapter VI). It is intuitive that the rules contained in Chapter VI are strongly influenced by MiFID standards, but also the rules applicable to *all* insurance products and services are a by-product of the centrifugal force of MiFID II: for example, the general duty to act honestly, fairly, and professionally in accordance with the best interests of the customer (art. 17 IDD);[68] rules on product oversight and governance (Art. 25 IDD, equivalent to MiFID II organizational rules of Art. 16(3));[69] the duty to provide fair, clear, and not misleading information (art. 1 (2));[70] the duty to identify and manage conflicts of interests (art. 28 IDD *vis-à-vis* art. 23 MIFID II), cross-selling practices,[71]

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66 See arts. 27-28, Commission Delegated Regulation (EU) no 231/2013 of 19 December 2012 supplementing the AIFMD. Similar provisions can be found in arts. 25-26 of the Commission Directive 2010/43/EU of 1 July 2010 implementing the UCITS Directive.

67 Art. 91 MiFID II. The road leading to centrifugal forces being at work from MiFID II to the IDD was paved by the Explanatory Memorandum to the IMD II Proposal, that clearly shows that the process was triggered by the need to elaborate rules for insurance-based investment products based on MiFID II conduct of business rules (Proposal COM (2012) 360 for a Directive of the European Parliament and of the Council on insurance mediation (recast) (3 July 2012) at 11).

68 See art. 24(1) MiFID II.

69 However, the IDD has no separate conduct of business rule on product governance, equivalent to art. 24(2) MiFID II.

70 This provision of the IDD is similar to art. 24(3) MiFID II. As to the differences, it should be noted that the IDD explicitly refers to the Unfair Commercial Practices Directive, whereas MiFID II provision does not.

71 Compare art. 24 IDD with art. 24(11) MiFID II.

albeit with some differences that are clearly visible, but do not modify the overall approach.[72]

Again, there are areas where, notwithstanding the common basic approach, there exist material differences between the IDD and MiFID II, that testify to the fact that, at times, centrifugal forces are weakened by strong, contrasting winds. One area is that of information obligations. The general information obligations of arts. 18 and 20-22 IDD, including the obligation for insurance firms to produce a PRIIPs-like standardized insurance product information document for non-life insurance products, are quite different from the MiFID II information obligations as set out under art. 24(4). They, moreover, set a standard of minimum harmonization only, whereas MiFID II conduct of business rules are generally considered to pursue a stronger, more comprehensive degree of harmonization, coupled with stringent limits to gold plating. Another area is that of the rules set out in art. 19 IDD, that differ from MiFID with respect to inducements and independent advice.[73] However, one should still consider the global picture and, leaving aside those differences, the inspiring principles are, ultimately, the same in MiFID II and in the IDD.

In certain cases, the centrifugal forces of MiFID also end up by producing rules that *look* different, but that, at a closer analysis, may be difficult to distinguish from their original standard. For example, the IDD regulates the so-called "need analysis", on the basis of which insurance distributors must identify, considering information obtained from the customer, the insurance demands and needs of the latter.[74] The need analysis seems to have

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[72] Sometimes these differences are minor and seem the result of inaccuracies; in other cases, they are the result of small additions or deletions. Art. 17(2) IDD for example states that it is "without prejudice to Directive 2005/29/EC". Art. 24(3) MiFID II does not replicate this provision, but the specular solution can be reached by way of interpretation.

[73] While MiFID II only provides some limited exceptions to the ban on inducements (see art. 24(7)-(9) MiFID II), under art. 29(2) IDD insurance intermediaries or insurance undertakings are regarded as fulfilling their obligations if the inducements do not impair the quality of the service and overall compliance with the duty to act honestly, fairly, and professionally in accordance with the best interests of the costumer. Also, as regards independent advice, while MiFID II provides for strict rules for investment firms that inform their clients that they offer "independent advice" (see art. 24(7) MiFID II), under art. 29(3) IDD, Member States may require that where an insurance intermediary informs the client that advice is given independently it should assess a sufficiently wide variety of insurance products. On independent advice in the context of MiFID II see Giudici, P., *Independent Financial Advice*, in *Regulation of the EU Financial Markets*, cit., p. 162.

[74] Art. 20(1) IDD sets out that "Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision".

no equivalent under MiFID, because its subject-matter is not on the risk, or investment profile of the customer, but on his «insurance needs». However, considering insurance-based investment products, one may wonder whether the need analysis is simply another way to describe the suitability test.[75] The point is, nonetheless, controversial, since one may consider that the need analysis typically aims at avoiding a client being over – or under – or inadequately insured: it is, in other words, an assessment that is linked to the insured risk, whereas the suitability test gears the product or service to the qualities and investment objectives of the client.

Other differences are more substantial. Consider, for example, rules on inducements: while MiFID II is based on the assumption that all inducements should be prohibited, and that exceptions should be interpreted narrowly,[76] the IDD sets out that intermediaries receiving the inducements are considered to be "fulfilling their obligations", if inducements do not have a detrimental impact on the quality of the service and do not impair compliance with the duty to act honestly, fairly, and professionally in accordance with the best interests of the customer.[77] Therefore, it is true that the IDD has, in relation to inducements, a lighter touch than MiFID (but this will also depend on how the IDD, as a minimum harmonization Directive is implemented in each Member State): however, the basic principles are the same, and it is *per se* remarkable that bans

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[75] Colaert, V., *MiFID II in relation to other investor protection regulation: picking up the crumbs of a piecemeal approach*, in *Regulation of The EU Financial Markets*, cit., p. 594, cites that the Belgian Financial Services and Markets Authority (FSMA), ruled that an insurance services provider which complies with the MiFID I suitability test can reasonably assume that the product or service in question also meets 'the demands and needs' of that client and therefore complies with the need analysis. According to the FSMA, no separate need analysis should therefore be performed in such circumstances. The Author concludes that "if the FSMA interpretation is correct, and both analyses (the need analysis and the analysis of the objectives of the client under the suitability test) would indeed overlap in this manner, the explicit mentioning in Article 30 §1 IDD that the suitability test for insurance-based investment products is without prejudice to the need analysis of Article 20 §1, would have little meaning".

[76] IDD and MiFID II show differences with respect to the provision of independent advice. MiFID II is quite strict, providing that independent advisors have to assess a sufficiently wide variety of products and need to comply with a particularly enhanced inducements regime. Art. 29(3) IDD is less strict, because Member States do not need to introduce rules regarding 'independent' advice, as this is an optional choice.

[77] See art. 29(2) IDD.

on inducements have been introduced in the traditionally impenetrable insurance market.[78]

In addition to the general conduct of business rules applicable to all insurance products and services, the IDD introduces additional requirements for insurance-based investment products: due to the same nature of those products, these are rules that are very close to MiFID II standards. They include know-your-customer (art. 30 IDD, *vis-à-vis* art. 25(2)-(3) MiFID II), conflicts of interest (arts. 27 and 28 IDD, *vis-à-vis* arts. 16(3) and 23 MiFID II), several, conspicuous information duties, with recurring differences.[79]

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[78] Some Authors have argued that there are major additional differences between the approach taken by the IDD and MiFID II. See, for a comprehensive analysis, Colaert, *MiFID II in relation to other investor protection regulation*, cit., p. 598, who notes that "First, as is clear from the above discussion, the IDD conduct of business rules aim at minimum harmonization, whereas the MiFID II conduct of business rules in principle aim at maximum harmonization. National implementation rules of the IDD conduct of business rules may therefore deviate even more from each other, from IDD, and from the MiFID II framework. Member States may, on the other hand, also use this freedom to align their national conduct of business regime for (certain) insurance products and services to the MiFID II regime. Second, MiFID makes an explicit and well-defined distinction between retail and professional investors, which the IDD does not make. IDD only refers to a Member States' option to loosen certain information requirements in relations with professional clients and empowers the Commission to adopt delegated acts with respect to the KYC requirements, taking into account, among other things, 'the retail or professional nature of the customer or potential customer'". Further references and comparisons in Colaert, V., Incalza, T., *Conflicts of Interest and Inducements in the Financial Sector*, in *European Financial Regulation*, cit., pp. 377 ss.
However, in relation to minimum vs. maximum harmonization, one should consider the fact that this is a somewhat inevitable consequence of the fact that the insurance sector has always been regulated quite differently from financial markets, and therefore the need for a progressive adaptation is greater. On the distinction between retail and professional clients, it is evident that, in MiFID II, the gap between the treatment of the two categories has been significantly reduced. Quite interestingly, V. Colaert, in the contribution cited above, cites that, in a case dealing with the same issue under current Belgian law, the Belgian Constitutional Court held that the fact that insurance services providers, contrary to investment services providers, had no possibility to distinguish between retail and professional clients (and therefore had to comply with the demanding conduct of business regime for retail clients in respect of all customers) was contrary to the constitutional principle of equal treatment (Belgian Constitutional Court, Judgment No 89/2016 (9 June 2016), <http://www.const-court.be/public/n/2016/2016-089n.pdf>). For some reflections on the IDD approach see Busch, D., Colaert, V., Helleringer, G., *An "Assist-Your-Customer Obligation" for the Financial Sector?*, in *European Financial Regulation*, cit., 343 ff.

[79] For example, MiFID II information obligations regarding independent advice have not been replicated in the IDD. Concerning information, MiFID II contemplates an exception for investment services offered as part of a financial product which is already subject to other provisions of Union law relating to credit institutions and consumer credits (art. 24(6) MiFID II). No similar exception is set out in IDD.

Another case is that of cross-selling practices, regulated by MiFID.[80] Similar principles have been transposed in the context of IDD, and in other Directive as well, in particular in the Payments account Directive (PAD) and in the Mortgage Credit Directive (MCD). Sectoral differences persist: for example, whereas MiFID II, IDD, and PAD seem to have a "light touch" on cross-selling practices[81] (there are no specific prohibitions, but only requirements of extra disclosure and risk assessment), the MCD looks more restrictive, since it prohibits tying,[82] although allowing bundling[83] in certain circumstances.[84] Second, the scope of the provisions is different. Whereas MiFID II, IDD, and PAD apply to all kinds of cross-selling practices, the MCD only applies when the practices involve two financial services or products.[85] Risks of misalignment are therefore concrete but,

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80 According to art. 4(1)(42) MiFID II these are "the offering of an investment service together with another service or product as part of a package or as a condition for the same agreement or package".

81 Arts. 12 MCD, 4(3), 5(2), 8 PAD, 24(11) MIFID II and 21 IDD deal with cross-selling practices.

82 This is "the offering or the selling of a credit agreement in a package with other distinct financial products or services where the credit agreement is not made available to the consumer separately" (art. 4(26) MCD).

83 Defined as "the offering or the selling of a credit agreement in a package with other distinct financial products or services where the credit agreement is also made available to the consumer separately but not necessarily on the same terms or conditions as when offered bundled with the ancillary services" (art. 4(27) MCD).

84 In particular, according to art. 12(2) MCD, Member States, notwithstanding art. 12(1), that allows bundling practices but bans tying, may provide that creditors can request the consumer or a family member or close relation of the consumer to (1) open or maintain a payment or a savings account; (2) purchase or keep an investment product or a private pension product or (3) conclude a separate credit agreement in conjunction with a shared-equity credit agreement in order to pool resources to obtain the credit, or to provide additional security for the creditor in the event of default or to accumulate capital to repay the credit. Also, under art. 12(3) Member States may allow tying practices when the creditor can demonstrate the tied products or categories of product offered, on terms and conditions similar to each other, which are not made available separately, result in a clear benefit to the consumers taking due account of the availability and the prices of the relevant products offered on the market. Eventually, Member States may allow creditors to require the consumer to hold a relevant insurance policy related to the credit agreement, while ensuring that the creditor accepts the insurance policy from a supplier different to his preferred supplier where such policy has a level of guarantee equivalent to the one the creditor has proposed.

85 Colaert, *MiFID II in relation to other investor protection regulation*, cit., 609, also points out that, notwithstanding the common background, «there is a "disheartening" carelessness in the use of terminology and in the lack of definitions in most directives». For example, the MCD only defines 'bundling' and 'tying' but does not use the term 'cross-selling practices'. MiFID II defines the term 'cross-selling practices' but does not use the terms 'bundling' and 'tying'. IDD uses the term 'cross-selling practices' without defining it. The PAD does not define any of those terms and uses the (undefined) term 'package'.

again, one should not overlook the fact that bridges are being built across sectors because of the gradual spreading of common principles.[86]

The centrifugal forces of MiFID have even affected banking legislation, especially in the field of consumer credit. The MCD contains specific rules on the provision of advice, tailored on the suitability regime typical of MiFID. For instance, according to art. 7(1) "*in relation to the granting, intermediating or provision of advisory services on credit and, where appropriate, of ancillary services the activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement*":[87] this provision recounts for the clear spreading of the suitability standard in that area.

Finally, it should be noted that suitability and know your customer duties were inserted more recently in the so-called PEPP Regulation, thus confirming that the centrifugal forces stemming from MiFID are still clearly operating throughout the system.[88]

6.3. "Claw back" mechanisms

While centrifugal and centripetal forces are visible in relation to MiFID standards, there is also another mechanism at work that leads to the expansion of those standards outside the strict scope of investment services legislation: this is what we would call a "claw back" mechanism. A "claw back" mechanism is visible when a certain activity, service, or product that clearly falls outside the scope of MiFID or of other EU Legislation that has incorporated MiFID standards: (i) becomes, as a matter of fact, subject to those same standards on a purely factual ground, or (ii) is strongly affected by the MiFID regime.

The most evident manifestation of the claw-back effect is product governance, particularly – because of the relevance of that market in the EU – in the area of collective investment schemes. Collective investment managers as «product manufacturers» are, clearly, outside the scope of MiFID, as they are subject to distinct, and sectoral, EU legislation, whereby neither the UCITS Directive, nor the AIFMD, contain any provision on product governance: collective investment schemes Directive in

86 Because cross-selling may involve products or services falling in the scope of different directives, EBA, ESMA, and EIOPA attempted to define common guidelines (Joint Committee of the European Supervisory Authorities, *Consultation Paper on guidelines for cross-selling practices*, JC/CP/2014/05, 22 December 2014). A consultation paper was launched on 22 December 2014, and guidelines were only issued by ESMA in December 2015.

87 On these issues see Alexander, K., *Bank Civil Liability for Mis-selling and Advice*, in *A Bank's Duty of Care*, ed. by Busch, D., van Dam, C., Oxford, 2017, p. 253.

88 See, for PEPPs, art. 34(4), Regulation 2019/1238 of 20 June 2019 on a pan-European Personal Pension Product (PEPP).

the EU are, therefore, simply insensitive to product governance requirements.[89] However, since many, if not most, fund managers resort to distributors that are within the scope of MiFID, and therefore subject to product governance rules, a claw back mechanism is likely to operate: in order to comply with their own product governance requirements, distributors need to have in place specific agreements and procedures with the manufacturers. This inevitably leads to fund manager being *indirectly* subject by MiFID product governance standards, at least insofar as this is necessary in order to allow MIFID distributors to comply with their own rules. This is generally achieved by way of contract, whereby distribution agreements between fund management companies and distributors contain provisions that regulate various duties that apply in the context of their relationship, so as to ensure compliance by the distributor with product governance.

Suggestions to align UCITS and AIFMD to product governance rules have been set out by ESMA:[90] if, and once, this happens, the claw-back effect of MIFID II will cease in this area but, at the same time, this evolution will demonstrate, once again, the strength of the centrifugal forces that underpin MiFID standards.

A further case of the claw-back effect of MiFID II is that of issuers of securities. When, in the context of an issue of securities, a MiFID entity provides services to the issuer, the latter also is ultimately impacted by product governance rules.[91]

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89 See arts. 24(2), 1(3) and (4) MiFID II and ESMA, *Final Report – ESMA's Technical Advice to the Commission on MiFID II and MiFIR*, (ESMA/2014/1569, 19 December 2014) at 52. However, certain Member States, such as the UK, did apply the product governance rules to non-MiFID manufacturers (see FCA Handbook PROD 3.1.2 R).

90 See ESMA, *Final Report*, cit., 52, para. 9: "ESMA wishes to note that the product governance requirements set out in MiFID II are intended to apply to investment firms authorised under MiFID II. However, it should also be noted that they equally apply to other supervised entities subject to MiFID, such as UCITS management companies and alternative investment fund managers, when such entities are authorised to perform MiFID investment services (pursuant to Article 6(3) of UCITS and Article 6(4) of AIFMD respectively) and only in connection to the performance of such services. Such UCITS management companies and alternative investment fund managers that distribute, or manufacture and distribute UCITS or AIFs to investors will only be directly subject to the requirements applicable to the investment services they provide. ESMA has amended the technical advice to clarify the information distributors should gather in such cases. Going forward ESMA considers that the EC should consider the possibility to align the relevant UCITS and AIFMD articles with the product governance obligations for manufacturers".

91 This is a consequence of the definition of « manufacturer » resulting from art. 9(1) of the Commission Delegated Directive (EU) 2017/593 of 7 April 2016 and of Whereas 15 thereby: «In order to avoid and reduce from an early stage potential risks of failure to comply with investor protection rules, investment firms manufacturing and distributing financial instruments should comply with product governance requirements. For the purpose of product governance requirements, investment firms that create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments, should be considered as manufacturers while investment firms that offer or sell financial instrument and services to clients should be considered distributors».

Something similar to a claw back effect is happening in the context of investment research. In MiFID II, investment research remains – as it was under MiFID I – an ancillary service, not regulated as an investment service.[92] However, MiFID II introduced special rules relating to investment research in the context of the provision of portfolio management and investment advice, that are a by-product of the wider framework of MiFID rules on inducements: their aim is to increase the transparency of the costs implied in investment research for the investor, and to reduce the risk of conflicts of interests.[93] The impact of these rules has not been irrelevant on the providers on investment research: after MiFID II, in fact, investment services providers have mainly opted for the solution to pay directly, out of their pockets, for investment research, rather structuring payment for research out of the dedicated account on which specific amounts are credited by the investor in order to pay for the research. One of the most striking effects of this is that the demand for independent research seems to have decreased significantly, leading to a lower coverage of listed companies (especially the smaller ones) by independent research providers.[94] MiFID II, therefore, has an indirect impact on the market for investment research, even though it does not regulate it directly. This is another example of the possible "claw back" effect of the MiFID regime.

7. *An example: suitability*

There are various implications that can be drawn from the phenomena briefly described in the previous paragraphs, all basically related to the consequences that inevitably arise when a certain standard, a rule, or a principle, circulates and is applied in contexts different from the ones where it originated (a typical topic for comparatist lawyers).

First of all, when MiFID conduct of business rules circulate in other territories because of its centrifugal forces, those rules are, most of the times, adapted. This

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[92] When investment research is provided by an investment firm (or another MiFID entity) it might be subject to special rules, such as the ones stemming from Regulation (EU) No 596/2014 of 16 April 2014 on Market Abuse, and those contemplated by Commission Delegated Regulation (EU) 2016/958 of 9 March, 2016.

[93] According to art. 13 MiFID II Delegated Directive, "research by third parties to investment firms providing portfolio management or other investment or ancillary services to clients shall not be regarded as an inducement" where the research: (1) is received in return for direct payments by the investment firm out of its own resources, or (2) is paid for by a separate research payment account and a number of conditions are met, including a specific research charge to the client, the regular assessment of the research budget and the development of quality criteria. A description of what is meant by "research" can be found in Recital No 28 of the MiFID II Delegated Directive.

[94] See CFA, *MiFID II: One Year On. Assessing the Market for Investment Research*, 2019, available at https://www.cfainstitute.org/-/media/documents/survey/cfa-mifid-II-survey-report.ashx.

phenomenon is quite evident, for example, when one considers how some of the core conduct of business rules that originated in the MiFID environment are currently applied in the context of collective investment management, or insurance distribution. Suitability is a good example: in its original, MiFID version, suitability is designed as a tailor-made rule for the protection of the individual investor. In the context of investment funds, suitability is not tailored on the individual investor but on the collective investment scheme *as such*, or to investors considered *as a wholesome group*. As a consequence of this, the construction and identification of the client's individual profile – which is the standard under MiFID, and the basis for the application of the suitability rule – becomes unnecessary in the context of applying suitability under the UCITS or the AIFM provisions: as a matter of fact, no such rules are to be found in that context. However, this transformation of the suitability principle not as such, but as to how it is applied, produces a puzzling effect: it is, in fact, difficult to understand how suitability, considered *vis-à-vis* the collective investments scheme, may effectively add something to the general, and overriding, principle according to which the fund manager must act in the best interest of the fund, and in compliance with the investment policies as set out in the fund's documentation.

Also conflicts of interest standards, when transplanted in the context of collective asset management, end up being applied differently: the interests that are to be considered are not, in fact, those of the individual investors in the fund, but those of the fund "as such". Again, because of the wording adopted in UCITS and AIFMD, the result is a bit puzzling.

Adapting MiFID standards across different sectors may also become challenging, when the context is radically different. MiFID conduct of business rules are clearly designed in order to provide the investor with adequate protection in the context of a decision that implies (or might imply, when rules are applied in the context of the provision of investment advice) an investment decision: this is, by the way, the essence of the entire MiFID architecture. The situation is, however, radically different in the context of lending transactions, and might be radically different in that of insurance contracts: two of the main areas where, as already discussed, MiFID standards have been transplanted.

Suitability is a good example of what might happen in this context. Within the MCD suitability is used as a criterion for assessing the correct standard of providing advice in relation to the mortgage: it is difficult to understand how much this may effectively add to a typical credit rating/scoring assessment, and how much additional protection this implies for the clients. Similar issues apply in the insurance field, whereby the assessment of the clients' insurance needs finally overlaps with the assessment to be carried out for insurance-based investment products, the latter being, in fact, a variation, if not a replica, of the suitability assessment contemplated in the field of MiFID.

The centripetal and centrifugal forces revolving around MiFID conduct of business rules therefore seem to have a true, potential capacity of building bridges between different silos of EU Law and reducing differences, but – since they are still applied in a sectoral environment – cross-sectoral divergences remain, sometimes more substantial, other times more formal,[95] and they cannot be entirely overcome by just extending further the scope of MiFID and/or of its conduct of business rules.

8. MiFID rules as enforceable private law provisions

Some implications of the developments that have been sketched in these notes naturally concern enforcement.

The first, and probably most interesting from a systematic perspective, is that – as a matter of fact – there seems to emerge a somewhat hazy, but sufficiently defined *general* status for the protection of the "end user" of financial products or services, based on MiFID standards. Notwithstanding the many, often incongruous, differences that remain between silos, it is quite clear that, as of today, we might already be able to identify, within the EU, a "general charter" of principles and rules that cut across the system. It should not be surprising that this charter actually looks not too different from the principles embedded in art. 11 of the old ISD, because that was the milieu were most of those concepts were set out in the EU context.

Further reflections arise in relation to the, quite debated, issue of the relevance of conduct of business rules as private law remedies. In relation to MiFID topics, conduct of business rules have, by now, a long tradition of enforcement in practically all Member States, as rules of public law. Their relevance as rules of private law is, instead, still questionable for some Member States.[96] The debate on the point has been ongoing for quite a long time, and clearly reflects the different legal traditions, and the different impact that conduct of business rules might have on the general body of private law within different legal systems. Whether or not MiFID conduct of business rules are also enforceable under private law remedies naturally has a huge impact on the effective level of protection provided to investors across and among Member States, and on the level of effectiveness[97] that is achievable through the harmonization of those rules within the EU. It is, therefore, striking to see that this issue has been left totally unaddressed, also in the new sectors where those standards have now circulated, and/or in those areas

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[95] Colaert, *MiFID II in Relation to Other Investor Protection Regulation*, cit., p. 610.

[96] On the more general topic of the regulatory effects of private law see Collins, H., *Regulating Contracts*, Oxford, 1999; Alpa, G., Andenas, M., *Fondamenti del diritto privato europeo*, in *Trattato di Diritto Privato*, ed. by G. Iudica, P. Zatti, Milano, 2005; Micklitz, H.-W., *The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, Vol. 28, No 1, January 2009, pp. 3-59.

[97] See Della Negra, *MiFID II and Private Law*, cit., *passim*.

where MiFID has exercised its centripetal and gravitational forces. Rather than achieving higher levels of harmonization, lack of clarity on this point ultimately leads to more market fragmentation, and produces a strabismus effect: on the one side, the MiFID template is clearly struggling to become a cross-sectoral standard in the EU; on the other side, it may ultimately produce dramatically different effects depending on the silos where that template is applied, and on the legal tradition and system where it impacts.[98]

Considering these issues, it is also unclear how MiFID standards would ultimately be applied across different sectors *if* one accepts the conclusion that they are effectively enforceable as private law remedies. The question as to which remedies would effectively be available under private law has been almost entirely clarified in some States, while it is still partially unanswered in other. One may therefore wonder as to what the outcome is, once those standards are applied cross-sectorially. It is reasonable to assume that the same solution, applicable in the MiFID context, would be reached in other sectors: if MiFID rules were *indeed*[99] to be considered as enforceable private law provisions in *all* Member

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[98] Cf. for several, still useful remarks, that should however be re-contextualised in the new scenario stemming up from the circulation of the MiFID standards, Cherednychenko, O.O., *The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?*, in *Journal of Consumer Policy*, Vol. 33, No 4, November 2010, p. 403; Id., *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, p. 243.

[99] The leading case on this topic is notoriously case C-604/11, *Genil v Bankinter*, ECLI:EU:C:2013:344, where the Court took an agnostic approach on this crucial issue. According to the Court "It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness". Two years later, in *Banif Plus Bank Zrt v Márton Lantos*, the ECJ reiterated this paragraph in relation to the private enforcement of arts. 19(4) and (5) of MiFID I, thus leaving to national courts the task to determine the civil law consequences of breaches of conduct of business rules: case C-312/14, *Banif Plus Bank Zrt v Márton Lantos*, ECLI:EU:C:2015:794, para. 79. In the latter case, the ECJ also ruled that a loan agreement denominated in foreign currency does not qualify as an investment service and therefore does not fall under MiFID conduct of business rules. Both cases, and the consequences thereof, are extensively discussed by Della Negra, *MiFID II and Private Law*, cit., 179 ff.

States[100] the same conclusion should, in fact, be reached in the banking,[101] or in the insurance sector, or elsewhere, as to the impact of the analogous set of rules aimed at regulating conduct of business. Also, if – in a certain legal system – MiFID rules are recognized and accepted as private law remedies,[102] the question is whether the remedies thereby awarded (nullity; award for damages; tortious liability; pre-contractual liability; etc.) would be the same also in other sectors.[103] To put it bluntly, assuming, for instance, that, in the MiFID context, violation of conduct of business rules is considered as a source of liability, rather than as a cause for nullity or other forms of contract invalidity, would the same apply when one considers applying conduct of business rules in the banking, or insurance sector, or in that of collective investments undertakings?

In the above context, the question arises as to whether sectors that more recently inherited MiFID standards would effectively benefit or not from the legal experience accumulated, in the MiFID environment, over the last 25 years. The conspicuous bodies of jurisprudence and precedents that, in some Member States, have by now consolidated under the ISD, MiFID I and MiFID II might ultimately work as formants to be applied in other sectors, so that a Court – deciding, for example, upon a case of breach of rules governing the distribution of insurance products – *might* consider looking at precedents established in the field of investment services. This result should not, however, be taken for granted. Looking at the broad picture, i.e. that of the circulation of the MiFID template, this might sound as a reasonable approach, but one needs to be wary. First of all because, as discussed, the common template is clear, but cross-sectoriality is still the prevailing approach. Second, because the general body of national law in a certain sector may be based on principles, and offer solutions, that, coming from the tradition of each Member State, may be difficult to combine with a cross-sectoral approach. Third, because different Directives have different

100 This is the suggestion clearly set out by Della Negra, *MiFID II and Private Law*, cit., *passim.*

101 On the impact of the Banking Union on the relationships between private parties see Grundmann, S., *The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook*, in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 345-367; Hadjiemmanuil, C., *The Banking Union and Its Implications for Private Law: A Comment*, in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 383-400. See also Möslein, F., *Third Parties in the European Banking Union: Regulatory and Supervisory Effects on Private Law Relationships Between Banks and their Clients or Creditors* in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 547-574.

102 Cf. Tison, M., *The Civil Law Effects of MiFID in a Comparative Law Perspective*, Financial Law Institute Working Paper Series, 2010, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596782 (last accessed 10 September 2020).

103 For further implications, due to the absence, within the EU, of a single contract tradition or a federal system of enforcement, Marcacci, A., *Regulating Investor Protection under EU Law. The Unbridgeable Gaps with the U.S. and the Way Forward*, London, 2018.

impacts: some are tendentially inspired by a maximum harmonization approach, while others are based on a minimum harmonization standard.[104]

Another issue is a consequence of the different degrees of harmonization introduced by different Directives incorporating the MiFID standards. As discussed above, for instance, the IDD is, clearly, a minimum harmonization Directive, contrary the maximum (or more intense) harmonization stance taken by MiFID II, that also includes a strong limitation to gold-plating:[105] in the insurance field one may, therefore, find National Laws that provide additional protection, and introduce stricter rules, than those arising from MiFID common standards, and that therefore would influence their interpretation. For example, in Nationale-Nederlanden v/Van Leeuwen[106] the ECJ was asked to provide a preliminary ruling as to whether art. 31(3) of the Third Life Assurance Directive precludes an obligation on the part of a life assurance provider – based on national 'open and/ or unwritten rules', such as reasonableness and fairness which govern the (pre) contractual relationship and/or a general and/or specific duty of care – to provide policyholders with *additional* information on costs and risks of the insurance policy'.[107] As the Directive provided for minimum harmonization, art. 31(3)

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[104] For example, it is likely that the phenomenon described in these pages will contribute to further narrow down the traditional difference between the protection to be awarded to an "investor" *vis-à-vis* to that provided to a "consumer" which is still valid but looks a bit shaky. In an interesting case decided by the ECJ, discussions revolved around the fact that certain foreign exchange transactions fall within the notion of investment service. In answering this question, Advocate General Jaaskinen held that "an investor in the sense of [MiFID I] is somebody who invests or intends to invest his own or borrowed capital in a financial instrument with a view to gaining revenue, or at least protecting the value of his capital" (Opinion of the Advocate General Jääskinen in case C-312/14, *Banif Plus Bank Zrt*, ECLI:EU:C:2015:621, para. 37). The Advocate General concluded that the reference was inadmissible but that the financial product is not covered by MiFID. Given that the client did not intend to invest any capital but to borrow from the bank the sum needed to finance the purchase of a car, the Advocate General concluded that "investment protection under Directive 2004/39 is not intended to cover situations in which consumers are financing consumption, in contradistinction to investments, which in economic terms are a form of saving". On this topic, see Della Negra, *MiFID II and Private Law*, cit., p. 32, who rightly notes that "although this Opinion is plus dixit quam voluit because MiFID I is not concerned with the individual purpose of a transaction, it supports the idea that this directive is based on an 'empowering investor' regulatory strategy, which relies upon the model of the retail client as a well informed and responsible investor". The tendency of the EU Legislator to transform the investor into a consumer is also highlighted by Moloney, N., *The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?*, in *European Business Organization Law Review*, Vol. 13, No 2, June 2012, p. 169.

[105] Legislative gold plating in MiFID II should comply with the conditions laid out in art. 24(12) of the Directive.

[106] Case 51-13, Judgment of the Court (Fifth Chamber) of 29 April 2015.

[107] Reference should also be made to case C-51/13, *Nationale-Nederlanden Levensverzekering*, ECLI:EU:C:2015:286, para. 34: see, on the decision, Busch, D., Van Dam, C., *A Bank's Duty of Care: Perspectives from European and Comparative Law*, in *A Bank's Duty of Care*, cit., p. 409.

allowed, in fact, Member States: (a) to impose stricter information duties on insurance firms only if that information enabled the policyholder to understand the essential elements of the commitment, and (b) to restrict the additional information which may be required from insurance companies by the Member State to what is necessary to achieve that end. Dutch law transposed the provision of the Directive and maintained the duty to provide additional information based upon the requirement of reasonableness and fairness under art. 6:2 of the Civil code. The ECJ held that the 'open and/or unwritten rules' of national private law may result in information duties that are stricter than those laid down in the national law transposing the directive, provided that the additional information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment, and it ensures a sufficient level of legal certainty.[108]

Finally, the increasing development of ADR systems in the EU,[109] also follows a sectoral approach, and therefore enhances the risk of divergences and fragmentation in the application of what should be intended as common standards.

9. Conclusions

The current status of EU Financial Law is, in many respects, far from being fully coherent and/or homogeneous. The traditional issues of lack of coordination between different measures, were exacerbated by the legislative deluge that's been incessantly going on after the Financial Crisis, and that, as of today, is far from being over. An overwhelming sense of awe is inevitable if one appreciates the truly staggering size and complexity of EU Financial Law. Sectoriality is a further element of complication, and inevitably produces fragmentation and lack of coordination.

The case of MiFID conduct of business rules is, in this context, an interesting exception, leading to homogeneity and cross-sectoral harmonization by way of its centrifugal and centripetal forces. One should expect that, for the future, this tendency is bound to continue, as, on the one side, it does seem to produce positive effects and, on the other side, the phenomenon has been ongoing for some time now and there is no trace of it abating. However, the result of achieving a higher level of homogeneity cannot be left only to this kind of approach, and for the

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108 According to Della Negra, *MiFID II and Private Law*, cit., p. 177, "This judgment confirms, in our view, that general private law duties may contain additional, more stringent duties than MiFID II's duties for investment firms. There are, however, three limitations to judicial gold-plating. First, the reinforced private law duties must be clear and specific, even if they derive from a general duty. Second, they must achieve the result sought by the investor protection objective and do not go beyond that purpose (i.e. requiring firms to give a personalised warning could be disproportionate if that warning had already been given in that form). Third, the additional duties must ensure a sufficient degree of legal certainty".

109 Ibid., 89 ff.

future it is imperative that the EU Legislator takes a much braver stance: lack of coordination and sectoriality greatly impair the effectiveness of EU Financial Legislation and its ability to achieve its final, ultimate objectives of integrating the common market. Academics, for instance, are providing several background suggestions in relation to possible actions that might need to be taken to narrow down cross-sectoral inconsistencies and differences.[110] It should ultimately be remembered that markets integration and interconnections have not waited for the legislators' initiative in the past and will not do so in the future: legislation risks to lag behind market forces, and be inadequate to challenge the real, fundamental questions that are at stake.

[110] See the numerous contributions collected in the volume edited by V. Colaert, D. Busch, T. Incalza, *European Financial Regulation: Levelling the cross-sectoral playing field*, cit.

Connecting public and private enforcement

*Raffaele D'Ambrosio and Stefano Montemaggi**

Summary: *1. Overlook – Part I. ESAs' Product intervention powers and side-effects on financial contracts – 2. Temporary intervention powers of the European Supervisory Authorities under Article 9 of their founding regulations – 3. The temporary intervention powers of the European Securities and Markets Authority under Article 28 of the Short-Selling Regulation – 4. The temporary intervention powers of the European Banking Authority and the European Securities and Markets Authority under Articles 39 et seq. of the Markets in Financial Instruments Regulation – 5. Whether ESAs' temporary intervention powers are compliant with the Meroni doctrine and Article 52 of the Charter – 6. Coordination of NCAs' and ESAs' intervention powers under MiFiR and PRIIPs regulations – 7. The impact of temporary intervention powers on financial contracts – Part II. The relationships between the public authorities' assessment and the private enforcement regime – 8. The interplay between private and public enforcement: an open issue – 9. The antitrust law paradigm – 10. The coordination mechanism between private and public enforcement under Article 9 of the antitrust damages directive – 11. The complexity of the MiFID rules of conduct and the risk of fragmented, where not divergent, interpretations – 12. Going beyond the binding effect of the "positive" decisions adopted by the competent supervisory authority*

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1. Overlook

The EU legal framework on financial markets increasingly provides for the intervention of sectoral supervisory authorities in services and products offered to clients and investors.

Initially, as it emerges from the original texts of the ESAs' founding regulations, these forms of intervention were designed to ensure the stability and the smooth functioning of the financial market and, only indirectly, also resulted in greater protection for clients and investors.

In fact, the regulations establishing the ESAs did not contain a rule directly conferring powers on the authorities, but stop short of defining the general framework for any forms of intervention, provided for in the special rules devoted to the various segments of the EU financial law.

The first concrete application of this type of ESAs' intervention powers on financial services and products is to be found in the EU regulation on short-selling. This latter, in line with the original paradigm of ESAs' intervention powers provided for in their founding regulations, directly protects only the stability and the proper functioning of the financial market.

Nevertheless, the evolution of the EU financial market legislation has seen the gradual introduction of forms of intervention by supervisory authorities devoted to the direct protection of clients and investors, thus departing from the basic paradigm envisaged by the ESAs' founding regulations.

The new regulations of financial services and in particular the MiFIR and PRIIP regulations mark this change in the European legislator's perspective, culminating in the reform of the ESAs and in the new formulation of the general clauses governing the forms of intervention on services and products.

In general terms, they now establish that the ESAs' intervention powers on financial services and products should not only aim, as in the past, at ensuring the stability and the proper functioning of the financial market, but also at protecting customers and investors.

These forms of direct intervention by the supervisory authorities affect the validity of the financial contracts touched upon by ESAs' temporary intervention powers and reflect on the forms of private protection that investors and clients are entitled to invoke before the Courts.

The first part of this paper is devoted to the analysis of these aspects.

However, the impact of the public intervention on the forms of private protection of investors and clients is wider as it concerns every assessment made by the supervisory authority on the compliance by the market actors with the rules, in particular of transparency and good conduct, which regulate the carrying out of the activity they are entitled to perform.

In what terms this assessment *might* and *should* condition that of the courts, seised by investors and clients to protect their reasons in case of non-compliance by market actors of the sectoral legislation, is the subject of the second part of this paper.

Indeed, it is all too evident that, in this area, private litigation and the consequent decisions taken by the courts do not exhaust their effects within the narrow boundaries of the individual contractual relations, but easily end up influencing the behavior and the business model of the firms participating to these markets.

The CJEU's case law itself has progressively intended the actions brought by individuals (consumers/retail investors) as instrumental in strengthening the compliance with EU law, moving from the assumption that private law remedies represent an effective means of preventing the infringement of EU law by economic operators.

This notwithstanding, the legislator of MiFID II has abstained from dealing with the issue of how this private enforcement governed by the judges should interact with the tasks performed and the interventions concretely taken by the public authorities, which are deputed to the regulation and supervision of the professional operators of these markets.

A field of EU law where, since the early years of the 21st century, the interplay between public and private enforcement has been developed, regulated and then istitutionalised is that of antitrust, starting from the EU Regulation No 1/2003, to get to the directive 2014/104/EU on the antitrust damages actions.

The solutions tested in that field might constitute an interesting starting point to set efficient interaction mechanisms between the courts called to settle the individual disputes and the public Authorities vested with the power to implement and enforce MiFID II rules of conduct.

Moreover, in this area of financial law, considering the complexity of the rules of conduct, which often recall general concepts designed to be concretely implemented by the supervisory Authorities, the risk of fragmented, where not divergent, interpretations between the courts and the supervisors appears more severe, with potential negative impacts on the stability of the supervised firms themselves. This might justify the introduction of even stronger coordination mechanisms between private and public enforcement, to be assessed against the principles deriving from the CJEU's case law and the constitutional jurisprudence of the single jurisdictions.

The work brings together two independent analyses carried out by their respective authors, Raffaele D'Ambrosio, for what concerns the ESAs' products intervention powers, and Stefano Montemaggi, for what concerns the relationships between the public authorities assessment and the private enforcement regime, highlighting the points of contact, as achieved following a joint reflection.

Part I.

ESAs' product intervention powers and side-effects on financial contracts

2. *Temporary intervention powers of the European Supervisory Authorities under Article 9 of their founding regulations*

The *sedes materiae* of the European Supervisory Authorities (ESAs)' temporary intervention powers is Article 9(5) of their founding regulations,[1] which is entitled 'Tasks related to consumer protection and financial activities' and has been recently amended by the ESAs' reform package of December 2019.[2]

In the original wording of Article 9(5), temporary intervention powers – despite the Article's title – could only be addressed to certain activities that threaten the orderly functioning and the integrity of financial markets or the stability of the whole or part of the financial system, but not consumer's interests specifically.

Though such powers were given to ESAs in two different situations, the interests protected by the enabling clauses contained in Article 9(5) – whether considered alone or in conjunction with Article 18 of their founding regulations – were the same.

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[1] As regards the European Banking Authority (EBA), see Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12. As regards the European Securities and Markets Authority (ESMA), see Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84. As regards the European Insurance and Occupational Pensions Authority (EIOPA), see Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC.

[2] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds [2019], OJ, L 334/1.

Indeed, temporary prohibition and restriction powers could only be used (i) in specified cases and under the conditions laid down in the directly applicable EU law pertaining to their scope of action;[3] (ii) in the case of an emergency situation declared by the Council, in accordance with and under the conditions laid down in Article 18.[4]

In both sets of cases the interests protected were 'the orderly functioning and the integrity of financial markets or the stability of the whole or part of the financial system'.[5]

Against this background, under the pre-reform ESAs' regulations, consumer protection was not the stated purpose of the ESAs' temporary intervention powers, but could only be attained through the duty to ensure the orderly functioning and the integrity of financial markets and the stability of the whole or part of the financial system.

Under this respect, the ESAs' reform of 2019 marks a significant breaking point by explicitly including the customers and consumers protection within the scope of Article 9 of their founding regulations.

Indeed, the new text of Article 9(5) allows the exercise of the ESAs' temporary intervention powers, not only in case of a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, but also when the products or practices "have the potential to cause significant financial damage to customers or consumers".[6]

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3 Though Article 9(5) generically refers to the 'legislative acts referred to in Article 1(2)', including both directives and regulations, it goes without saying that only directly applicable EU law may confer powers on an EU authority.

4 In the same vein, recital 12 of each ESA's founding regulation stipulates, amongst others, that the EU Authority should (i) 'be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in this Regulation' and (ii) 'if required to make such temporary prohibition in the case of an emergency situation, […] should do so in accordance with and under the conditions laid down in this Regulation'.

5 In the case of an emergency situation, recital 30 of the ESAs' founding regulations confirmed this view. Indeed, it clarified that 'serious threats to the orderly functioning and integrity of financial markets or the stability of the financial system in the Union require a swift and concerted response at Union level. The Authority should therefore be able to require national supervisory authorities to take specific actions to remedy an emergency situation. The power to determine the existence of an emergency situation should be conferred on the Council, following a request by any of the ESAs, the Commission or the ESRB [European Systemic Risk Board]'.

6 See Regulation(EU) 2019/2175 of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds.

The wide reference to the mere potentiality of the damage to an unspecified number of customers and consumers confirms the preventive nature of the product intervention powers.

At the same time, considering the impact that those measures might have on the freedom to conduct financial business as protected by the EU Charter of Fundamental Rights, the wording used by the Legislator should be tested in light of the specific rules of Union law which vest in practice ESAs with temporary intervention powers.

Indeed, also after the reform, Article 9(5) continues to be a not self-standing empowerment clause, as it refers to cases provided for under different specific provisions of directly applicable EU law. In other words, it is still true that the powers under Article 9(5) may only be exercised if specified in the sectorial legislative acts referred to in Article 1(2).

The Commission's proposal to convert this Article into a self-standing empowerment[7] has been abandoned in the draft regulation on the reform of the ESAs[8] and it is therefore not reflected in the new texts of ESAs' founding regulations as amended after the approval of the reform package.

This does not mean that Article 9(5) does not have any prescriptive content at all.

Prescriptive provisions are those identifying the interests protected and those imposing the obligation to review the adopted measures at appropriate intervals.

These prescriptions set out some general principles applicable to all specific cases provided for in other EU legislative acts, unless the latter explicitly derogate said principles.[9]

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7 See the Commission's Report on the reform of the ESAs of 8 August 2014, COM(2014) 509 final, p. 8. Available at: http://ec.europa.eu/internal_market/finances/docs/committees/140808-esfs-review_en.pdf.

8 See COM(2017) 536 final, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-536-F1-EN-MAIN-PART-1.PDF.

9 As for the decision-making process, the ESAs' temporary intervention decisions are taken on the basis of the qualified majority under Article 44(1), second sub-paragraph, of their respective founding regulations. The same majority is required if, following a Member State's request to reconsider the decision, the Authority is called to decide whether to maintain it or not (Article 9(5), third sub-paragraph, of the founding regulations). Special rules apply to decisions taken by the EBA following the entry into force of the SSM. Indeed, under Article 44(1), second sub-paragraph, of the EBA founding regulation, the qualified majority "shall include at least a simple majority of the members, present at the vote, from competent authorities of Member States that are participating Member States as defined in point (1) of Article 2 of Regulation (EU) No 1024/2013 ('participating Member States') and a simple majority of the members, present at the vote, from competent authorities of Member States that are not participating Member States ('non-participating Member States')".

The reform package also extends, as from January 1st 2022, the duration of the temporary intervention decisions by ESAs which, under the new framework, will be reviewed at appropriate intervals and, at least, every six months, with the possibility for the ESA to decide, after two semi-annual renewal, for an annual renewal of the measure. The previous regime (still in force) imposed the review on a 3-months basis and established the automatic expiration of the decision if not renewed after a 3-month period.

The wording of Article 9 provides for no limits to the number of times ESAs can renew product intervention measures. However, unlimited prolongations of time of the previous measure run the risk to exceed the limits laid down in Article 52 of the Charter, as they encroach on the essence of the freedom to conduct a business in the field of banking and financial activity (see § 8).

A Member State may request the Authority to reconsider the decision. In that case, the Authority has to decide whether to confirm the decision or not by qualified majority under Article 44(1) of its founding regulation (Article 9, paragraph 5, sub-paragraph 3).

Further general conditions for the decision to be taken are provided for under Article 18.[10] ESAs are automatically empowered to make use of the temporary prohibition and restriction powers under Article 9, where the Council determines the existence of an emergency situation and, in exceptional circumstances, where coordinated action by the competent authorities is necessary to respond to adverse developments, which may seriously jeopardise the orderly functioning and integrity of financial markets, the stability of the whole or part of the financial system of the Union or – under the new text of Article 18(3) as amended by virtue of the reform of 2019 – customer and consumer protection.

Moreover, decisions addressed to financial institutions by the ESAs under Article 18 may be adopted only (i) after a request has been addressed to the relevant competent authorities and (ii) after the latter has failed to comply with such a request. Said decisions need to be 'in accordance with the legislation referred to in Article 1(2)' (i.e. the EU legislation within the scope of which the Authority is authorised to act).

Although the wording of such a provision is not crystal clear, a reasonable interpretation would be that the ESAs' temporary intervention powers under Article 18 include – within their respective scope of action – all powers conferred on national competent authorities, for the same purposes, in accordance with the EU legislative acts (including those conferred by national law transposing directives).

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10 With regard to decisions adopted by the EBA under Article 18(3) and (4), fifth sub-paragraph, "the Board of Supervisors shall take decisions on the basis of a simple majority of its voting members, which shall include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States".

3. *The temporary intervention powers of the European Securities and Markets Authority under Article 28 of the Short-Selling Regulation*

Article 28 of EU Regulation No 236 of 2012 (the Short-Selling Regulation) confers on the European Securities and Markets Authority specific temporary intervention powers regarding the short-selling.[11]

Article 28(2)(a) limits the scope of these powers to cases of 'a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications'. Criteria specifying the conditions under Article 28(2)(a) are laid down in Article 24(3) of Commission Delegated Regulation No 918/2012.[12]

By virtue of the express reference to Article 9(5) of Regulation (EU) No 1095/2010 contained in the first lines of Article 28(1) of the Short-selling Regulation, a question arises as to whether the measures under said Article 28(1) might be adopted also in order to prevent a significant damage to customers or consumers, as provided for under the new text of Article 9 of the ESMA's founding regulation.

Such an interpretation based on the wording of Article 28(1) of the Short-Selling regulation, cannot be followed in that it expressly refers to Article

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[11] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L 86/1. ESMA's powers are specified in Article 28(1), according to which ESMA shall either: '(a) require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position; or (b) prohibit or impose conditions on the entry by natural or legal persons into a short sale or a transaction which creates or relates to a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument'.

[12] [2012] OJ L 274/1. Article 24(3) stipulates that 'for the purposes of Article 28(2)(a), a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union shall mean: (a) any threat of serious financial, monetary or budgetary instability concerning a Member State or the financial system within a Member State when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union; (b) the possibility of a default by any Member State or supranational issuer; (c) any serious damage to the physical structures of important financial issuers, market infrastructures, clearing and settlement systems, and supervisors which may seriously affect cross-border markets in particular where such damage results from a natural disaster or terrorist attack when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union; (d) any serious disruption in any payment system or settlement process, in particular when it is related to interbank operations, that causes or may cause significant payments or settlement failures or delays within the Union's cross-border payment systems, especially when these may lead to the propagation of financial or economic stress in the whole or part of the financial system in the Union'.

9(5) of the ESAs' founding regulations. Indeed, Article 9(5) is not a self-standing empowerment clause, as it refers in turn to cases provided for under different specific provisions of directly applicable EU law. Therefore, it is still true that the powers under Article 9(5) may only be exercised if provided for (and to the extent specified) in the sectorial legislative acts referred to in Article 1(2) of the ESAs' founding regulations.

Consequently, despite the new wording of Article 9 of the ESMA's founding regulation, powers under Article 28(1) of the Short-Selling regulation shall continue to be used only for the purposes to address a threat to the orderly functioning and the integrity of financial markets.

The words "in accordance with Article 9" of the ESMA's founding regulation contained in Article 28(1) of the Short-Selling regulation are therefore to be read as referred to the general regime applicable to temporary intervention powers, but cannot be used to broaden the scope of the powers as provided for under said Article 28(1).

A further requirement, for ESMA to make use of its temporary intervention powers, is provided for in Article 28(2)(b). Under this provision, ESMA may only act, consistently with the idea of ESMA's product intervention measure as the "*ultimum remedium*", where 'no [national] competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat'.

4. The temporary intervention powers of the European Banking Authority and the European Securities and Markets Authority under Articles 39 **et seq.** *of the Markets in Financial Instruments Regulation*

The European Banking Authority and the European Securities and Markets Authority are vested with further temporary intervention powers under Articles 40 and 41 of the Markets in Financial Instruments Regulation (MiFIR) respectively.[13] Apart from its powers under these provisions, ESMA (but not EBA) is also vested with specific intervention powers on positions or exposures in derivatives under Article 45 MiFIR.

Articles 40 and 41 MiFIR, since their enactment, include – in addition to the threat to the orderly functioning and integrity of financial markets and the threat to the stability of the financial system – the paradigm of the significant concern for investor protection.

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[13] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L 173/84. See Carotenuto, G., *Product intervention under MiFID II/MiFIR*, in www.dirittobancario.it, Approfondimenti, 5 September 2017 and Franza, E., *La "product intervention" del mondo MIFID II/MIFIR*, in www.dirittobancario.it, Approfondimenti, 11 December 2017.

This wider approach to the use of ESAs' temporary intervention powers is confirmed by the provisions of Article 16 of Regulation No 1286/2014 on key information documents for packaged retail and insurance-based investment products, which confers temporary intervention powers on the European Insurance and Occupational Pensions Authority (EIOPA).[14]

Article 40(2) and Article 42(2) of MiFIR clarify that these product intervention powers can also be used on a precautionary basis before a financial instrument has been marketed, distributed or sold to clients. The duration and the conditions for the renewal of these measures have been expressly coordinated with those established in general terms under the new Article 9(5) of the founding regulations.[15]

The scope of Article 45 MiFIR on derivative contracts is subject to the following requirements: (i) the measure addresses a threat to the orderly functioning and integrity of financial markets, including commodity derivative markets; (ii) a competent authority or competent authorities have not taken measures to address the threat or the measures taken do not sufficiently address the threat.

Differently from what provided for in Articles 40(2) and 42(2) of MiFIR, ESMA's temporary intervention powers on derivatives cannot be used in the occurrence of a significant investor protection concern.

As for the Article 28(2) of the Short-selling regulation, a question here arises as to whether measures under Article 45 MIFIR might be adopted also in order to prevent a significant damage to customers or consumers.

Such an interpretation could be based again on the text of Article 45(1) MiFIR where it expressly refers to Article 9(5) of the ESAs' founding regulations. Nevertheless, similarly to what already observed with regards to Article 28(2) of the Short-selling regulation, it cannot be followed as Article 9(5) is not a self-standing empowerment clause.

In light of the above, it is not worth asking the question of whether the clause contained in the new text of Article 9 of the Regulations establishing the ESAs, which refers to the potential to cause significant financial damage to customers or consumers, differs from the ones contained in Articles 40 and 41 MiFIR, which is expected to address a significant investor protection concern.

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14 [2014] OJ L 352/1. Indeed, under Article 16 of the said regulation, EIOPA may temporarily prohibit or restrict the marketing, distribution or sale of certain insurance-based investment products or insurance-based investment products with certain specified features or a type of financial activity or practice of an insurance or reinsurance undertaking, 'where the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'.

15 No similar alignment has been introduced with respect to EIOPA's product intervention powers, which have their legal basis in the PRIIPs Regulation. There is no obvious reason for this different approach: it probably derives from a lack of coordination in the legislative process.

As the ESAs' powers may be used only to the extent that they are provided for under the specific empowerment clauses, reference should be made to the latter. The general wording contained in Article 9 only marks the programme-limit of the scope of the ESAs' intervention, which can be even derogated by subsequent rules.

For the EBA and ESMA to make use of their powers, it is also necessary that the regulatory requirements under EU law do not address the threat in question and that the National Competent Authorities have not taken an action or adequate action to address it.[16] The same holds true for the EIOPA's powers under Article 16 of Regulation No 1286/2014 mentioned above.[17]

Criteria and factors for determining when there is a threat to the orderly functioning and integrity of financial markets[18] or to the stability of the whole or part of the financial system,[19] as well as a significant investor protection concern have to be specified in the Commission's delegated acts under Articles 40(8), 41(8) and 45(10).[20]

As regards the temporary intervention powers under Articles 40 and 41 of MiFIR, those criteria must include, inter alia, the degree of complexity, size and notional value of a financial instrument and the relation to the type of client to whom it is marketed and sold, the degree of innovation of a financial instrument, activity or practice, and the leverage that a financial instrument or practice entails.[21]

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16 Temporary intervention powers by national competent authorities are provided for under Article 42 of MiFIR and Article 69(2)(o) and (p) of MiFID II. Moreover, recital 29 of MiFIR refers to 'the exercise of such powers by competent authorities and, *in exceptional cases*, by ESMA or EBA'.

17 Powers of national competent authorities are provided for under Article 17 of Regulation 1286/2014.

18 Including commodity derivative markets in accordance with the objectives listed in Article 57(1) of MiFID II and including in relation to delivery arrangements for physical commodities.

19 In the case under MiFIR Article 45, also for determining the reduction of a position or an exposure and situations where a risk of regulatory arbitrage may arise from the measure adopted by the authority.

20 Criteria and factors to be taken into account by EIOPA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union are listed in the Commission Delegated Regulation (EU) 2016/1904 of 14 July 2016, supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council with regard to product intervention [2016] OJ L 295/11.

21 For the case under MiFIR Article 45, the criteria and factors shall take into account the regulatory technical standards referred to in Article 57(3) of MiFID II (Directive 2014/65/EU published in [2014] OJ L 173/349) and shall differentiate between situations where ESMA takes action because a competent authority has failed to act and those where ESMA addresses an additional risk which the competent authority is not sufficiently able to address pursuant to Article 69(2)(j) or (o) of MiFID II (Article 45(10) MiFIR).

Chapter V of Commission Delegated Regulation (EU) No 2017/567[22] sets out a list of criteria and factors to be taken into account by ESMA and EBA in determining when there is such a 'threat' to ensure a consistent approach, while permitting appropriate action in the case of unforeseen adverse events or developments. Nevertheless, the need to assess all criteria and factors should not prevent the temporary intervention powers from being used by EBA or ESMA where only one factor or criterion leads to such a threat (see recital 19).

Recital 18 of the delegated regulation makes an unexpected distinction between the 'threat' and the 'significant investor protection concern', where it clarifies that 'the existence of a "threat" […] would require the existence of a greater concern than a "significant concern", which is the prerequisite of the intervention for investor protection'.

This view is disputable as it seems to be at odds with some of the provisions and recitals of MiFIR, in which 'threat' and 'significant concern' are considered as interchangeable.[23]

In any case, a reading of the wording '*significant investor protection concern*' as a '*threat*' appears to be more in line with the need – suggested by the general principles of EU law – to make use of the powers referred to in Articles 40, 41 and 45 of MiFIR as an *extrema ratio*.

Indeed, the EBA's and ESMA's powers are to be used only where regulatory requirements – related to the specific products or services – do not address the significant investor protection concern or the threat to the orderly functioning and integrity of financial market or to the stability of the whole or part of the financial system.

Procedural requirements include – besides the obligation to review the measures at least every three months and the provision for their expiration after that period if they are not reviewed (these requirements mimicking the ones already provided for in Article 9(5) of the EBA's and ESMA's founding regulations) – the notification of the proposed action to the national competent authorities, as well as the publication of the decision on the EBA's or ESMA's website, specifying the details of the measure and the time, following publication, when the measure takes effect.

The scope of the EBA's and ESMA's temporary intervention powers is confined to (i) the marketing, distribution or sale of certain financial instruments or financial instruments with some specified features (in the case of the EBA, certain structured deposits or structured deposits with some specified features); and (ii) a type of financial activity or practice.

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22 In [2017] OJ L 87/90.

23 See recital 29 and Articles 40(2), lit. b) and c), and 41(2), lit. b) and c), of MiFIR.

Further specific limits to the scope of ESMA's and EBA's temporary intervention powers depend on the scope of the MiFIR provisions and on the division of competences between EBA and ESMA. In 2018, ESMA exercised for the first time the powers under Article 40(2), by adopting product intervention measures in relation to the marketing, distribution or sale of contracts for differences and binary options to retail clients.

On 1 June 2018, the first ESMA's product intervention measures were published in the Official Journal of the European Union.[24] [25] The measure in relation to binary options started to apply on 2 July 2018 and the measures in relation to contracts for difference (CFDs) on 1 August 2018. Following three consecutive renewals, these temporary measures expired on 1 July 2019 for binary options and on 31 July 2019 for CFDs.[26] As reported by ESMA,[27] nearly all National Competent Authorities in the EU have taken national product intervention measures in order to address, in a permanent way, the investor protection concerns arising from these products.[28]

As under Article 1(2) Regulation (EU) No 600/2014, MiFIR applies to credit institutions and investments firms only, asset managers are apparently excluded from the scope of the ESMA's temporary intervention powers. This view has been explained in the opinion of ESMA of 12 January 2017, published on its

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[24] European Securities and Markets Authority Decisions (EU) 2018/795 of 22 May 2018 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (OJ L 136, 1.6.2018, p. 31).

[25] European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (OJ L 136, 1.6.2018, p. 50).

[26] As observed by Colaert, V., *The MiFIR and PRIIPs Product Intervention Regime: In Need of Intervention?*, in *European Company and Financial Law Review*, Vol. 17, No 1, March 2020, pp. 99-124 (see in particular p. 120) "*All in all the number of product intervention measures issued by the ESAs is very limited. It shows that the ESAs are quite reluctant to issue product intervention measures and see them, rightly, as last resort measures reserved for extreme products or practices*".

[27] See the Final Report published by ESMA on 4th February 2020 "*on the effects of product intervention measures*", available on the ESMA website.

[28] In Italy, Consob (the Italian Market Authority) – with Resolutions n. 20975 and 20976 of 20 June 2019 – introduced on a permanent basis, pursuant to Article 42 of MiFIR and of Article 7-bis of the Consolidated Law on Finance (TUF), intervention measures to protect retail investors similar to those already adopted by ESMA, concerning the offer of binary options and contracts for difference (CFD). As stressed by the Authority in its press-release of 20th June 2019, the adoption of the measures follows the confirmation of the existence of significant fears for the protection of retail investors in CFDs and binary options, due to the complexity and lack of transparency of these products, their peculiar characteristics – which entail, inter alia, disparity between expected return and risk of loss – as well as the methods with which they are marketed and distributed.

website, on the 'impact of the exclusion of fund management companies from the scope of the MiFIR intervention powers'.[29]

Though excluded from the scope of the MiFIR intervention powers, asset managers may market, under their licence, units or shares of Undertakings for Collective Investment in Transferable Securities (UCITS) or Alternative Investment Funds (AIFs) that they manage. Moreover, asset managers may be given permission to carry out certain MiFID services or activities (i.e., individual portfolio management) in relation to all financial instruments.

This may lead to the risk (i) of arbitrage between MiFID firms and asset managers; and/or (ii) of circumventing ESMA's restrictions (through group structures containing both MiFID firms and asset managers). Therefore, if product intervention powers were to be used in relation to a specific financial instrument that may also be marketed, distributed or sold by AIFMs and UCITS management companies, there would be an unlevel playing field as the product intervention measures would not cover these entities.

In order to address these risks, the Commission's draft package on the reform of the European Supervisory Authorities specified that MiFIR intervention powers would also apply in respect of management companies of UCITS and UCITS investment companies and of managers of Alternative Investment Funds.[30]

However, the final version of Regulation No 2019/2175 approved by the European Parliament and the Council on 18th December 2019 does not provide for that extension, leaving the issue at stake.

This notwithstanding, ESMA, in its Final Report published on 4th February 2020 "*on the effects of product intervention measures*",[31] insisted in recommending that the European Commission addresses the risk of arbitrage between MiFID firms and fund management companies. Specifically, with reference to the powers available under MiFIR, NCAs and ESMA should have the powers to apply restrictions/prohibitions directly to AIFMs and UCITS management companies.

As highlighted in the Report, this would ensure that there is a common toolkit for NCAs and ESMA across entities and instruments, thereby contributing to the establishment of a level-playing field between MiFID entities and AIFMs and UCITS management companies.

29 Available at: https://www.esma.europa.eu/file/21133/download?token=1zaIZyLd.

30 See Article 1(5a) MiFIR, as per Article 6 of the draft regulation on the ESAs' reform.

31 Available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-2134_technical_advice_to_the_ec_on_product_intervention.pdf.

Recently, in the academic debate, it has been argued that the narrow interpretation adopted by ESMA with the opinions above-mentioned might be revised, without the need of a legislative intervention.[32]

Indeed, it has been argued that, "*while article 1(2) MIFIR defines the scope of application of the MIFIR, it does not define the scope of application of the product intervention measures which EBA, ESMA or a national authority would take on the basis of the MIFIR*".[33] In other words, in that view, "*although Article 1(2) limits the scope of application of MIFIR to investment firms authorised under MIFID and credit institutions authorised under CRD, this limitation would not, in this opinion, extend to the measures which the supervisors can take on the basis of MIFIR*". This view would be supported by the *ratio legis* of the rules concerning product intervention that are explicitly aimed at investors protection and market stability.[34]

However, it is questionable whether and to what extent this proposal – which raises some concerns with respect to the principles of legal certainty and legitimate expectations – might be deemed compatible with the criterion of strict interpretation, which the academia generally supports in relation to intrusive measures, like those under discussion, which unavoidably interfere with the freedom to conduct a business.

EBA's temporary intervention powers are limited to the marketing, distribution or sale of certain structured deposits or structured deposits with some specified features as well as to a certain type of financial activity or practice. A problem here arises as to whether such a financial activity or practice has to be

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32 See Colaert, *The MiFIR and PRIIPs Product Intervention Regime: In Need of Intervention?*, cit., pp. 99-104; *European Financial Regulation: Levelling the Cross-Sectoral Playing Field*, ed. by V. Colaert, D. Busch, T. Incalza, Oxford, 2019.

33 Following this line of reasoning, the MIFIR rules regulating product intervention measures are not clearly directed at credit institutions and investment firms, but at the national and European supervisory authorities. Indeed, Article 1 (1) e) MIFIR indeed mentions that MIFIR determines uniform requirements regarding "product intervention powers of competent authorities, ESMA and EBA" without limiting these powers in function of the product offeror or distributor. Recital 29 also refers to the necessity of complementing the powers of the competent authorities with an explicit mechanism for prohibiting or restricting the marketing, distribution and sale of "any" financial instrument or structured deposit giving rise to serious concerns regarding the goals of MiFID and MIFIR.

34 On that specific regard the Author notes that "*if the product intervention measures were only applicable to the investment firms authorised under MiFID and the credit institutions authorised under CRD, these goals would be undermined. It would mean that investment firms authorised under MiFID II and credit institutions authorised under CRD IV would no longer be allowed to market, distribute or sell certain products, while fund managers and institutions not authorised under MiFID II or CRD (for example institutions from third countries) would still be allowed to do so. This would create opportunities for regulatory arbitrage and an unlevel playing field between different distributors of the same product*".

limited to those concerning structured deposits only[35] or if it may be extended, where the banking component is prevalent within the cross-selling package, to any cross-selling activities or practices altogether related to banking and financial products.[36]

On the one hand, restricting the scope of 'a financial activity or practice' to structured deposits only would be against the *effet utile* criterion, as there would be no difference between the EBA's power to temporarily restrict such activities or practices and the marketing, distribution or sale of certain structured deposits.

On the other hand, vesting the EBA with the power to assess the prevalence of the banking component within the cross-selling package and, therefore, to decide its scope of competence would encroach on the legislator's aim of confining the EBA's temporary intervention powers to structured deposits only and of giving ESMA the role of leading supervisor in this field.

5. *Whether ESAs' temporary intervention powers are compliant with the Meroni doctrine and Article 52 of the Charter*

Traditionally, as agencies of the Union, ESAs are considered to be subject to the limits deriving from the so-called Meroni doctrine.

The question of whether the temporary intervention powers of the European Supervisory Authorities are compliant with the *Meroni* doctrine needs to be assessed under the provisions conferring specific temporary intervention powers on ESAs and not under Article 9 (5) of the ESAs' founding regulations.

Indeed, as Article 9(5) is not a self-standing empowerment clause, reference has to be made to the empowering rules contained in the EU regulations pertaining to their scope of action and, where these powers are used in an emergency situation, to the provisions under Article 18 of the ESAs' founding regulations.

Unsurprisingly, the question has been meticulously assessed and decided upon by the European Court of Justice in the so-called '*ESMA-Short Selling case'*.[37]

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35 See Article 41(8), according to which the criteria and factors to be taken into account by EBA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union are basically related to structured deposits.

36 Cross-selling identifies any investment services offered together with other services or products as part of a package or as a condition for the same agreement or package: see Article 4, n. 42, of MiFID II.

37 Case C-270/12, *United Kingdom vs Parliament and the Council*, EU:C:2014:18.

In the Court's view,[38] the powers available to ESMA under Article 28 of the Short-Selling Regulation were delineated precisely and amenable to judicial review in light of the objectives established by the delegating authority. Accordingly, those powers complied with the requirements laid down in the *Meroni* v *High Authority* judgment.[39]

The same reasoning holds true with regard to EBA's and ESMA's temporary powers of intervention under Articles 39 *et seq.* MiFIR and Commission Delegated Regulation No 2017/567 and with regard to the powers of the European Insurance and Occupational Pensions Authority, under Article 16 of Regulation No 1286/2014 and Commission Delegated Regulation No 1904/2016. Indeed, the use of said powers is subject to conditions similar to those provided for in the Short-Selling Regulation and in the relevant Commission Delegated Regulation No 918/2012.

Even though said Commission Delegated Regulations detail a closed-end list of criteria and factors, a few of them are so broadly framed that they inevitably leave a margin of discretion to the ESAs and consequently risk falling within the bounds of the *Meroni* prohibition.[40]

Nevertheless, this appears not to have raised concerns on the part of the Court of Justice in its judgment on the Short-Selling Regulation.

On the contrary, it is disputable whether the same conclusions (as those contained in the said Court's judgment) may be drawn with regard to the temporary intervention powers of the European Supervisory Authorities under Article 18 in conjunction with Article 9(5) of the ESAs' founding regulations.

Though the powers of the European Supervisory Authorities under Articles 18 and 9(5) are *Meroni*-compliant, as they are clearly circumscribed,[41] doubts arise concerning the ESAs' assessment of the circumstances that authorise the use of their powers.

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38 See paras. 44-54.

39 See ECJ, case C-9/56, *Meroni vs High Authority*, EU:C:1958:7.

40 See, for example, the conditions laid down in Article 24(3)(a) of Commission Delegated Regulation No 918/2012 – 'any threat of serious financial, monetary or budgetary instability concerning a Member State or the financial system within a Member State when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union'; in Articles 19(2)(u) and 20(2)(u) of Commission Delegated Regulation No 2017/567 – in consideration of 'whether a financial instrument, financial activity or financial practice may threaten investors' confidence in the financial system'; and in Article 1(2)(q) of Commission Delegated Regulation No 1904/2016 – in consideration of 'whether an insurance-based investment product, financial activity or financial practice may threaten investors' confidence in the financial system'.

41 Indeed, they are the same as those specifically conferred on national competent authorities in accordance with the EU legislative acts and may be used only after (i) a request has been addressed to the relevant competent authorities and (ii) the latter has failed to comply with such a request.

Indeed, under Article 28(1) of the Short-Selling Regulation, Articles 39 *et seq.* of MiFIR and Article 16 of PRIIPs' Regulation, the ESAs' assessment is subject to the criteria laid down in the Commission's Delegated Regulations No 918/2012, No 2017/567 and No 1904/2016 respectively, which are strict and detailed in most cases. This makes such an assessment *Meroni*-compliant, according to the judgment of the Court of Justice in the *ESMA-Short Selling* case. On the contrary, in the case of an emergency situation, the ESAs' assessment of circumstances that authorise the use of temporary intervention powers is free from any specific criteria.[42]

The ESAs' temporary intervention powers also encroach on the freedom to conduct a business in the field of banking and financial activity. A question therefore arises as to whether said powers are compliant with Article 52 of the EU Charter of Fundamental Rights.

In light of Article 52, any limitation on the exercise of rights and freedoms recognised therein must respect the following conditions: (i) be provided for by the law; (ii) respect the essence of the freedom; (iii) be necessary and proportionate; and (iv) genuinely meet objectives of general interest recognised by the Union.

Nevertheless, as regards the ESAs' temporary intervention powers, all these conditions are being respected.

Indeed, the ESA's temporary intervention powers are provided for in EU regulations, specifying the conditions for the use of such powers. Even in the case of an emergency situation under Article 18 of the ESAs' founding regulations, decisions that the ESAs may adopt are the same as those that national supervisory authorities may adopt under provisions of directly applicable EU law or national laws transposing directives.

Moreover, all the ESAs' temporary intervention powers are conceived as impinging on some, but not all, banking or financial activities. They have a temporary nature, are to be reviewed at least every three months and, if not reviewed, they automatically expire. Against this backdrop, they do not encroach on the essence of the freedom to conduct a business as this freedom is only limited in its scope and it automatically re-expands once the measures expire.

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[42] Against this background, a distinction has to be drawn between (i) the emergency situation declared by the Council; and (ii) the exceptional circumstances, where coordinated action by the competent authorities is necessary in order to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. Whilst in the first case the *Meroni* prohibition may be overcome by the Council's declaration of an emergency situation, as this declaration includes the recognition of a serious threat to the orderly functioning and integrity of financial markets or the stability of the financial system in the Union, in the second case the conditions for activating the ESAs' temporary interventions powers are assessed by the ESAs themselves, without either *ex ante* specific criteria or an *ex post* Council endorsement, which seems to run counter to the *Meroni* prohibition.

From this perspective, the ESMA's proposal in favour of the introduction of a legal mechanism to consolidate pan-European product intervention measures and make them permanent (for example by a legal act of the European Commission consolidating temporary measures after a given period) might be problematic and, at the same time, raise issues of compliance with Article 52 of the EU Charter of Fundamental Rights.[43]

The ESAs'powers may be regarded as necessary, as the goal they pursue cannot be attained through other means.[44]

Moreover, the powers of the European Supervisory Authorities, according to the relevant specific enabling rules, may only be adopted as an *extrema ratio* and are therefore proportionate.

Finally, the orderly functioning and integrity of financial markets, the stability of the financial system and the investor protection concern are objectives of general interest recognised by the Union as they may be inferred from the EU financial legislation, including that conferring on the ESAs' the temporary intervention powers mentioned above. The European Court of Justice has expressly recognised that investor protection is a paramount goal of EU financial legislation[45] and that the attainment of financial stability justifies certain limitations of fundamental rights.[46]

6. *Coordination of NCAs' and ESAs' intervention powers under MiFiR and PRIIPs regulations*

Under Article 42 MiFIR and Article 17 PRIIPs regulation, the NCAs have the power to permanently prohibit or restrict the marketing, distribution or sale of financial instruments or a type of financial activity and practice.

Nevertheless, when the NCAs intend to take product intervention measures, they have to notify these same measures to the relevant ESA.

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43 See ESMA Final Report 2020, *cit.*, p. 23.

44 Indeed, supervisory and resolution powers limiting the business activities of banking and investment firms: (i) cannot be used to address a threat to the orderly functioning and integrity of financial markets, the stability of the financial system or the investor protection concern, as they are aimed at attaining the different target of ensuring the stability of banks and investment firms; and (ii) can only be used in relation to single institutions.

45 See case C-604/11, *Genil 48 SL v Bankinter*, EU:C:2013:344, para. 39 and case C-248/11, *Nilaş and Others*, EU:C:2012:166, para. 48.

46 See case C-526/14, *Tadej Kotnik and others v Državni zbor Republike Slovenije*, EU:C:2016:767, paras. 69 and 91; case C-41/15, *Gerard Dowling and others v Minister for Finance*, EU:C:2016:836, para. 50; joined cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and others v Commission and ECB*, EU:C:2016:701, para. 74; case C-686/18, *Adusbef and Others*, ECLI:EU:C:2020:567, para. 92.

In accordance with Articles 43 MiFIR and 18 PRIIPs regulation, ESAs perform a facilitation and coordination role in relation to product intervention measures by NCAs.

ESAs shall adopt an opinion on whether the prohibition or restriction is justified and proportionate, taking into account the potential cross-border effects of the measure.

Should the NCA of the Member State "A" adopt stricter measures than the NCA of the Member State "B", firms from the Member State "B" have to abide by the national product intervention measures of the Member State "A" in respect of any cross-border activity provided to clients in the Member State "A" that is within the scope of the national measure of the latter.

Though ESAs – differently from NCAs – can adopt only temporary product intervention measures (for a period of three months, after which they must review them), they can consider the need to extend them for a further period of three months.

Nevertheless, as already mentioned, unlimited prolongations of time of the previous measure run the risk to exceed the limits laid down in Article 52 of the Charter, as they encroach on the essence of the freedom to conduct a business.

Infringements of ESMA's, EBA's and NCAs' product intervention measures are subject to the sanctioning powers under Article 70(3)(b)(xxviii) MiFID2. Strangely enough, PRIIPs regulation does not contain similar provisions.

7. The impact of temporary intervention powers on financial contracts

The exercise of product intervention powers by NCAs and ESAs has necessarily an impact on financial contracts.

However, due to the lack of harmonization, the civil consequences vis-à-vis contracts concluded in breach of NCAs' or ESAs' intervention measures are governed by the national law.

In the Italian jurisdiction, in order to investigate such an impact, a distinction shall be drawn between those contracts concluded after the adoption of an intervention measure and those concluded before the measure is taken, but whose performance is still ongoing at that moment.

Considering the provision under Article 1418 of the Italian Civil Code, as interpreted by *Corte di Cassazione* (the Italian Supreme Court),[47] a contract

[47] See Cassazione civile, Sezione I, 29.9.2005, No 19024, according to which the nullity of the contract under Article 1418 of the Civil Code for breach of mandatory rules requires that the violation derives directly from the intrinsic elements of the contract itself, i.e. from the structure or content of the contract. This interpretation has been endorsed by Cassazione, Sezioni Unite, 19.12.2007, No 26724.

concluded in breach of an NCA's or ESMA's/EBA's intervention measure should be deemed as being null and void to the extent that its content is in contrast with limitations or bans imposed by that intervention measure, if issued before the conclusion of such contract. The mandatory rules could be considered to be enshrined within the NCAs' or ESAs' measure.

Against this backdrop, it could be argued that whilst contracts whose structure or content contrast with an intervention measure issued before the conclusion of the contract itself should be declared null with *ex tunc* effects, those concluded before the issuance of the intervention measure, but whose performance is still ongoing at that moment, shall be declared null and void with the exception of the effects already produced.

Without claiming to examine the matter in depth, it should be noted that the possibility that the temporary prohibition or restriction may also apply to contracts drawn up before the measure becomes effective but whose execution continues after that moment derives from the letter of Articles 40(5) and 41(5) MiFIR.

The latter provide for that ESMA or EBA, as the case may be, "shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect".

As the above rules refer to the activity performed rather than the contracts concluded, the object of the measures themselves could well be the enforcement activity of a contract concluded prior to them.

On the other hand, a different interpretation would make the measures in question unsuitable for the purpose for which they were designed by the legislator, namely to address a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system. Not surprisingly, the German text of the rules in question merely states, for the part that concerns us here, that "*ein Verbot oder eine Beschränkung gelten erst dann, wenn die Maßnahmen wirksam geworden sind*".

Part II.

The relationships between the public authorities' assessment and the private enforcement regime

8. The interplay between private and public enforcement: an open issue

What just said shows that the EU agencies as well as the national competent authorities have been progressively vested with intrusive powers that might lead to an intervention directly into private contracts.

Indeed, the mandatory rules resulting from the regulatory framework end up conditioning (i.e. shaping) many aspects of the pre-contractual and contractual relations between the financial intermediaries and the investors.

In the meantime, civil courts are willing to declare null, void or unenforceable the contracts whose structure or contents deviate from those mandatory rules.

As confirmed by a recent research,[48] private law – also in the area of investment contracts – is powerfully transforming from "*an instrument to ensure the parties' autonomy to a synthesis that combines both its traditional concerns about corrective justice between individuals and instrumental ambitions about steering markets towards objectives of general interests*".

However, the design of private law remedies for breaches of financial rules "*remains crucially dependent on the interpretative approach of national courts*",[49] considering that MiFID II does not harmonise private law consequences applicable

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48 Della Negra, F., *MiFID II and Private Law: Enforcing EU Conduct of Business Rules*, Oxford, 2019.

49 Andenas, M., *Foreword,* in Della Negra, *MiFID II and Private Law*, cit.

to the contractual or non-contractual relationships between the investment firms and the clients.[50]

This is the reason why private law remedies in case of MIFID infringements continue to diverge significantly from jurisdiction to jurisdiction: more precisely, in continental Europe, conduct of business rules produce civil law effects and give rise to contract law remedies. Nevertheless, the type of remedy (liability for damages *versus* avoidance of contracts) as well as the conditions to exercise these remedies materially vary. At the same time, neither the EU principle of effectiveness nor the principle of equivalence, as governed by the CJEU, can eliminate these discrepancies.

This *status quo* can be hardly considered as the optimal regime: indeed, the shaping of private law remedies at the national level risks to hamper the implementation of a level playing field for financial and banking institutions.

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[50] More broadly, the legislative harmonization of the private law consequences in the area of financial services is still in an embryonic stage at the EU level. Indeed, apart from the regime on civil liability *vis-à-vis* the rating agencies introduced by Regulation No 462/2013 (Article 35a), both the *Prospectus* directive (Directive 2003/71/EC and the connected regulation) and the so called *Transparency* directive (Directive 2004/109/EC on the information about issuers whose securities are admitted to trading) contain only a minimum harmonisation of civil liability for breaches of regulatory duties, by defining essentially the minimum scope of the liability rule, in terms of persons to be necessarily considered subject to this kind of civil liability. More precisely, Article 6 of the Prospectus Directive only requires the Member States to ensure that their legal and administrative provisions on civil liability apply to those persons who are responsible for the information given in a prospectus. For the rest, the civil liability for prospectuses remains an issue of national law (and this is particularly true also with regard to the transparency directive whose Recital No 17 emphasizes that the liability rules shall continue to be "*laid down by each Member State under its national law or regulations*"). The ESMA Report on liability regimes in Member States in relation to the Prospectus Directive of 2013 still represents a good starting point to go through a comparative analysis of these different regimes.
Slightly similar considerations apply to the PRIIPs Regulation (Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products), whose Article 11 dictates, on one hand, the rule according to which a retail investor demonstrating loss resulting from reliance on a key information document misleading, inaccurate or inconsistent with the relevant parts of legally binding pre-contractual and contractual documents, when making an investment into the PRIIP for which that key information document was produced, may claim damages from the PRIIP manufacturer for that loss, and on the other hand, points out that such a claim should be conducted in accordance with the national law and that elements such as 'loss' or 'damages' shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.
Apparently a higher level of harmonization is pursued through the EMIR, *i.e.* the Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories, which – under Article 12 – provides that the infringement of clearing, reporting and risk mitigation obligations by THE parties to an OTC derivative contract shall neither affect the validity of that contract, nor the possibility for the parties to enforce the provisions of an OTC derivative contract and shall not give rise to any right to compensation from a party to an OTC derivative contract.

This is not the place to deal with the question of whether there is a legal basis, at the EU level, for the harmonization of private law remedies in the field of MiFID II.

On that regard, it has been argued that "*since MiFID I and MiFID II have been based on the freedom of establishment, the* (..) *tool of Article 114 of TFEU was not available to co-legislators to harmonise the civil liability of investment service providers. However, from a legal perspective, the harmonisation of private law rules may also be justified for regulatory measures that ultimately aim to foster freedom of establishment. The main rationale would be to facilitate the investors' confidence in the EU financial markets, ensuring a greater degree of uniformity of private law and civil liability standards. These standards would contribute to ensure, together with regulatory duties, the competence and trustworthiness of the financial intermediaries on whom investors are particularly reliant*".[51]

In very broad terms, to the extent that a piece of EU legislation is deemed suitable to confer a right for individuals,[52] once transposed at the national level, the same EU legislation might legitimately set the minimum regime of enforceability of this right before the civil judge, in light of the principle of effectiveness as constantly implemented by the CJEU.

With this respect, it is noteworthy that the Court of Justice has progressively intended the actions brought by the privates as instrumental in strengthening the compliance with EU law, moving from the assumption that private law remedies

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[51] Della Negra, *MiFID II and Private Law*, cit., p. 15.

[52] Recently, an Author (Callens, E., *Recalibrating the Debate on MiFID's Private Enforceability: Why the EU Charter of Fundamental Rights is the Elephant in the Room*, in *European Business Organization Law Review*, May 2020) has argued that a reassessment of the CJEU's decision in *Genil* v. *Bankinter* (C-604/11) reveals important arguments in favour of MiFID's private enforceability. According to this Author, the referral in *Bankinter* to the *observance of the principle of effectiveness* as articulated in *Littlewoods* would be completely pointless if MiFID conferred no rights upon individuals and the principle of effectiveness would thus be inapplicable. In this reading, as the principle of effective judicial protection is equally contingent on the conferral of rights by EU law, the applicability of the traditional *Rewe* effectiveness clause (and the implied conferral of rights by MiFID) signals the applicability of the principle of effective judicial protection. It follows that Member States have to provide effective judicial remedies for investors whose rights conferred by MiFID are violated. Although effective investor protection is conceptually not necessarily obstructed by the absence of private law remedies, the inference that Member States have the power to decide *whether* they provide private law remedies only holds true on this purely conceptual level. "*Once one considers the implications of Bankinter's referral to the classical Rewe effectiveness for the conferral of rights upon investors, this position becomes* – in Callens's view – *indefensible*".

represent an effective means of preventing the infringement of EU law by economic operators.[53]

In *Hirmann* (C-174/12), the Court expressly takes into account the deterrent effect of private law remedies within securities disputes. The Court noted that "*civil liability (..) is capable of deterring issuers from misleading investors*" (para. 46).

The importance of the deterrent effect of private law remedies has been emphasized also in *Francisco Gutiérrez Naranjo* (C-154/15), a preliminary ruling concerning two precedents of the Spanish Supreme Court, which had declared unfair the "floor clauses" contained in consumer mortgage loan contracts. Nevertheless, it had decided – at the same time – that the mortgage loan agreements in question were capable of continuing in existence and, furthermore, had limited the retroactive effect of the declaration of nullity in respect of the 'floor clauses', essentially because there was a risk that restitution would have triggered serious economic repercussions for the involved credit institutions. In line with *Hirmann* and the previous case law on the Directive 1993/13, the CJEU – while holding that the limitation of the retroactive effect of the nullity (*e.g.* restitutionary effects) of floor clauses is in contrast with Article 6(1) of Directive 93/13 – highlighted that the deterrent effect (of the private law remedy) is an essential component to ensure the effectiveness of EU law and the fundamental right to an effective judicial protection as well.

On these grounds, the private enforcement might be a very powerful key in order to reach further harmonization of the private law remedies in the very sensitive field of MiFID II.

Nevertheless, the lack of a satisfactory level of harmonization of private law remedies in this area is not the only open issue.

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[53] As recently noted by Cherednychenko, O.O., *Rediscovering the public/private divide in EU private law*, in *European Law Journal*, Vol. 25, No 6, December 2019, pp. 1-21: "*the EU legislator has been using private law as an instrument for establishing the European internal market. In this context, it has also been promoting the public enforcement of EU private law by administrative agencies and alternative dispute resolution (ADR) outside civil courts. In so doing, it has not, at least not explicitly, acknowledged the relevance of the conventional public/private distinction. In particular, the EU legislator has commonly refrained from prescribing a particular mode of implementation within national legal orders, leaving it to the Member States to choose whether to transpose a particular EU directive within administrative law, private law, or both. (..) The emergence of EU private law in the above sense has profoundly challenged the traditional understanding of private law as it had evolved in national legal systems. In particular, it has prompted or fostered the development of legal hybrids, such as constitutionalised private law", "regulatory private law", or "supervision private law*".

As long as the private-law actions brought by the investors before the courts cannot be seen in isolation as a mean to "merely" restore a corrective justice between individuals, but they influence the behavior, the business model as well as the organization of credit institutions and investment firms, it arises the issue of how this private enforcement managed by the judges should interact with the tasks performed and the interventions concretely taken by the public authorities which regulate and supervise those firms.

Indeed, especially in highly regulated markets, such as the financial markets supervised by specialised administrative authorities, the interplay between private and public enforcement should be considered as a priority. This is particularly true in the field of MiFID II, where Article 69(2) might be read as requesting Member States to vest supervisory authorities with the power to implement "*mechanisms to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014*".[54]

Despite this, MiFID II remains silent on this point, in the sense that no mechanisms of coordination between the courts, on one hand, and the supervisory authorities, on the other hand, have been provided.

9. *The antitrust law paradigm*

With this regard, interesting insights might be gained from the established experience of the EU antitrust law. Indeed, in this specific area of EU law, more (and before) than in others, the enforcement has been conceived as a two-pillar system, where "private" and "public" work as complementary tools. The whole architecture is built on the assumption of the deterrent effect of private law remedies against such violations.

In *Courage* (case C-453/99), which remains a leading case in the field of antitrust law, the Court of Justice noted that "*the practical effect of the prohibition laid down in Article 81(1) of the Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*".[55] As pointed out by the Advocate General of the CJEU in a recent Opinion of 6 February 2019 (delivered in the case C-724/17, *Otis*), "*by employing the forceful language of rights and the effectiveness of EU competition law, the Court has put particular emphasis on the deterrent function of actions for damages for breaches of EU competition law*".

[54] On the interpretation of Article 69(2) MiFID II, see Callens, *Recalibrating the Debate on MiFID's Private Enforceability*, cit.

[55] See par. 26. The point is exactly repeated also in Manfredi (C-295/04), par. 60.

The idea of "instrumentalising" the interested private parties so as to encourage them to make an important contribution to the enforcement of certain rules of EU law has also been enshrined in some specific provisions of EU law. The directive on antitrust damages (directive 2014/104/EU) represents the paradigm.

The directive moves from the explicit consideration that "*the full effectiveness of antitrust rules requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions*" (Recital No 3). In that picture, "*actions for damages are (..) one element of an effective system of (..) enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions*" (Recital No 5).

However, in this area, the EU Legislator has gone further by introducing some specific coordination mechanisms between private and public enforcement. As expressly reminded in Recital No 6 of directive 2014/104/EU, "*to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules*". The Recital goes ahead by adding that "*it is necessary to regulate the coordination of those two forms of enforcement in a coherent manner*".

Firstly, with the aim of striking the right balance between the incentive of bringing private claims and the protection of investigative tools for public enforcement, the directive sets specific limits to the possibility for national courts to order the disclosure of evidence retained by the national competition authority.[56] For instance, a barrier is posed to safeguard the confidentiality of leniency statements and settlement submissions: the rationale being that of preserving one possible tool at the disposal of the public authority in its enforcing activity, *i.e.* the leniency programs.

In parallel, in order to avoid inconsistencies, the directive establishes that the finding of an infringement of antitrust rules enshrined in a final decision by a national competition authority or by a review court of a Member State should not be "re-litigated" in subsequent actions for damages before the courts of the same Member State. More precisely, according to Article 9 of the directive, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority (or of the review court) relating to that infringement. The directive also clarifies that such a binding effect should cover only the nature of the

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[56] See Article 6, par. 6.

infringement and its material, personal, temporal and territorial scope (as determined by the competition authority or by the review court in the exercise of its jurisdiction).[57]

The requirement of finality of the decision of the NCA does not impinge on the right of the damaged person to file an action before the civil court at a time when the NCA's decision is not yet final.[58]

The mechanism partially mirrors that resulting from Article 16 of the EU Regulation No 1/2003 (on the implementation of the rules on competition), where it is provided that, when national courts rule on agreements, decisions or practices under Article 101 or 102 TFEU which are already the subject of a Commission's decision, they cannot issue decisions that run counter to the decision adopted or contemplated by the Commission.[59]

When the Commission has initiated a proceeding, the national court – in order to avoid giving a decision that would conflict with that of the Commission – may assess whether it is necessary to stay the judicial proceeding. As clearly explained by the CJEU in the case C-199/11 (*Otis*), "*it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid. The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts*".[60]

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57 A different regime is dictated when, before the civil court of a Member State, the plaintiff adduces the final finding of an antitrust infringement by the NCA of another Member State. With this respect, Article 9 provides that such a final decision by the NCA of another Member State "*may, in accordance with national law, be presented before the national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties*".

58 See Truli, E., *White Paper on damages actions for breach of the EC antitrust rules: the binding effect of decisions adopted by national competition authorities*, in *European Competition Journal*, Vol. 5, No 3, December 2009, p. 802.

59 As noted in the literature (see Merola, M., Armati, L., *The binding effect of NCA decisions under the damages directive: rationale and practical implications,* in *Italian Antitrust Review*, Vol. 3, No 1, 2016, p. 89): *"The principle that national courts should avoid rulings that conflict with Commission's decisions finds its origins in the Delimitis ruling, in which the Court of Justice underlined that the Commission* '*is responsible for defining and implementing the orientation of Community competition policy*' *and that, in a system of parallel competences, in order not to breach the general principle of legal certainty, national courts must avoid issuing decisions that would conflict with a decision contemplated by the Commission"*.

60 See par. 53-54 of the decision.

All this without prejudice of the possibility for the national court to raise a question of validity/interpretation of the Commission's decision before the CJEU under Article 267 TFUE.[61]

10. The coordination mechanism between private and public enforcement under Article 9 of the antitrust damages directive

The coordination mechanism under Article 16 of Regulation No 1/2003 has been only partially extended to the decisions of the National Competition Authorities.

Article 9 of the directive limits the binding effects to the "positive" finding of infringement incorporated into a final decision of the NCA, with the effect that, in principle, civil courts should remain free not only to extend the scope of the unlawful conduct giving rise to damage beyond the findings of the NCA's decision, but also to overturn a decision where the Authority had excluded the existence of an antitrust violation.

This means, in practical terms, that the civil court should not be prevented from ruling that an infringement was longer lasting or wider in ambit than found by the NCA, or that other companies took part in the cartel, differently from what is stated in the NCA's decision.[62]

The provision under Article 9 of the antitrust damages directive has been transposed in our jurisdiction through Article 7 of the Legislative Decree No 3 of 19 January 2017.

Pursuant to the Italian legal framework, final and conclusive AGCM (*Autorità Garante della Concorrenza e del Mercato*)'s decisions – which means decisions not further subject to appeal before the administrative judge – or judgments issued after the judicial review of these decisions have binding effect for antitrust damages before the national judges: the binding effect being limited to the factual analysis of the infringement of competition law, while not covering neither the existence or amount of harm, nor the causal link.

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61 As pointed out by Merola and Armati (in *The binding effect of NCA decisions under the damages directive*, cit., p. 90), with regard to the scope of Article 16(1), it is commonly accepted that it concerns only Commission's decisions that apply substantive law within the system of Regulation 1/2003, *i.e.*, decisions finding an infringement (Article 7), interim decisions (Article 8), decisions finding inapplicability (Article 10) and decisions withdrawing exemptions (Article 29(1). By contrast, Article 16(1) does not apply to commitment decisions (Article 9) that do not take a position on infringement. As highlighted the same Authors, another question is whether the national court's duty to avoid conflicts is confined to the very same cases, i.e., the same conduct perpetrated by the same parties, or whether this duty extends to the same type of conduct perpetrated by other undertakings.

62 See again, in this sense, Merola, Armati, *The binding effect of NCA decisions under the damages directive,* cit., p. 105.

Furthermore, it is also established, in line with a settled Italian case-law,[63] that, in the judicial review of the AGCM's decisions, the administrative courts shall have the power to fully verify the facts and the technical profiles (except those technical profiles which imply highly discretionary evaluations) on which such decision is based. The provision is probably aimed at getting rid of the doubts on the compatibility of this coordination mechanism with the right of defence as enshrined in the Constitution, the European Convention on Human Rights[64] and the EU Charter of fundamental rights. Indeed, the binding effect represents only a limitation of the infringer procedural right, in the action for damages, to provide contrary evidence as to the existence of the infringement. Evidence that the infringer has the right to file in the procedure before AGCM or in the judicial review of the Authority's decision before the administrative judge, having in both cases full rights of defense.

Nevertheless, this framework – both at the EU and at the national level – leaves open several material issues on the interaction between public and private enforcement.

A first dilemma concerns the "negative decisions" by the National Competition Authority, confirming that certain agreements or practices do not constitute an infringement of Article 81 or Article 82 of the Treaty.

Article 9 of the directive 2014/104/EU does not cover this hypothesis: apparently, the reason for this silence is quite formalistic, if we consider that in the Commission Staff Working Paper (published in 2008 together with the White Paper on Antitrust Damages), the Commission explained that such "negative decisions" could not be invoked with binding effects before the national courts since they are not part of Article 5 of Regulation 1/2003, which sets out an exhaustive list of the types of decisions that an NCA can take when applying Article 81 or Article 82 of the Treaty. In turn, also the Italian legislator abstained from tackling the issue.

A second point concerns the case where a civil action for antitrust damages is filed when neither a decision by the NCA has been adopted, nor a proceeding by the NCA for potential infringements of antitrust law has been opened.

While Article 16 of Regulation No 1/2003 provides for a mechanism requiring the civil court to assess the conditions for a stay of the civil action on the ground that a proceeding opened by the Commission is pending on the same facts, nothing is contemplated by Article 9 of the antitrust damages directive with reference to NCA's proceedings. Therefore, the risk of conflicting decisions

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63 See Corte di Cassazione, decision n. 1013/2014, *Acea-Suez*.

64 On the Italian system of judicial review of antitrust decisions and its compatibility with Article 6 of the ECHR, see Giovagnoli, R., Tavassi, M., Police, A., Libertini, M., Siragusa, M., Chieppa, R., *Judicial review of antitrust decisions: Q&A*, in *Italian Antitrust Review*, Vol. 2, No 1, 2015, pp. 144-163.

by the civil court, on one hand, and by the administrative authority, on the other hand, remains unmitigated.

The Commission Staff Working Paper of 2008 on antitrust damages merely noted, on this regard, that "*where an appeal is pending against the NCA decision, national civil courts seised with a damages action are encouraged to consider whether staying their proceedings is appropriate*".[65]

At the same time, no mechanisms have been designed to provide an *ex officio* reporting by the civil court of potential breaches of antitrust law to the NCA in relation to the filed damages action.

11. The complexity of the MiFID rules of conduct and the risk of fragmented, where not divergent, interpretations

Coming to MiFID II, we should consider that this regulatory framework tends to pursue not only the goal of achieving a consistent level of investors protection, but also the objectives of the stability of the financial market (Recital 17) and investments firms (Articles 9 and 10).[66]

These latter objectives might be hampered by the fragmentation of applicable rules and by the mis-coordination not only between those administrative authorities responsible for the public supervision of the framework (i.e. supervisory authorities), but also between the former and the civil courts entitled to ensure the private enforcement of these rules.

Now it is clear that, in the field of antitrust law, the provision of the binding effect of the final NCA's decisions has been conceived, since the beginning, as a measure essentially aimed at creating strong incentives for the follow-on actions for damages against the members of the illegal cartel, by alleviating the burden of proof on the damaged consumers.

Against this backdrop, the limitation of the binding effect to "positive decisions" taken by the NCA, with the exclusion of the "negative decisions" from the scope of Article 9 of directive 2014/104/EU, appears consistent with this set of objectives.

This stance also explains why no instruments have been established to enable the NCA to be promptly informed as soon as an action for antitrust damages has

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65 Commission Staff Working Paper, par. 157.

66 The interest in the stability of financial market and of the single investment firm is not a stranger to MIFID II: indeed, we find a reference to this interest in Recital 17 (Persons who provide the investment services and/or perform investment activities covered by this Directive should be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system) as well as of the investments firms in Articles 9 and 10, which are aimed "*to ensure the sound and prudent management of the investment firm*".

been filed, so as to have the possibility to adequately intervene or take a position. Indeed, in the said perspective, the consumers' interest in timely civil proceedings is more important than the defendants' interest in waiting that the NCA – in its capacity of technical authority – verifies whether the cartel effectively exists.

In the field of financial services regulated by the MiFID package, the matrix of the interests at stake appears more complex. It is not "simply" a matter of ensuring the enforcement of a well-established set of prohibitions aimed at safeguarding the competition into the common market.

Indeed, the enforcement of the MiFID framework implies the application of a complex, constantly changing, multi-level law, whose implementation passes through the regulatory acts as well as soft-law acts of the Commission, the EU agencies and also of the supervisors, which – by this way – specify the general rules of the EU directive as well as of the transposing national law.

The fair treatment and best interest duties, under Article 24(1) of MiFID II, constitutes a paradigm of this type of rules, whose normative content is built through the reference to general standards (fairness, best interest), rather than to specific conducts.

To a certain extent, the same is true for the suitability rule (set out in Article 25(2) of MiFID II and Articles 54 and 55 of the MiFID II Delegated Regulation) which is one of the key obligations for investor protection, compelling investment firms (which deal with investment advice or portfolio management) to provide suitable personal recommendations to their clients or to make suitable investment decisions on behalf of their clients.

Likewise, the notion of "conflict of interests" remains undefined under Article 23 of MIFID II, which requires investment firms to take all appropriate steps to identify and prevent or manage conflicts of interest between themselves and their clients or between one client and another that arise while providing any investment and ancillary services, or combinations thereof.

The need – in this field – for efficient mechanisms of coordination between public and private enforcement is evident, considering the risk of fragmented, or even divergent, interpretations of this complex set of rules, which appears even more severe considering that, in each jurisdiction, the private litigation between investors and firms falls within the remit of a plurality of territorial courts.

Consideration should also be given to the interest in the stability of the financial system as a whole (implying the stability of the supervised firms), which – for sure – would be adversely affected by legal uncertainty arising from decisions of civil courts, on the one hand, and of regulators/supervisors, on the other, which do not match each other.

Indeed, one must not forget that all financial (*lato sensu*) market disciplines tend to pursue a macro-economic objective of stability and good functioning of the overall system, which could be hampered by the fragmentation of applicable rules and the mis-coordination between the authorities responsible for the supervision of the overall mechanism (*i.e.* supervisor authorities) and those responsible for ensuring justice in the specific case (*i.e.* judicial authorities). From this standpoint, as already noticed, we should remind that the interests in the stability of financial market and of the single investment firm fall within the objectives of MiFID II.

It has been convincingly argued that one key element for an effective application of EU conduct of business rules in private-law disputes might be represented by ADR bodies set up within supervisory authorities, which "*may tend to apply regulatory and supervisory standards when resolving*" the case.[67]

With this respect, it should be noted that MiFID II (Article 53; see also Recital 61) confirms the high expectations of the EU legislator for efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes, concerning the provision of investment and ancillary services provided by investment firms. Indeed, in theory, the ADR systems which operate within the supervisory Authority or which benefit from its organisational support might more easily establish a constructive dialogue with those Authorities at least on the most complex cases, with the aim of promoting a consistent and coordinated application of MiFID rules of conduct.

Nevertheless, the practicability of this coordination mechanism should not be over-emphasised for two main reasons.

First, ADR bodies, although financially and organisationally supported by the Authority, are often shaped and effectively regulated as independent from the Supervisor. As a consequence, any dialogue on the specific case submitted to the Ombudsman should take place in accordance with this mutual independence principle, with the further consequence that the dialogue should not be treated as an informal consultation of the Authority.

Next, directive No. 2013/11/EU of 21 May 2013, on the alternative dispute resolution for consumer, which also applies to claims raised by consumers with respect to the compliance with MiFID II, explicitly establishes that the outcome of the ADR procedure shall be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint (except for highly complex disputes). Consequently, one can seriously doubt that the timing and intimate features of the ADR procedures – which, by their essence, should be quick and extremely simplified – might be compatible with a parallel assessment of the relevant facts to be conducted by the supervisory Authority on the report of the ADR itself, in order to be taken into account by the Ombudsman for the final decision.

[67] Della Negra, *MiFID II and Private Law*, cit., p. 90.

12. *Going beyond the binding effect of the "positive" decisions adopted by the competent supervisory authority*

In light of the above, we will explore how, in the field of MiFID II, the private enforcement governed by the "official" courts might be better aligned with the public enforcement managed by the supervisory authorities.

From this standpoint, the mechanism designed under Article 9 of the EU directive on antitrust damages might be probably strengthened so as to cover not only "positive" decisions by the supervisory authority, which ascertain the breach, but also – to some extent – "negative" decisions, which exclude the recurrence of a breach, with the formal closure of the infringement procedure.

As observed in a recent research,[68] in the context of financial markets, especially in retail markets, supervisory authorities are, in principle, better equipped to assess and verify – on a technical basis – whether and to what extent a regulatory duty has been infringed and to gather evidence to prove such infringement.

In other words, a limitation of civil courts' discretion in deciding whether or not an economic operator has violated one of the MiFID rules of conduct – once the existence or not of such infringement has been already assessed by a *definitive* decision of an independent authority with specific technical expertise in the field of reference – seems strongly advisable in order to ensure a consistent application of this regulatory law. In the meantime, such a rule would increase the legal certainty, with significant benefits for the stability of credit institutions and investment firms and thus of the relevant market.

As to the binding effect of a negative decision of the authority also vis-à-vis investors who did not participate in the administrative proceeding before the said authority, reference should be made to the scheme of the legal proofs, which are well-known and "practised" in the jurisdictions of the Member States. Indeed, the proposed binding effect of the decision of the competent authority amounts, neither more nor less, to the establishment by law of a non-rebuttable presumption of the existence or not of a MiFID breach. There is no need to add that, with regard to the "negative" decisions of the authority, their binding effect, i.e. the irrefutable presumption of the non recurrence of the breach, should not apply whenever the claimant provides proof of new relevant facts, not previously assessed by the Authority.

Against this background, investigation should also be extended to a rule that, in appropriate cases, allows or even requires the civil court – when called to decide on the possible civil consequences of a potential violation of the MiFID rules – to promptly inform the competent supervisory authority, so that the latter can verify the conditions for the opening of a proceeding. In addition, once the administrative proceeding is initiated, a coordination mechanism ought to be

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[68] Della Negra, *MiFID II and Private Law*, cit.

designed so that the civil court can properly take into account the conclusions reached by the sectoral authority.

In this regard, a first relevant bundle of criteria to be confronted with are those elaborated by the CJEU in *Alassini* (C-317/08), concerning the interpretation of the principle of effective judicial protection in relation to national legislations under which an attempt to achieve an out of-court settlement was a mandatory condition for the admissibility before the courts of actions in certain disputes (between providers and end-users under Directive 2002/22/EC).

It is a well-established principle in the CJEU's case-law that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions to safeguard rights which individuals derive from EU law. The Member States are nevertheless responsible for ensuring that those rights are effectively protected in each case. On that basis, the detailed procedural rules governing actions to safeguard an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

At the same time, the Court reminds that that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (see *Mono Car Styling*, paragraph 47).

Nevertheless – as noted by the CJEU in *Alassini* – "*it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, case C-28/05 Doktor and Others [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in Fogarty v United Kingdom, No 37112/97, §33, ECHR 2001-XI (extracts))*".

According to *Alassini*, it is essential that the condition of admissibility of the civil action "*does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties*", and – last but not least – that *interim* measures by the court are possible where the urgency of the situation so requires.

Having said this, it is useful to note that a mechanism of suspension of the civil lawsuit, while the administrative proceeding for the ascertainment of the same relevant facts is pending, does not represent a total novelty in the Italian legislation, which provides for something similar with regard to both the class action of consumers referred to in Article 140-bis of the Consumer Code and the so called "public" class action, introduced by the Legislative Decree No 198/2009.

In particular, under the former, the civil court – after the first hearing – rules on the admissibility of the class action or may decide that the action has to be suspended if there are other proceedings concerning the same issues already pending before an administrative agency/authority or an administrative court. Under the latter, the action may be brought by a group of consumers and users and/or their representative associations in order to seek protection against the wrongdoings of a public administration, including government entities or other public or private bodies providing public services.

Interestingly, in order to specifically address the risks coming from parallel proceedings, Article 2 of the Legislative Decree No 198/2009 governs the relationship between private and public enforcement. In particular, if a supervisory/investigative authority (established by a state or a regional law and in charge of the sector concerned) has opened and not yet defined a procedure for the same violation, subsequently a public class action may not be brought. However, when a public class action has been brought first, such an action shall be stayed until the proceeding held by the administrative authority has been finally decided.

For sure, a rule providing the possibility for the civil judge of suspending the lawsuit during the administrative proceeding handled by the sectoral authority should duly take into account also the constitutional limits of each jurisdiction. With respect to the Italian legal system, the right of defence under Article 24 of the Constitution, as well as the principles of fair trial and "reasonable time" of the trial, as enshrined in Article 111 of the Constitution (as well as in Article 6 of the ECHR) and as interpreted by the Constitutional Court,[69] would obviously represent red lines for which there is no way around.

In light of the above, a mechanism of mandatory suspension of the civil lawsuit to be applied for the whole time of the administrative proceeding before the supervisor would hardly succeed in passing the test of consistency with the CGEU's case law as well as with the Constitution. It might also be argued that such a mandatory suspension would be disproportionate if compared to the goals

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[69] See, for instance, Constitutional Court, Order No 251 of 2003, reading that the right of defence is not violated by provisions that require the holder of the right to carry out procedures aimed at the out-of-court settlement of the dispute before being able to bring an action in court, since the right of defense guaranteed by Article 24 of the Constitution, is also inclusive of the right not to be sued unnecessarily. See also the Order No 124 of 2005, according to which the impossibility of celebrating a single judgment on connected claims cannot, in itself, impact on the reasonable duration of the trial, since the various claims can be well proposed and treated simultaneously; whereas the possibility of conflicting judgments can be remedied, either in advance (if the conditions are met), by suspending under Article 295 of the Code of Civil Procedure, or subsequently, through the ordinary means of appeal.

to be pursued, considering – just for instance – that the suspension would be superfluous in plain-vanilla cases.

From this perspective, a more balanced solution might consist in providing that, when the civil court transmits the dossier to the supervisory authority, the action may be stayed by the court, on its own motion, after an assessment of all the circumstances of the specific case under issue, for a period not exceeding a certain amount of days pre-established by law and set in accordance with the principle of reasonable time of the action. Indeed, at the end of the day, what should be avoided is that the court has to decide before the completion of any assessment by the sectoral authority: but this objective does not necessarily implies that the action should remain "frozen" until the issuance of a definitive decision by the specialized authority.

At the same time, the provision by law of a rigid time-limit for the suspension of the lawsuit might create incentives for the authority, to which the court transmits the dossier, to quicken – to the extent deemed possible and appropriate – its proceeding for the relevance assessment of the facts.

From this analysis, it follows that the attempts of connecting private and public enforcement in this area raise a number of sensitive issues of consistency with the principles elaborated by the CJEU as well as with the constitutional regime and tradition of the individual EU jurisdictions. Nevertheless, the challenge should be definitely taken up by the Legislator in occasion of the next periodical update of the MiFID package.

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

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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.

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

The civil effects of MiFID II between private law and regulation

*Federico Della Negra**

Summary: *1. Introduction – 2. The role of private law in EU securities regulation – 3. The private enforcement of MiFID II conduct of business obligations – 4. The de-centralised private enforcement of EU law: principles – 5. The 'investor protection' purpose of conduct of business rules – 6. The content of conduct of business rules – 7. Arguments against the right-conferring nature of conduct of business rules… and the counter-arguments – 8. The type of remedy: national divergences – 9. An EU law perspective on remedies – 9.1. Breaches of the suitability rule – 9.2. Breaches of other conduct of business rules – 9.2.1. Standard of proof – 9.2.2. Causation – 10. Concluding remarks*

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1. Introduction

The issue whether the breach of conduct of business rules by financial intermediaries can enable clients to obtain a civil law remedy has been extensively examined. The academic discussion on this topic started under the 1993 Investment Services Directive (ISD), which laid down seven general rules of conduct,[1] and continued after the adoption of the 2004 Markets in Financial Instruments Directive (MiFID I), which introduced a new sophisticated framework for conduct regulation.[2] The rise of mis-selling litigation that followed the outbreak of the 2008 global financial crisis (GFC) reinvigorated the debate on whether, absent an express EU law provision, national courts should allow investors to obtain compensation or another remedy for losses suffered as a result of breaches of MiFID conduct of business rules. Much of the doctrinal analysis has remained on the national law level, focussing on the vexed issue of how to 'connect' general private law with a body of sectoral regulation that was left outside civil codes and common law.[3]

From the EU law perspective, an additional problem is whether and to what extent EU law requires national private law to establish private law remedy for breaches of these conduct of business rules and which should be the legal basis for such a remedy, in the absence of an express provision. While there seems to be general consensus about the fact that conduct of business rules should give rise

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[1] See in particular Annunziata, F., *Regole di comportamento degli intermediari e riforme dei mercati mobiliari*, Milan, 1993.

[2] See in particular and 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, p. 317.

[3] See for an overview, Mazeaud, D., *Droit commun du contrat et droit de la consommation. Nouvelles frontierès?*, in *Études de droit de la consommation. Liber amicorum Jean Calais-Auloy*, Paris, 2004, p. 697; Breccia, U., *La parte generale fra disgregazione del sistema e prospettive di armonizzazione*, in *Il diritto europeo dei contratti fra parte generale e norme di settore*, ed. by E. Navarretta, Milano, 2008, p. 31 and Alpa, G., *Gli obblighi informativi precontrattuali nei contratti di investimento finanziario. Per l'armonizzazione dei modelli regolatori e per l'uniformazione delle regole di diritto comune*, in *Contratto e Impresa*, Vol. 24, No 4/5, 2008, p. 914. For an overview of the problem in the common law experience, see in particular, Hudson, A., *The Law of Finance,* 2nd ed., London, 2013, pp. 2 ff.

to some civil law effects,[4] views diverge as regards the intensity of these effects and the most appropriate type of civil law remedy to enforce these rules.[5] In most continental jurisdictions courts do acknowledge the civil law effects of conduct of business rules but grant different types of remedies to investors. By contrast, in the UK courts do not generally accept the civil law effects of conduct of business rules, except where the client entered into an advisory contract with the investment firm.[6]

One common element across both continental juridictions and the UK is that national courts do not refer to MiFID I/II and EU law to decide on whether or not a private law remedy should be granted to investors. Judicial reasoning is based on interpretation of general national private law concepts (i.e. pre-contractual good faith, duty of care) and rarely takes into account the specific wording and purpose of the regulatory duties. General private law often overshadows (national law transposing) MiFID provisions. A consequence of this approach is to limit the consistent and uniform application of conduct of business rules across the EU. Recourse to national private law concepts could explain why so far only in two cases national courts have referred to the CJEU questions for preliminary rulings on civil law effects of MiFID.[7]

It is submitted that MiFID II and general principles of EU law should be taken into account before national courts to determine the civil law consequences of breaches of conduct of business rules.[8] These principles can provide useful guidance to national courts, as well as out-of-court dispute resolution mechanisms, to interpret in a uniform manner common regulatory concepts and thus contribute to achieve a consistent level of investor protection in the EU in litigation and dispute resolution.

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4 See in particular Cherednychenko, O.O., *Contract Governance in the EU: Conceptualising the Relationship between Investor Protection Regulation and Private Law*, in *European Law Journal*, Vol. 21, No 4, July 2015, pp. 500-520; Andenas, M., Della Negra, F., *Between Contract Law and Financial Regulation: towards the Europeanisation of general contract law*, in *European Business Law Review*, Vol. 28, No 4, 2017, pp. 499 ff; Hadjiemmanuil, C., *The Banking Union and Its Implications for Private Law: A Comment*, in *European Business Organisation Law Review*, Vol. 16, No 3, November 2015, pp. 383-400; Reynolds, P., *Selling Financial Products: The Interface between Regulatory and Common Law Standards*, in *Journal of International Banking Law and Regulation*, Vol. 29, 2014, p. 269; Della Negra, F., *MiFID II and Private Law Enforcing EU Conduct of Business Rules,* Oxford, 2019; 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. 515 ff.

5 For an overview of the different positions, see *A Bank's Duty of Care*, ed. by Busch, D., Van Dam, C., Oxford, 2017.

6 The UK became a third country on 1 February 2020. On the basis of the Withdrawal Agreement concluded between the EU and the UK on 7 October 2019, the transitional period will last until at least 31 December 2020. Until then, EU law continues to apply to the UK.

7 Case C-604/11, *Genil v Bankinter SA*, EU:C:2013:344 and case C-312/14, *Banif Plus Bank Zrt. v Márton Lantos*, EU:C:2015:794.

8 See Della Negra, *MiFID II and Private Law*, cit., p. 17 and p. 220.

2. *The role of private law in EU securities regulation*

The objectives of EU harmonisation of national securities laws have gradually moved from liberalisation (i.e. broadening access to stock exchanges and passporting rights) to re-regulation of financial markets participants, investment services and financial instruments. The 1999 Commission Financial Services and Action Plan (FSAP)[9] paved the way for the re-regulation of this sector via imposition of detailed requirements on financial institutions and gradual harmonisation of supervisory measures and sanctions.[10]

However, the FSAP did not envisage the harmonisation of civil law consequences for breaches of regulatory duties. The divergences across national private laws, the different private enforcement cultures and the fear that harmonising national civil liability would give rise to excessive levels of litigation have represented the main obstacles for a development of an EU civil liability regime for financial market participants.[11]

Before the outbreak of the 2008 GFC, and leaving outside the scope of this paper the consumer law directives, which are generally applicable to securities transactions,[12] only the 2003 Prospectus Directive[13] and the 2004 Transparency Directive[14] contained general rules about civil liability. Both directives provide for a minimum and partial harmonisation of national laws on civil liability, which leave to Member States the task of regulating the so called 'executive conditions' for civil liability (i.e. persons subject to liability, degree of fault, burden of proof).[15]

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[9] European Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan (FSAP) (COM(99) 232).

[10] See especially Moloney, N., *EU Securities and Financial Markets Regulation*, 3rd ed., Oxford, 2014, p. 19.

[11] See Tridimas, T., *EU Financial Regulation: Federalization, Crisis Management and Law Reform*, in *The Evolution of EU Law*, ed. by P. Craig, G. De Burca, 2nd ed., Oxford, 2011, p. 794.

[12] In particular, the Directive 1993/13/CEE on unfair contract terms and the Directive 2005/29/CE on unfair commercial practices.

[13] Article 6(2) of the Directive 2003/71/EC, which was replaced by the Regulation (EU) 2017/1129.

[14] Article 7 of the Directive 2004/109/EC, which was amended by Directive 2013/50/EU. In response to the UK's argument that this provision would have introduced a private right of action in favour of investors, the European Commission expressed the view that this provision did not intend to introduce a new liability regime in Member States nor to extend the scope of issuers' liabilityLetter from Director General Schaub to the Financial Markets Law Committee, 3 May 2006 The Directive 2013/50/EU amended the Transparency Directive by introduced new rules on administrative sanctions but did not change nor revised the civil liability's related provision of the Transparency Directive.

[15] For the notion of constitutive and executive conditions for liability, see Van Gerven, W., *Of Rights, Remedies and Procedures*, in *Common Market Law Review*, Vol. 37, 2000, p. 525.

After the GFC the EU has introduced some rules to harmonise national tort law remedies for the civil liability of key financial market actors. The 2011 AIFM Directive establishes that depositary institutions shall be liable to the AIF or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody is delegate[16] and a similar rule has been introduced by the UCITS V Directive.[17] The 2013 CRA Regulation enables investors or issuers to claim damages if a credit rating agency has committed, *intentionally or with gross negligence*, any of the infringements listed in Annex III having an impact on a credit rating. [18] The 2014 PRIIPs Regulation grants the retail investor who demonstrates loss resulting from reliance on a key information document ('KID') the right to claim damages from the PRIIP creator in accordance with national law.[19]

The unifying rationale for harmonising national civil liability rules is that of protecting clients and investors, limiting as far as possible divergences determined by different national private law regimes. Whether this objective will be achieved is to be seen but at this juncture, it seems difficult for these provisions to produce a maximum and complete harmonisation of national laws since they left a significant margin of discretion to Member States to implement crucial aspects of the civil liability regime.[20]

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16 Article 21 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, 1). See also Articles 100-102 of Commission Delegated Regulation (EU) No 231/2013 See, in more details, Ferran, E., *After the Crisis: The Regulation of Hedge Funds and Private Equity in the EU*, in *European Business Organisation Law Review*, Vol. 12, No 3, September 2011, p. 387 and Siena, J., *Depositary liability – A fine mess and how to get out of it*, in *The Alternative Investment Funds Managers Directive*, ed. by D.A. Zetzsche, Alphen aan den Rijn, 2012, p. 470.

17 Article 24 of Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (*OJ L 257, 28.8.2014, 186).*

18 Article 35a of Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies ('CRA Regulation') [2013] OJ L 146/1. See, in more details, Haar, B., *Civil Liability of Credit Rating Agencies after CRA 3 – Regulatory All-or-Nothing Approaches Between Immunity and Over-Deterrence*, University of Oslo Faculty of Law Research Paper No 2013-02 and Lehmann, M., *Civil liability of rating agencies: an insipid sprout from Brussels*, in *Capital Markets Law Journal*, Vol. 11, No 1, January 2016, p. 62.

19 Article 11 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products ('PRIIPs Regulation') [2014] OJ L 352/1.

20 See in particular Article 35a(4) of the CRA Regulation and Article 11(3) of the PRIIPs Regulation. In more details, see Della Negra, F., *The regulatory design and goals of civil liability in EU securities regulation after the global financial crisis: trends and perspectives*, in Cherednychenko, O.O., Andenas, M., *Financial Regulation and Civil Liability in European Law* (Edward Elgar, forthcoming).

An area where the EU achieved a complete harmonisation of civil liability is that of private enforcement of conduct of business rules by parties to an over-the-counter (OTC) derivative contract. Yet, in this case EU pre-empts and limits the scope of national civil liability regimes. In fact, the 2012 EMIR Regulation[21] states that the infringement of clearing, reporting and risk mitigation obligations by these parties shall not affect the validity of that contract or the possibility for the parties to enforce the provisions of an OTC derivative contract and shall not give rise to any right to compensation from a party to an OTC derivative contract. A national law that would provide for a private law remedy for breaches of these rules would be in contrast with this regulation.

3. The private enforcement of MiFID II conduct of business obligations

In addition to the above mentioned forms of legislative harmonisation of private law remedies, there are also forms of 'implicit' harmonisation of these remedies, i.e. instances where the private law remedy can be derived from a EU legal provision by way of interpretation.[22]

The most important case, for its relevance in national litigation, is that of the condut of business rules set out by MiFID.[23] MiFID I was adopted in 2004 and was repealed in ten years later by the MiFID II, which is in force since 3 January 2018. Its conduct of business obligations apply to both credit institutions and investment firms when they provide investment services to clients.[24] Conduct of business rules serve both as transactional or quasi-contractual rules to reduce information asymmetries and conflict of interest between firms and clients and as a market regulatory instrument to ensure that financial markets are efficient and function well. The dual objective of these rules has its origins in the US reforms of securities law that followed the 1930‘ Great Depression (in particular, the 1933 Securities Act and the 1934 Securities Exchange Act). The aim of these

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[21] Article 12(3) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) [2012] OJ L 201/1.

[22] See Badenhoop, N., *Private Law Duties Deriving from EU Banking Regulation and its Individual Protection Goals*, in *European Review of Contract law*, Vol. 16, No 2, June 2020, p. 246.

[23] Another example is that of the civil law consequences of breach of Article 17 of the Market Abuse Regulation. See in detail Tountopoulos, V.D., *Market Abuse and Private Enforcement*, in *European Company and Financial Law Review*, Vol. 11, No 3, 2014, p. 297 and Busch, D., *The private law effect of the EU market abuse regulation*, in *Capital Markets Law Journal*, Vol. 14, No 3, July 2009, p. 296.

[24] Conduct of business obligations are set out in Section II, Chapter II of MiFID II.

reforms was to protect the individual client and, more importantly, to restore trust in financial markets.[25]

The EU conduct of business regime, unlike the US one, avoids the clearcut distinction between the broker-dealer and advisers[26] but shares the important two-fold, individual and supra-individual, objective of protecting the client against misconduct and ensuring the confidence of market participants in financial markets. The long-term aim of EU conduct of business rules is to facilitate cross-border trade and create an internal market for financial services.

Turning our attention on MiFID II, it is worth mentioning that this directive harmonises supervisory and public enforcement powers[27] and requires Member States to set up out-of-court dispute resolution mechanisms for consumer complaints and to ensure that Member States to set up mechanisms to ensure that compensation can be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014. This latter provision is important from a systematic perspective as it confirms that MiFID II intended to strengthen the private (and not only the public) enforcement of conduct of business rules. However, it does not intend to harmonise the civil law consequences for breaches of this rules and is not capable of restricting nor expanding the scope of civil liability of investment firms under national law.[28] This is not only because it literally requires that compensation or other remedial action is to be paid based on national law but also because of the location of this rule, which is inserted in the article on supervisory powers. It is also important noting that the term 'remedial action', used in the English version of the directive, is translated by the Italian, French and Spanish versions into the term of 'corrective measures' which is not restricted to a private law remedy but includes also administrative measures taken by a competent authority.[29] It is therefore plausible that Article 69(2) MiFID II was drafted having in mind the

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[25] Securities Exchange Act of 1934, § 2 15 US Code § 78b. See also Zingales, L., *The Future of Securities Regulation*, in *Journal of Accounting Research*, Vol. 47, No 2, May 2009, p. 422.

[26] See Tuch, A., *Conduct of Business Regulation*, in *The Oxford Handbook of Financial Regulation*, ed. by N. Moloney, E. Ferran, J. Payne, Oxford, 2015, p. 547.

[27] Article 69(1) and 70 of MiFID II.

[28] For the view that Article 69(2) of MiFID II could be used to interpret national contract law see Callens, E., *Recalibrating the Debate on MiFID's Private Enforceability: Why the EU Charter of Fundamental Rights is the Elephant in the Room*, in *European Business Organization Law Review*, May 2020. For a different view, see Della Negra, *MiFID II and private law*, cit., p. 93.

[29] The German version reads *Abhilfemaßnahmen* which could be translated into 'measure to remedy'. The term 'remedy' seems to be used in the meaning of 'corrective measure' also by the first paragraph of Article 69 of MiFID II.

model of the consumer redress schemes that the UK FCA can decide to set up to compensate investors in large scale mis-selling.[30]

Nevertheless, unlike some national jurisdictions that grant to investors a private law remedy (generally, compensation for damages) for losses suffered as a result of breaches of conduct of business rules,[31] MiFID II remains silent on the issue of the civil law consequences of breaches of its conduct of business rules. The legislative history of MiFID II shows that there was no clear political intention to harmonise the civil law consequences for breaches of conduct of business rules.

In 2010, the European Commission, in the MiFID I's review, pointed out that, due to the regular number of complaints received especially from retail investors on the firms' breach of conduct of business rules, considered that 'a principle of civil liability of investment services providers would be essential for ensuring an equal level of investor protection in the EU'.[32] However, this principle was not included in the MiFID II Commission proposal. The European Parliament proposed to harmonise rules for the civil and criminal liability of members of the management board but also this proposal was not included in the final text of the directive.[33]

In 2014 the ESMA's stakeholder group has rightly pointed out that 'in many Member States private enforcement is even more important than fines and other measures by NCAs',[34] but in the public consultation launched by the Commission on 17 February 2020 for the review of the MiFID II/MiFIR regulatory framework there is no reference to potential changes aimed at fostering private enforcement.[35]

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30 Section 404G del *Financial Services and Markets Act* 2000 e FCA CONRED *Consumer Redress Schemes sourcebook* (FCA 2016/32).

31 See in the UK s 138D of the Financial Services and Markets Act (FSMA), in Ireland s 44 of the Central Bank (Supervision and Enforcement) Act 2013 (No 26/2013) and, in Portugal, Art 304a of Código dos Valores Mobiliários (Decreto-Lei n. 486/99) Diário da República no 265/1999, Série I-A de 1999-11-13.

32 Commission, Review of the MiFID, Consultation 8 December 2010, 18.

33 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011)0656 – C7-0382/2011 – 2011/0298(COD)) A7-0306/2012 5 October 2012 (Art 9(8a)).

34 ESMA, *Securities and Markets Stakeholder Group, Investor Protection Aspects of the Consultation Paper on MiFID II and MiFIR*, p. 4.

35 Public consultation on the Review of the MiFID II/MiFIR regulatory framework launched on 17 February 2020. Available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-mifid-2-mifir-review-consultation-document_en.pdf

4. *The de-centralised private enforcement of EU law: principles*

The legislative history of MiFID II shows that EU legislators are not yet ready to make a step towards harmonisation of civil law consequences for breaches of conduct of business rules. Views may diverge on whether harmonisation of private law remedies for breaches of conduct of business rules is a legally feasible and appropriate option. Harmonisation of private laws would bring some benefits in terms of legal certainty and predictability of private law adjudication but it would be an extremely complex endaviour. Not only for the need to find an appropriate legal basis in EU law[36] but also for the difficulty to find common denominators across very different national private law traditions and to work with general and open-ended concepts (i.e. negligence, fault, causation, measure of damages) which are interpreted differently in each country. A 'selective' harmonisation, restricted to certain private law aspects, following the model of the CRA and PRIIPs Regulation, might lead to further fragmentation and legal uncertainty. Harmonisation therefore might eventually lead to disappointing results from an investor protection perspective.[37]

Against this background, the issue of what should be the civil law consequences of MiFID conduct of business rules should be addressed by looking at the CJEU's case law on horizonatal effects of regulatory duties and private enforcement of EU law.

The theme of private parties liability for breaches of EU law has been deeply investigated, particularly in the area of competition law and consumer law.[38] The question on whether civil liability for breaches of EU law can be established, in spite of the absence of an express EU law provision, is clearly relevant also for MiFID. However, differently from competition[39], consumer law[40] as well as public procurement law[41], where the EU introduced rules to harmonise contract

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36 See in particular Micklitz, H.-W., *The EU as a Federal Order of Competences and the Private Law*, in *The Question of Competence in the European Union*, ed. by L. Azoulai, Oxford, 2014, p.133.

37 See also for this argument Wilman, F., *Private Enforcement of EU Law Before National Courts. The EU Legislative Framework*, Cheltenham, 2015, p. 518. For the difficulties of harmonising private law in EU financial markets see also Wymeersch, E., *Objectives of Financial Regulation and their Implementation in the EU*, in *European Financial Regulation: Levelling the Cross-Sectoral Playing Field*, ed. by V. Colaert, D. Busch, T. Incalza, Oxford, 2019, p. 45.

38 See for a recent overview on this issue: Leczykiewicz, D., Weatherill, S., *The Involvement of EU Law in Private Law Relationships*, Oxford, 2013.

39 Article 101(2) TFEU and Directive 2014/104/EU on antitrust damages.

40 See in particular Directive 1993/13/EEC on unfair contract terms and Directive 1999/44/EC on the sale of consumer goods.

41 See Directive 89/665/EEC and Directive 92/13/EEC, as amended by Directive 2007/66/EC. Both directives were substantially amended by Directive 2007/66/EC.

and tort law remedies, there is no EU law remedy to compensate investment's losses caused by breaches of conduct of business obligations.[42]

It is then useful to recall that the EU relies on a de-centralised structure for private enforcement: individuals and firms have to resort to their national courts to enforce the rights based on EU law. [43] This applies both in case of rights based on directly applicable acts (e.g. regulations) and rights based on national law transposing directives. National courts thus play a fundamental role in ensuring the effectiveness of EU law and the effective protection of individuals, as recognised by Article 19(1) of the Treaty on the European Union.

Where EU law grants a right to individuals but does not harmonise the procedural and remedial conditions to enforce this right, national laws apply (so called principle of procedural autonomy).[44] However, the procedural conditions governing the action must not be less favourable than those relating to similar actions of a domestic nature (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise the rights which are based upon or derived from EU law (principle of effectiveness). The case law on the Directive 1993/13/EEC on unfair contract terms shows that these two principles apply to national private laws, with very significant outcomes in terms of consumer protection.[45]

In the *Bankinter* and *Banif Plus Bank* judgments the CJEU confirmed that these principles apply also to the civil law actions brought by investors against firms for breaches of the MiFID I appropriateness and suitability rules and held that it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with the obligations of Article 19(4) and (5) of MiFID I, subject to observance of the principles of equivalence and effectiveness.[46] However, the CJEU did not say whether the absolute nullity of contracts (the remedy mentioned by the national courts in their request for a preliminary ruling) is an appropriate remedy to compensate clients' losses and which should be the appropraite remedy.

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[42] Tridimas, *EU Financial Regulation*, cit., p. 794.

[43] Micklitz, H.-W., *The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies*, in *The European Court of Justice and the Autonomy of the Member States*, ed. by H.-W. Micklitz, B. De Witte, Cambridge-Antwerp, 2012, p. 350.

[44] Della Negra, *MiFID II and Private Law*, cit., p. 20. For an overview of the concept in general EU law, see Wilman, *Private Enforcement of EU Law before National Courts*, cit., p. 409.

[45] See for an overview, Della Negra, F., *Protecting consumers against unfair terms in mortgage contracts: trends and perspectives in the recent case law of the CJEU*, in *European Journal of Consumer Law*, Vol. 2, 2020, p. 205.

[46] Case C-604/11, *Genil v Bankinter SA*, EU:C:2013:344, para. 57 and case C-312/14, *Banif Plus Bank Zrt. v Márton Lantos*, EU:C:2015:794, para. 79.

5. *The 'investor protection' purpose of conduct of business rules*

To answer these questions, it is first of all necessary to determine whether the conduct of business rule at stake grants a right to the investor.[47]

Rights can be conferred directly (i.e. by way of a provision which entitles the individual to a certain benefit) or indirectly (i.e. by way of provisions imposing requirements on another party). While in some judgments, mainly concerning directly applicable provisions, the CJEU considered it sufficient for a provision to be sufficiently clear and precise to give rise to civil liability,[48] in others the CJEU required something more, namely that the provision 'by its content and purport affords protection to the interests which he is invoking in law ('protective purpose').[49]

It seems appropriate to embrace this last stricter criterion, which builds on the German *Schutznormtheorie*,[50] to determine the civil liability of private parties for breaches of EU law. This is because this criterion provides for a stronger justification than other theories (e.g. horizontal application of EU law) why, absent an express EU legal provision on the subject, private parties should bear the burden of achieving the EU's objectives, why a particular individual should be required to pay damages and conversely why a particular individual should be entitled to receive compensation.[51]

With regard to the purpose of conduct of business rules, it is generally acknowledged that their main objective is to protect investors. However, there are open questions on the meaning and scope of 'investor protection' objective. First, MiFID does not clarify whether the 'investor' is understood as a broad class of individuals and business accessing capital markets[52] or whether it indicates

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47 In more details on the concept of 'right' under EU law, Tison, M., *Do not attack the watchdog! Banking supervisor's liability after Peter Paul*, in *Common Market Law Review*, Vol. 42, No 3, April 2005, p. 21.

48 Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*, EU:C:2002:497, para. 27.

49 Opinion of the Advocate General Geelhoed in case C-253/00, *Muñoz*, EU:C:2001:697, para. 47. In legal doctrine, see in particular Eilmansberger, T., *The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link*, in *Common Market Law Review*, Vol. 41, No 5, October 2004, p. 1242. This criterion has been used by the CJEU also in 'vertical liability' cases, i.e. civil liability of Member States for breaches of EU law: joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer*, EU:C:1996:375 para. 21.

50 See also Ruffert, M., *Rights and Remedies in European Community Law: A Comparative View*, in *Common Market Law Review*, Vol. 34, 1997, p. 310 and Reich, N., *Horizontal Liability in EC Law: Hybridisation of Remedies for Compensation in case of breaches of EC Rights*, in *Common Market Law Review*, Vol. 44, No 3, June 2007, p. 719 (who argues that this theory in EU law is interpreted in a strictly objective sense depending on the need for protection and not the subjective intention of the tortfeasor).

51 See Leczykiewicz, D., *Private Party Liability in EU Law: In Search of the General Regime*, in *Cambridge Yearbook of European Legal Studies*, Vol. 12, 2009-2010, p. 281.

52 Recital No 164 of MiFID II.

the specific client concluding a contract with the firm.[53] Moreover, the needs for protection vary depending depending on the type of financial instrument (equity, debt, derivatives), the type of investment service (investment advice, execution-only) and the level of experience and expertise of the investor. Third, while MiFID introduced a differentiated treatment of clients,[54] it still lacks granularity with particular regard to the retail client group which is the most exposed to litigation and is by no means homogeneous.[55] It includes both natural and legal persons who do not possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that they incur. So far, the CJEU has rejected the view that unsophisticated retail clients (i.e. natural persons without knowledge and experience in financial markets) should be granted the same level of protection as consumers, i.e. natural persons acting outside their trade, business or profession.[56] Consistently, the notion of consumer, should be interpreted literally and therefore the knowledge, experience and expertise in financial markets is not sufficient in itself to qualify a natural person acting outside his professional activity as a retail client.[57] The CJEU has also specified that the notions of MiFID investment services and financial intruments should be interpreted narrowly and cannot be extended to products not expressly covered,[58] or to other sectors (i.e. insurance, consumer goods).[59]

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[53] Article 24(1) of MiFID II which refers to 'client'.

[54] In this regard, MiFID adopts a functional approach to regulation, focussed on the investor's need for protection and not on the issuer or intermediary's characteristics. For this concept, see in particular, Choi, S., *Regulating Investors Not Issuers: A Market-Based Proposal*, in *California Law Review*, Vol. 88, No 2, March 2000, p. 5.

[55] See Avgouleas, E., *The Global Financial Crisis and the Disclosure Paradigm European Financial Regulation: The Case for Reform*, *European Company and Financial Law Review*, Vol. 6, No 4, October 2009, p. 470.

[56] Article 2(1) of Directive 2011/83/UE.

[57] Case C-208/18, *Jana Petruchová v FIBO Group Holdings Limited*, EU:C:2019:825 (the CJEU held that a university student, working part-time, that concluded transactions in FOREX markets outside and independently from her (part-time) profession is to be qualified as a consumer for the purpose of Article 17(1) of Regulation No 1215/2012).

[58] Case C-678/15, *Mohammad Zadeh Khorassani*, EU:C:2017:451, para. 42 (the investor protection objective cannot justify allowing a particularly broad meaning to be attached to the definition of 'investment service' to the point of encompassing brokering with a view to concluding a contract covering portfolio management services).

[59] Case C-312/14, *Banif Plus Bank Zrt v Márton Lantos*, EU:C:2015:794, para. 76 (an investment service or activity does not encompass certain foreign exchange transactions, effected by a credit institution under clauses of a foreign currency denominated loan agreement, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated) and case C-542/16, *Länsförsäkringar Sak Försäkringsaktiebolag v Dödsboet efter Ingvar Mattsson*, EU:C:2018:369, para. 69 (the CJEU held that the financial advice relating to the placement of capital in the context of insurance mediation relating to the conclusion of a capital life assurance contract falls within the scope of Directive 2002/92 on insurance mediation and is therefore not covered by MiFID I).

It is also difficult to determine what is the object of the investor protection objective. Traditionally, EU regulation of retail markets has swung between a protecting investor and an empowering investor goal.[60] Prior to the GFC, the predominant regulatory strategy, associated with empowering investors with more autonomy and choice, was pre-contractual disclosure. The well known assumption was that regulatory intervention was needed only to remedy market failures (i.e. information asymmetries, conflict of interest and imperfect competition).[61] After the GFC, in the US and in the EU, the paradigm of disclosure and its underlying theoretical basis (Efficient Markets Hypothesis, Rational Choice Theory) have been subject to several strands of criticism. The large scale mis-selling experienced in several countries (Italy, Spain, UK) has shown that this form of regulation is prone to circumvention,[62] is difficult to enforce[63] and is at the same time costly for these intermediaries.[64] Moreover, numerous empirical studies have shown that individuals are subject to behavioural biases: bounded rationality (judgment errors, biased perceptions), bounded willpower (present bias), bounded self-interest (social influence, trust) and cognitive capacity limits (limited attention and memory).[65] Therefore, in addition to cognitive limitations that prevent consumers from reading and understanding the text of financial contracts[66], there are 'self-control' or bounded willpower problems, linked to social influence, peer pressure, present bias, that prevent consumers from entering into a transaction that in that moment he or she wants to make, even if perfectly informed about its risks.[67] Disclosure duties provide an insufficient remedy for self-control issues

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[60] See MOLONEY, N., *Regulating the Retail Markets*, in *The Oxford Handbook of Financial Regulation*, cit., p. 737.

[61] See LLEWELLYN, D., *The Economic Rationale for Financial Regulation*, FSA Occasional Paper Series, No 1, April 1999.

[62] FRANKE, G., MOSK, T., SCHNEBEL, E., *Fair retail banking: How to prevent mis-selling by banks*, SAFE White Paper, No 39, 2016. See also on the MiFID's shortcomings, ALEXANDER, K., *Principles of Banking Regulation*, Cambridge, 2019, p. 253.

[63] See for the limitations of private enforcement in retail markets BAR-GILL, O., WARREN, E., *Making Credit Safer*, in *University of Pennsylvania Law Review*, Vol. 157, No 1, November 2008, p. 77.

[64] FRANKE, MOSK, SCHNEBEL, *Fair retail banking*, cit., p. 12.

[65] The literature on behavioural finance is abundant. For an overview of the US literature, see in particular, BARBERIS, N., THALER, R., *A Survey of Behavioral Finance*, NBER Working Paper No 9222, September 2002, p. 200 and LANGEVOORT, D., *Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation*, in *Northwestern University Law Review*, Vol. 97, No 1, September 2002, pp. 135-188 and for an overview of EU literature, see HACKER, P., *Nudge 2.0: The Future of Behavioural Analysis of Law in Europe and Beyond*, in *European Review of Private Law*, Vol. 24, No 2, 2016, p. 297.

[66] See, in particular, AYRES, I., SCHWARTZ, A., *The No-Reading Problem in Consumer Contract Law*, in *Stanford Law Review*, Vol. 66, No 3, May 2013, p. 548.

[67] See BUBB, R., PILDES, R.H., *How Behavioral Economics Trims its Sails and Why*, in *Harvard Law Review*, Vol. 127, No 6, April 2014, p. 1649 and p. 1658 and ARMOUR, J., AWREY, D., DAVIES, P., ENRIQUES, L., GORDON, J.N., MAYER, C., PAYNE, J., *Principles of Financial Regulation*, Oxford, 2016, p. 207.

and do not tackle the growing complexity of contractual documentation in both loan and securities transactions.[68]

National supervisory authorities and the ESMA have taken into account insights from behaviour finance to design their regulatory and supervisory approach.[69] By contrast, EU regulators have generally been cautious about importing these insights in EU financial regulation.[70] MiFID II acknowledges expressly that the financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments,[71] but has not introduced forms of simplified and aggregated disclosure. The disclosure paradigm has been somehow 'corrected' by product governance obligations, product intervention measures and new forms of product-disclosure for MREL instruments.

6. The content of conduct of business rules

Since the concept of 'investor protection' does not provide sufficiently clear indications on the protective purpose of specific conduct of business rules, the question of private enforceability of these rules should be addressed having regard to other criteria, such as the nature of the legal instrument (i.e. directly applicable or not), its purpose (i.e. whether the requirement has a transactional function[72]) and the level of detail of the rule.[73]

The Level 2 of MiFID II is now laid down in a regulation (MiFID II Delegated Regulation), which is a directly applicable act and can therefore be

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[68] On the concept of complexity in financial markets, see in particular Awrey, D., *Complexity, Innovation and the Regulation of Modern Financial Markets*, in *Harvard Business Law Review*, Vol. 2, No 2, 2012, p. 235 and Schwarcz, S.L., *Regulating complexity in financial Markets*, in *Washington University Law Review*, Vol. 87, No 2, 2009, p. 211.

[69] See Fca, *Applying behavioural economics at the Financial Conduct Authority*, Occasional Paper No 1, April 2013; Linciano, N., Fca, *High-risk investments: Marketing speculative illiquid securities (including speculative mini-bonds) to retail investors*, Consultation Paper CP20/8*** June 2020, 4. See also in Italy, N. Linciano and P. Soccorso (eds.), *Challenges in ensuring financial competencies Essays on how to measure financial knowledge, target beneficiaries and deliver educational programmes*, ed. by N. Linciano, P. Soccorso, Quaderni di finanza Consob, No 84, October 2017. ESMA incorporated some behavioural findings in its guidelines on certain aspects of the MiFID II suitability requirements, 28 May 2018 ESMA35-43-869.

[70] Hacker, P., *More Behavioral vs. More Economic Approach: Explaining the Behavioral Divide between the United States and the European Union*, in *Hastings International and Comparative Law Review*, Vol. 39, 2016, p. 358.

[71] Recital no 104 of MiFID II.

[72] The concept of 'transactional decision' is defined by Article 2(k) of the Directive 2005/29/EC on unfair commercial practices.

[73] The more detailed the requirement, the stronger the legislative intention to fix in advance the interest that the individual is entitled to enforce via that requirement. See in this regard, case C-101/08, *Audiolux SA ea v Groupe Bruxelles Lambert SA (GBL) and Others*, EU:C:2009:626, para. 62.

invoked by individuals against private parties before national courts. Besides the legal nature of EU legislation, it should be assessed whether the rule at stake has a transactional function, namely whether the regulatory duty is ancillary to (i.e. cannot exist in the absence of) a contractual transaction between the firm and the client.[74] The transactional function is the key element that differentiates the supra-individual investor protection objective (not relevant for private enforcement) from the individual investor protection objective of conduct of business rules. The transactional function should then be examined together with the level of detail of the rule at stake.

Turning now our attention to the most relevant and litigated conduct of business rules, it seems clear that pre-contractual information duties and the suitability and appropriateness requirements have a transactional function because they apply only in so far as firms enter into a contractual relationship with a client and are sufficiently detailed and precise so that both firms and clients can understand what is the content of the duty and the corresponding clients' right.

The same applies in our view to the fair treatment duty (Article 24(1) MiFID II). The fact that this rule is crafted as a general clause referring to a standard, rather than a specific rule referring to a conduct, does not mean that it is not enforceable by private parties because it has a transactional nature, i.e. it clearly entails a pre- or contractual relationships between firms and clients. In fact, general rules that protect individual interests should be differentiated from detailed rules that protect general or diffuse interests. For example, micro-prudential capital requirements are normally very detailed but they protect a general, diffuse interest in the safety of individual credit and investment firms. Investors and depositors' protection is only an indirect or secondary objective of these requirements.[75] For that reason, as the CJEU held in the *Peter Paul* judgment[76], the existence of prudential requirements and the fact that the protection of depositors is one of the requirements, is not sufficient to confer a right on these individuals.

The transactional nature is not apparent in the MiFID organisational requirements, such as rules on conflict of interest and the product governance rules concerning internal processes and procedures. The aim of these rules is to enable the firm, as an organisation, to be in the best condition to fulfil its conduct of business duties vis-à-vis its clients. Hence, these rules affect primarily the firm's staff and internal procedures and processes, without having a direct, external impact on clients. It is true that a breach of the duty

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74 See Della Negra, *MiFID II and Private Law*, cit., p. 178.

75 See for the different view that prudential requirements are primarily aimed at protecting clients and depositors: Badenhoop, *Private Law Duties Deriving from EU Banking Regulation and its Individual Protection Goals*, cit., p. 235 and p. 249.

76 Case C-222/02, *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*, EU:C:2004:606.

to have in place adequate product governance arrangements may eventually result, together with other factors, in a loss for the client but, generally speaking, there seems to be no direct link, both in terms of protected scope of the norm and factual causation, between the firm's internal processes and the end-client's decision to purchase the financial instrument.[77] By contrast, the requirement to identify a target market (i.e. the negative target market is defined too narrowly),[78] in addition to the requirement to distribute products that are compatible with that market,[79] may have transactional implication. Although the topic would require a specific analysis, it seems that the target market identification requirement relates directly and proximately to the distribution-phase at the 'point of sale' of financial instruments. Product governance and conduct of business requirements are different (the existence of a target market does not replace the responsibility of distributors to sell to individual consumers appropriately[80]) but interrelated: the firm distribution strategy should be consistent with the target market.[81] Moreover, the target market identification requirement details precisely the scope of its addressees ('the type(s) of client for whose needs, characteristics and objectives the financial instrument is compatible') and should make it possible to assess which clients fall within the target market, for example to assist the ongoing reviews after the financial instrument is launched.[82] The more detailed is the target market (for example, for complex products, like bail-inable instruments), the more the distributor may rely on that assessment, thus shifting on the manufacturer also potential civil liability consequences of a poor product design. It could therefore be argued that this requirement, as transposed by national law (product governance obligations are laid down in Level 1 and Level 2 directives), aims at protecting the individual investor and its breach should enable him or her to bring a civil law action against the firm manufacturing the product. This is particularly relevant where consumer's harm results primarily from poor product design, that the distributor could not have remedied when selling the product (i.e. the product design is driven

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77 Violation of these organisational rules remains therefore subject to the actions of competent supervisory authorities. See the judgment of the Court of Appeal of Milan, 13 November 2008, in www.ilcaso.it, I, 1451/2008, which rejected the bank's challenge against a CONSOB's sanction for breach of organisational rules for the manufacturing of OTC derivatives.

78 Article 9(9) of MiFID II Delegated Directive.

79 Article 10(1)-(3) of MiFID II Delegated Directive.

80 See EBA, *Guidelines on product oversight and governance arrangements for retail banking products*, EBA/GL/2015/18 15, July 2015, 43.

81 Distributors have a duty to correct a possible wrong identification of the target market by the manufacturer (Article 10(5) of MiFID II Delegated Directive). But in any case each financial instrument in the scope of MiFID should have a target market before being offered to clients.

82 Recital No 19 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

by a business model that relies on poor client outcomes to be profitable) or from both a product and a conduct failure. The biggest hurdle for investors in litigation would be the proof of the material causal link between the alleged breach and the client's decision to purchase the financial instrument. This needs to be assessed taking into account the specific target market, the nature of the infringement and the applicable private law rule (contract or tort law).

7. *Arguments against the right-conferring nature of conduct of business rules… and the counter-arguments*

Before considering which remedies would be appropriate to enforce the right-conferring conduct of business rules, we should pause to examine the potential objections that could be made against the right-conferring nature of certain conduct of business rules.

The first objection could be based on a literal argument: since MiFID did not harmonise the private law remedies for breaches of conduct of business rules, there is no duty for Member States to grant a private law remedy to investors. This argument, in our view, is not conclusive for at least two reasons. First, the fact that EU law does not envisage an express private law remedy for the breach of its rule does not mean that such a remedy should not be granted. It rather means that it has to be granted on the basis of national law, under the principles of equivalence and effectiveness and taking into account the relevant EU fundamental rights. Moreover, when the EU legislators wanted to limit civil law effects of regulatory duties, they would have done it expressly, as they did in respect of the conduct of business rules laid down in the EMIR Regulation.[83]

The arguments based on the legislators' intention are not persuasive either. It is true that the 2010 Commission's proposal, advanced in the review of MiFID I, to introduce a 'principle of civil liability' was not eventually in the final Commission proposal for the MiFID II. However, while this could show that the Commission and co-legislators did not want, at that stage, to create an harmonised regime for civil liability it does not prove that MiFID II conduct of business rules do not give rise to a private law remedy. In addition to this, it is reasonable to assume that during the MiFID II legislative process, legislators were fully aware that in some countries (e.g. Italy, Spain and France) investors have successfully managed to recover damages suffered from breaches of conduct of business rules trough private law remedies, in spite of the absence of any express EU law remedy. Had legislators wanted to limit private enforcement of MiFID II conduct of business rules, they would have done it expressly. Legislators' silence is therefore a sign of implicit acceptance of this state of affairs.

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[83] Article 12(3) EMIR.

There is also a systematic argument that shows that MiFID II accepted the private enforceability of conduct of business rules. Article 75 and Article 69(2) of MiFID II consider conduct of business obligations as quasi-contractual rules, giving rise to civil law consequences; otherwise, it would not be logical to empower investors to claim damages for breach of these rules against the firm. It is also notewhorty that Article 26(6) of the MiFID II Delegated Regulation, concerning the firms' complaints handling function, requires firms to inform clients, inter alia, on whether they may be able to refer their complaint to an ADR body or 'to take civil action'.[84] The reference to a civil action shows, again, that EU legislators are very well aware and have accepted the private enforceability of conduct of business rules.

A policy objection against extending civil liability in the financial sector is the fear of vexatious litigation. As it is well known, this fear motivated several reforms in the US and the UK to limit the scope of investors' statutory rights of action and procedural guarantees. In the EU however the risks of vexatious litigation have not been evidenced and anyway appear to be rather low given that retail clients (which account for most of the plaintiffs in mis-selling litigation) have generally little incentive to bring lawsuits and neither EU nor national law offers investors the 'toxic cocktail' (class actions and punitive damages) that could facilitate abuses of civil ligation. Research has also shown that national courts have developed several tools (ie causation theories, limits to compensation, contributory negligence) to dismiss non-meritorious lawsuits (e.g. claims brought because the price of the security dropped after purchase) and to ensure that plaintiffs bear the losses caused by their own conduct.[85]

Finally, it could be argued that supervisory and enforcement powers would be sufficient to ensure the effectiveness of conduct of busines rules.[86] However, this objection does not seem convincing because it is doubtful, as a matter of fact, whether supervisory authorities have sufficient resources to investigate and sanction all potential infringements of MiFID II conduct of business rules.[87] Second, these powers do not offer a sufficiently effective enforcement of provisions which also aim at protecting the individual investor.[88]

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[84] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, 1).

[85] See in more detail Della Negra, *MiFID II and Private Law*, cit., p. 208.

[86] See for this argument the case law of the German Federal Supreme Court: BGH, 17 September 2013 – XI ZR 332/12, para. 36. In the same sense, see also BGH, 19 February 2008 – XI ZR 170/07; BGH 27 September 2011, *XI ZR* 178/10; BGH 27 September 2011, XI ZR 182/10.

[87] See Tountopoulos, *Market Abuse and Private Enforcement*, cit., p. 312.

[88] Opinion of Advocate General Kokott of 14 November 2019, in case C-616/18, *Cofidis SA v YU, ZT*, ECLI:EU:C:2019:975, para. 82.

8. *The type of remedy: national divergences*

MiFID II contains only one ‘contract law’ rule, namely it requires a written contract agreement between a retail client and the firm. However, it does not set any requirement regarding the form and type of contracts that are required to provide certain financial services or instruments to clients, nor it establishes which remedy should be used for breaches of conduct of business rules.

In continental EU jurisdictions, courts have accepted that breaches of conduct of business rules give rise to a civil law remedy but differences remain as regards the type of remedy that is granted to investors. The main difference is that between compensatory and restitutionary remedies – ‘the competing paradigms of damages in securities law’.[89] For example, in Spain[90] and Austria[91] breaches of conduct of business rules may determine the nullity of contracts. In France,[92] Germany[93] and the Netherlands[94] the main civil law consequence is compensation for contractual or tort law damages and in Italy the remedies include both compensation if the breach occurs before the investment service contract is concluded or termination of contract, if breaches concern the investment service contract.[95] However, Italian courts declare the nullity of derivative contracts (interest rate swaps) where for the lack of pre-contractual information or the irrational allocation of risk, the cause of the contract is lacking or is not valid.[96] There are also differences regarding the standard of proof. In some countries breaches of conduct of business rules (normally, suitability and appropriateness rules) give rise in themselves to a breach of contract (Italy, Spain and France), whereas in other countries (Germany[97]) the investor can be successful in his claim for damages only if he proves a breach of a contract term or a private law rule.

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89 Easterbrook, F.H., Fischel, D.R., *Optimal Damages in Securities Cases*, in *University of Chicago Law Review*, Vol. 52, No 3, 1985, p. 634.

90 Zunzunegui, F., *Mis-selling of Preferred Shares to Spanish Retail Clients*, in *Journal of International Banking Law and Regulation*, Vol. 29, No 3, 2014, p. 174.

91 See Ring, J., Spitzer, M., *Austria*, in *A Bank’s Duty of Care*, cit., p. 104.

92 See Bonneau, T., *France*, in *A Bank’s Duty of Care*, cit., p. 109.

93 See Mülbert, *The Eclipse of Contract Law in the Investment Firm-Client-Relationship*, cit., p. 317.

94 See in detail Busch, D., *The future of the special duty of care in the financial sector – Perspectives from the Netherlands*, EBI Working Paper Series, No 63, April 2020.

95 See the judgments of the Italian Supreme Court in Joined Chambers of 19 December 2007, No 26724 and No 26725. For a recent overview of Italian case law: Della Negra, F., *I rimedi per la violazione di regole di condotta MiFID II: una riflessione di diritto UE*, in *Banca Borsa Titoli di Credito* (forthcoming, No 5, September 2020).

96 See the judgments of the Italian Supreme Court of 28 July 2017, No 18781, 31 July 2017, No 19013, 13 July 2018, No 18724 and recently the judgment of the Supreme Court in Joined Chambers of 12 May 2020, No 8770.

97 See the judgment of the German Federal Supreme Court of 19 December 2013 – XI ZR 332/12, reported in BKR 2014, 32, at 33-36. For a comment, see Binder, J., *Germany*, in *A Bank’s Duty of Care*, cit., pp. 72 ff.

The UK represents for several reasons a 'special case' in comparison to the continental experiences.[98] First, differently from Italy, France and Spain, UK law provides for an express private right of action for investors to compensate losses suffered as a result of breaches of conduct of business rules but this action has proven to be very difficult to activate in practice. Second, private law remedies for breaches of conduct of business rules based on common law can be granted only in specific circumstances, i.e. when the investors prove that an an advisory contract was concluded, or when the firm mis-stated facts negligently or intentionally. However, compensation claims based on common law have succedeed only where they were based on negligent advice (although in these cases, investors also brought claims on breach of statutory duty).

The market-friendly approach of UK courts could be explained by the nature of plaintiff in mis-selling disputes. Whereas in continental jurisdictions the plaintiff is generally an unsophisticated retail client, in the UK the plaintiff is often a sophisticated retail client (high net worth individual or SMEs) or a professional client (banks and investment firms). Hence, the strong emphasis on the principle of *caveat emptor* in judicial reasoning of UK courts reflects the judiciary's expectation that had the client intended to seek a stronger contractual protection for financial risks, he would have been able to obtain it through negotiations with the financial firm.

9. An EU law perspective on remedies

9.1. Breaches of the suitability rule

From an EU law perspective, the choice of the private law remedy should be determined by the content and purpose of the rule at stake. There is no 'one-size-fits-all' remedial solution applicable to breaches of conduct of business rules.[99] Moreover, since private law remedies are not harmonised at the EU level, national private laws maintain a certain autonomy and differences in the detailed remedial rules adopted by Member States are in line with EU law.

Bankinter and *Banif Plus Bank* provided little guidance on the type of civil law remedy that should be used to compensate investors for breaches of condut of business rules. Another relevant judgment is Alfred *Hirmann v Immofinanz AG*. In the main proceding, a retail investor claimed that the contract for the purchase of shares should be cancelled and the firm should pay a sum equivalent to the initial purchase price of the shares because of the shares' prospectus

[98] See in particular Alexander, K., *England and Wales*, in *A Bank's Duty of Care*, cit., pp. 261 ff. and Bugeja, D., *Reforming Corporate Retail Investor Protection. Regulating to Avert Mis-Selling*, Oxford, 2019, pp. 103 ff.

[99] See in this sense in the Italian legal scholarship Dolmetta, A.A., *La violazione di «obblighi di fattispecie» da parte di intermediari finanziari*, in *I Contratti*, No 1, 2008, p. 85.

contained information which was incomplete, false or misleading. The national court asked the CJEU, inter alia, whether a national law that requires a firm to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares is compatible with Union law. The CJEU answered in the affirmative and stated that 'the civil liability regime provided for in the national legislation is an appropriate remedy for the harm suffered by the investor and for the failure of the issuing company to comply with the information requirements. Further, it is capable of deterring issuers from misleading investors'.[100] This judgment is in line the CJEU's case law that, ever since the landmark *Van Gend en Loos* judgment, has underlined the important role that private enforcement actions play in ensuring the deterrent effect of EU law rules.[101]

Hirmann cannot be directly applied to litigation deriving from MiFID II conduct of business obligations (which does not apply to prospectus liability cases), it shows that in securities disputes the CJEU is willing to take into account the deterrent effect of a private law remedy to assess its compliance with the effectiveness principle. The extent to which restitutionary effects can be linked to breaches of MiFID II conduct of business rules should depend on the nature of the rule at stake.

A key distinction is that between the suitability rule and the other (right conferring) conduct of business rules. The suitability rule applies to investment advice and portfolio management, where the investment firm drives or takes the investment decision and the appropriateness rule applies to non-advisory services, including execution-only transactions, where the investment firm executes a client order (i.e. execution only services). The suitability rule requires firms to assess the client's knowledge and experience, their financial situation and objectives and, with MiFID II, also the risk tolerance and ability to bear losses before recommending a financial instrument. The BRRD 2 gives to the suitability rule a more prominent product-oriented and retail client protective function. This directive amended the BRRD by giving to Member States the option either to require financial intermediaries to sell eligible liabilities to retail clients once the suitability assessment has been conducted or to set a minimum denomination amount of at least EUR 50 000 for the eligible liabilities.[102]

The suitability rule has 'revolutionary flavor', in comparison to the general private law of agency or mandate, because it shifts the responsibility for making investment decisions from the investor to the broker-dealer.[103] It is also different from the information duties, where the firm is only asked to provide

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[100] Case C-174/12, *Hirmann v Immofinanz AG*, EU:C:2013:856, paras. 43-44.

[101] In competition law, see case C-453/99, *Courage Ltd*, EU:C:2001:465, para. 27. In consumer law, see case C-618/10, *Banco Español de Crédito SA*, EU:C:2012:349, para. 69 and joined cases C-154/15 and C-307/15, *Francisco Gutiérrez Naranjo*, EU:C:2016:980, para. 61.

[102] Article 44a of the BRRD.

[103] Mundheim, R.H., *Professional Responsibilities of Brokers-Dealers: the Suitability Doctrine*, in *Duke Law Journal*, No 3, 1965, p. 449.

some information on the assumption that the final decision is to be made by the client.[104] The aim is therefore to reduce the conflict of interest between clients and intermediary firms in the investment services where the firm takes or facilitates the client's investment decision.

If the firm does not obtain the information from the clients, it shall not carry out the transaction.[105] The same prohibition should apply also to when the information obtained from the client are incomplete[106] and as ESMA held,[107] when the firm has assessed that the investment service or financial instruments are unsuitable. This prohibition, which is unusual in the EU financial regulatory framework,[108] generally based on pre-contractual disclosure duties, aims to avoid unforeseeable losses for investors in investment services where the intermediary plays a crucial role but also to protect the investors' confidence in financial markets by avoiding circulation of unsuitable financial instruments.

The problem that arises from a private law perspective is that, literally speaking, this prohibition concerns the investment service and financial instrument and not the contract concluded by firms in order to provide that service/instrument. This wording should not come as a surprise: MiFID was not drafted with the purpose of harmonising national contract laws but to harmonise the different national conduct of business rules, that at that time, were much more detailed than the general conduct of business rules laid down in the 1993 ISD. Hence, MiFID avoided any possible reference to private law concepts, given also the significant differences regarding contractual and tortious liability between civil and common law countries, and within civil law countries in Europe. Therefore, the potential civil law effects of this prohibition need to be assessed having in mind (not to the wording but) the rationale of this rule. From this perspective, separating the investment service from the contract would run against the purpose and the effect utile of the rule because the supply of these investment services necessarily implies the existence of a contract. Hence, a prohibition to carry out the service entails a prohibition to conclude the contract for the supply of that service. Therefore, given also the fact that these prohibitions are directly

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104 See for critical remarks on the disclosure paradigm in financial regulation: Dolmetta, A.A., *Efficienza del mercato e «favor naturalis» per le imprese bancarie*, in *Rivista dirito civile*, Vol. 64, No 5, September 2018, p. 1234.

105 Article 52(8) of MiFID II Delegated Regulation. Article 52(10) of that regulation further added that firms shall not recommend or decide to trade where none of the services or instruments are suitable for the client.

106 See Maggiolo, M., *Servizi ed attività di investimento, Prestatori e prestazione*, in *Trattato di diritto civile e commerciale*, previously directed by A. Cicu, F. Messineo, L. Mengoni, continued by P. Schlesinger, Milan, 2012, p. 390.

107 See ESMA, *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics*, 36-37 (Q&A n. 6). See also Moloney, *EU Securities and Financial Markets Regulation*, cit., p. 806.

108 It is noteworthy that Article 20 of the Directive 2014/17/EU on mortgage credit does not establish, like MiFID, a prohibition for the lender to conclude the credit agreement where the consumer does not provide all the necessary information.

applicable between private parties,[109] they should be interpreted as prohibitions to conclude the contract.[110]

However, the scope of these prohibition is not unlimited.

First of all, if the client insists to purchase an unsuitable financial instrument against the firm's advice, the suitability rule and the related prohibition to carry out the transaction do not apply and the firm would be allowed to execute the transaction under the appropriateness test (if the product is complex) or at his own risk, in execution-only (if the product is not complex).[111]

In case of investment advice, the prohibition should concern only the contract for investment advice, which contains the personal recommendation to the client, but not the contract concluded after the advice for the purchase or sale of financial instruments because these contracts are generally based on a different investment service (e.g. execution of order) which fall outside the scope of the suitability rule.[112]

In case of portfolio management, instead, the prohibition at stake should apply both to the contract for the portfolio management and to the contracts that the firms concludes to purchase and sale the instruments in the client'portfolio, since these contracts are part of the firm's investment portfolio mandate.[113]

If a prohibition to recommend or trade certain financial services/ instruments is tantamount of a prohibition to conclude contracts to provide those instruments, the civil law consequence for the breach of such prohibition should be, in accordance with the principle of equivalence, not less favourable than the one that is applied by national laws for the violation of mandatory rules prohibiting parties to conclude contracts. From the point of view of the principle of effectiveness, a remedy with restitutionary effects would ensure, better than a compensatory remedy, the deterrent effect of the prohibition to carry out the transaction because firms would known *ex ante,* i.e. before offering investment advice and portolio management services, that a breach

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109 See for the effects of provisions prohibiting certain conducts, the opinion of AG Bobek of 5 June 2018, in case C-167/17, *Volkmar Klohn v An Bord Pleanála*, EU:C:2018:387, para. 40 and the judgment of 15 April 2008, in case C-268/06, *Impact*, EU:C:2008:223, para. 60.

110 See also Della Negra, *I rimedi per la violazione di regole di condotta MiFID II*, cit.

111 ESMA, *Questions and Answers. On MiFID II and MiFIR investor protection and intermediaries topics*, 18 February 2020, ESMA35-43-349, 39.

112 See Maggiolo, M., *Servizio di consulenza in materia di investimenti vs. servizio di ricezione e trasmissione di ordini*, in *Banca Borsa Titoli di Credito*, Vol. 67, No 4, July 2014, p. 491, nt. 5.

113 This interpretation would not be prevented by the judgment of 14 June 2017 in case C-678/15, *Khorassani*, EU:C:2017:451, para. 44 where the CJEU held that the investment service consisting in the reception and transmission of orders in relation to one or more financial instruments does not include brokering with a view to concluding a contract covering portfolio management services.

of that rule would mean to bear the price paid by the client for the financial instrument. The restitution of the price paid by the client would put the client in the pre-contract situation in which the client would have been, had no contract been concluded and thus would be in line with the principle of effectiveness, as interpreted by the CJEU in the *Hirmann* judgment.[114] In order to respect fully the rationale of the suitability rule and to avoid a potentially opportunistic use of this remedy,[115] restitutions should be limited to the specific cases where clients can prove that the MiFID II prohibition to distribute unsuitable financial instruments was breached (i.e. analogic application of this remedy to other cases does not seem possible).

9.2. Breaches of other conduct of business rules

MiFID II does not provide any consequence, aside from the possibility for competent authorities to take supervisory measures and sanctions, for breaches of other conduct of business rules, i.e. fair treatment, disclosure, appropriateness and product governance rules. Importantly, a breach of these rules does not prevent firms from distributing the financial instrument to its clients.

The rationale is that these rules apply to services that presuppose the clients' responsibility in taking the investment decision. It can therefore be inferred that the EU legislators have 'accepted' that the contract can remain validly in force irrespective of breaches of these rules. Although in practice, there could be instances of mis-selling also when clients are supposed to take the investment decision (in particular, due to the firm's implicit recommendations), the rationale and wording of these rules suggest that a private law remedy that would nullify the transaction, or determine automatically a restitutionary effect, without need for the client to prove the causal link and/or the amount of loss suffered, would not be consistent and would give rise to the over-protection of clients.

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[114] See Sartori, F., *La (ri)vincita dei rimedi risarcitori: note critiche a Cassazione, (S.u.) 19 dicembre 2007, n. 26725*, in www.ilcaso.it, January 2008, p. 16. See also, for the relevance of deterrent effect of private law remedies, see the judgment of 21 December 2016, in joined cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo et al*, EU:C:2016:980. On the principle of dissuasiveness and deterrence, see Cafaggi, F., Iamiceli, P., *The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions*, in *European Review of Private Law*, Vol. 25, No 3, June 2017, p. 604.

[115] However, see for a criticism against restitutionary remedies, due to the risk of client's opportunistic behaviours, see Afferni, G., *Sulla risoluzione dei singoli ordini di investimento*, in *Le Società*, Vol. 37, No 5, May 2018, p. 667.

9.2.1. Standard of proof

In the actions for damages for breaches of conduct of business rules, two major issues have arisen in the case law of national courts: the standard of proof in compensation claims and the causation.[116]

A first issue is under what conditions an investor can prove that a conduct of business rule, normally, an information duty has been breached. Should it be sufficient that they prove a breach of the specific regulatory duty, or should they be asked to prove that a private law standard (i.e. duty of pre-contractual good faith, or duty of care) is breached altogether? In some countries (Italy, France, Spain) courts have accepted that a breach of an information duty or the appropriateness test is sufficient to prove that the pre-contractual duty of good fatih or the investment contract is breached. In other countries (Germany, the UK) courts have accepted that regulatory duties may inform the content of private law duties but did not go as far as to hold that the two duties are co-extensive, hence investors have to prove also the breach of a contract law duty.[117]

The duty of conform interpretation would require national courts to interpret general private law concepts in light of the purpose and wording of MiFID information duties. Since these duties are directly applicable to the firm and are normally very detailed, once the investor is able to prove the breach of such duties, a duty of the applicable general private law duty should be regarded *in re ipsa*.

A different question is whether national courts could apply to investment firms standards of conduct that are stricter than those laid down in regulatory duties. This issue was relevant especially under the pre-MiFID framework, where conduct of busines rules of the ISD were drafted in general terms and it was therefore possible for courts to impose on firms stricter information duties than these ones laid down by EU law, i.e. a duty to assess the suitability of the investment even if no investment advice was given. Under MiFID I and MiFID II, where the level of detail of conduct of business rules has increased to a great extent, it is likely that a standard crafted by national courts is anyway covered by one of the detailed rules, or, if not by the MiFID fair treatment duty.[118] Moreover, the CJEU has held that 'open and/or unwritten rules' of national private law could, in principle, result in information duties that are stricter than those laid down in the national law transposing a directive.[119] More specifically, in advisory relationships, the firm should ensure that the

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[116] We assume that the action is based on contract law but similar issues would arise if the actions were to be based on tort law.

[117] See, in more detail, Binder, *Germany*, cit., p. 61.

[118] Della Negra, *MiFID II and Private Law*, cit., p. 176.

[119] See also case C-51/13, *Nationale-Nederlanden Levensverzekering*, EU:C:2015:286, para. 34. See for a comment, *A Bank's Duty of Care*, cit., p. 409.

client understands the risks (risk comprehension), is able to absorb them (risk capacity) and is willing to run these risks (risk tolerance). As the UK High Court clearly held in *Haider Abdullah v Credit Suisse,* the greater the risk to which the adviser exposes his client, the stronger the need for the adviser to ensure by way of specific documentation that the client is fully aware of the risks he is taking.[120]

9.2.2. Causation

The 'but for test' or *conditio sine qua non* seems to be the general model used to select factual causes in the examined jurisdictions, although more innovative causation theories based on the balance of probabilities or increase of risk have been adopted in certain jurisdictions (i.e. Italy and France).[121]

Article 69(2) of MiFID II indicates that in actions for damages it is necessary to establish a causal link between the firm's conduct and the loss (the loss should be 'the result' of the infringement) but it does not specify how the standard of causation should be determined. It is for Member States to define the detailed rules on the application of the concept of a 'causal relationship', provided that the principles of equivalence and effectiveness are observed.

In competition law, the CJEU accepted that a 'sufficiently direct causal link' is sufficient to establish factual causation. This criterion aims to ensure that a person who has acted unlawfully is liable only for such loss as he could reasonably have foreseen and only for loss the compensation of which is consistent with the objectives of the provision of law which he has infringed.[122] Again, the type of investment service and financial instrument offered, as well as the type of client, are key criteria to determine the causal link between misconduct and loss.

The biggest hurdle for investors is to prove that had the information been correct, they would have bought a different financial instrument (less risky) or they would not have made any investment. On the other hand, compensation claims are normally filed when a loss has already materialised: clients would not claim compensation for breaches of conduct of business rules, if the investment turns out to be profitable. The causation requirement should therefore be interpreted to ensure an effective compensation, while avoiding instances of opportunistic behaviour.

To this purpose, the assessment has to take into account several factors, including the clients' investment objectives (i.e. if the instruments was bought for hedging purposes or just to remunerate the capital, it can be presumed that the client would not have bought it, had he been correctly informed about the level of

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120 *Haider Abdullah v Credit Suisse* [2017] EWHC 3016 at para. 168.

121 See for more details, Della Negra, *MiFID II and Private Law*, cit., p. 191.

122 Opinion of Advocate General Kokott, in case C-557/12, *KONE AG and Others*, EU:C:2014:45, para. 40.

risk), the previous client's investment history (i.e. it can be presumed that a client who has invested in low risky instruments in the past would not have bought the instrument, if correctly informed about its risks), the level of client sophistication (i.e. sophisticated clients might have bouth risky instruments even if correctly informed about the risks).[123]

In addition to this, since risks and returns of financial instruments cannot be precisely quantified,[124] the standard of proof of the causal link should not be based on 'certainty' but on a probabilistic scenarios based on whether it was 'more likely than not' that the investor would have taken a different decision, had the correct information been given. It is also necessary to take into account the relevant contributory causes, such as a capital issuance launched by a firm's competitor, the corporate restructuring of the issuer, in the causal link's assessment, as the misconduct may not be the single causal event determining the investment's loss.[125]

To reduce the risk of opportunistic behaviours from the investor's side, the measure of damages should be reduced by the amount that the client would have 'saved' by selling the financial instrument from the time he became aware or could have reasonably realised the loss suffered. In fact, it would be contrary to the principle of good faith, to allow the investor to recover the price of the financial instrument at the time of its purchase, if before filing the lawsuit, the client became aware of the risks of the securities but decided not to sell them.[126] This criterion is also in line with the general principle of EU law that injured parties should act with diligence to limit the extent of the loss suffered.[127]

10. Concluding remarks

Private law has certainly taken a more prominent role in EU securities regulation after the GFC. New rules have harmonised the national tort laws rules applicable to key financial market actors (e.g. depositary institutions, credit rating agencies). MiFID II, like its predecessor, does not explicitly harmonise the civil law effects of conduct of business rules but it strengthens the

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[123] See, in this sense, the judgment of the Dutch Supreme Court of 27 November 2009, JOR 2010/43. For more details, see *A Bank's Duty of Care*, cit., p. 427. By contrast, if the client is unsophisticated, the fact that they were willing to bear risk does not mean that they were aware of or informed about it. See, in this sense, the judgment of the Italian Supreme Court Cass, 28 February 2018, n. 4727.

[124] Fundamental uncertainty together with liquidity volatility are the two constitutive premises of finance. See in this regard, Pistor, K., *A legal theory of finance*, in *Journal of Comparative Economics*, Vol. 41, No 2, 2013, p. 315.

[125] Case C-557/12, *KONE AG and Others*, EU:C:2014:1317, para. 33.

[126] This criterion is applied by the Italian Supreme Court: Cass, 29 December 2011, n. 29864.

[127] See case C-571/16, *Nikolay Kantarev v Balgarska Narodna Banka*, EU:C:2018:807, para. 141 and case C-497/13, *Faber v Autobedrijf Hazet Ochten BV*, EU:C:2015:357, para. 63

out-of-court enforcement thus showing more attention for the the private enforcement of conduct of business rules.

It has been argued that the legislative silence on the issue of private law remedies does not mean that these rules do not produce civil law consequences but it implies that these consequences (i.e. specific private law remedies) should be determined by national private law, subject to the principles of equivalence and effectiveness. These principles, which cannot replace nor lead to interpretations *contra legem* of national laws, require national courts and out-of-court dispute resolution mechanisms, to interpret national private law in order to ensure the effective application of conduct of business rules and consequently an effective protection of clients. To this purpose, the wording and purpose of the conduct of business rule provides an essential guidance.

Conduct of business rules constitute a complex regulatory system where each requirement (disclosure, distribution, product governance) plays a specific role in relation to the specific financial instrument and investment service offered to clients. General private law is a necessary tool to ensure the private enforcement of these rules, to enable courts and adjudicators to value specificities of each dispute and to ensure their deterrent effect. However, general private law concepts may create uncertainty in adjudication and can offuscate the specific rationale of each rule leading to instances of over- and under-protection of clients which are not justified by the regulatory framework.

The principles of effectivenesss and equivalence can assist national courts in choosing the remedial solution on the basis of the rationale of each specific rule. This approach could improve the consistent application of conduct of business rules in the EU, ensuring a stronger alignment between regulation and private enforcement, and strengthening the overall effectiveness and credibility of MiFID II.

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