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

October 2020

number 90

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

Number 90 – October 2020

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.

Editorial Board:

Marino Perassi, Olina Capolino, Giuseppe Leonardo Carriero, Stefania Ceci, Raffaele D'Ambrosio, Maria Patrizia De Troia

Editorial Assistants:

Roberta Pilo, Beatrice Scrima, Maria Elisabetta Rizzica

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

SUMMARY

MADS ANDENAS – FOREWORD 7

1. FILIPPO ANNUNZIATA – 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 21

1. Introduction 23

2. EU Financial Legislation: sectoral & cross-sectoral approach 23

3. ISD Directive 25

4. MiFID I 31

5. MiFID II 33

6. Adapting MiFID conduct of business rules 37

6.1. Centripetal forces 38

6.2. Centrifugal forces 40

6.3. "Claw back" mechanisms 48

7. An example: suitability 50

8. MiFID rules as enforceable private law provisions 52

9. Conclusions 56

2. RAFFAELE D'AMBROSIO AND STEFANO MONTEMAGGI CONNECTING PUBLIC AND PRIVATE ENFORCEMENT 59

1. Overlook 61

PART I – ESAs' product intervention powers and side-effects on financial contracts 63

2. Temporary intervention powers of the European Supervisory Authorities under Article 9 of their founding regulations 63

3. The temporary intervention powers of the European Securities and Markets Authority under Article 28 of the Short-Selling Regulation 67

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* 68

5. *Whether ESAs' temporary intervention powers are compliant with the Meroni doctrine and Article 52 of the Charter* 75

6. *Coordination of NCAs' and ESAs' intervention powers under MiFiR and PRIIPs regulations* 78

7. *The impact of temporary intervention powers on financial contracts* 79

PART II – The relationships between the public authorities' assessment and the private enforcement regime 81

8. *The interplay between private and public enforcement: an open issue*....81

9. *The antitrust law paradigm*....85

10. *The coordination mechanism between private and public enforcement under Article 9 of the antitrust damages directive* 88

11. *The complexity of the MiFID rules of conduct and the risk of fragmented, where not divergent, interpretations*....90

12. *Going beyond the binding effect of the "positive" decisions adopted by the competent supervisory authority*....93

3. **GIORGIO AFFERNI – REMEDIES AVAILABLE TO RETAIL CLIENTS OF INVESTMENT FIRMS IN THE LIGHT OF THE DECISIONS OF THE ITALIAN FINANCIAL OMBUDSMAN (*ACF*)** 97

1. *Introduction* 99

2. *The Italian Financial Ombudsman (ACF)*....99

3. *The role of ACF in the private enforcement of MiFID* 101

4. *Restitutory vs compensatory remedies*....104

5. *Proof of causation*....108

6. *Limitation period* 110

7. *Conclusions*....112

4. **FEDERICO DELLA NEGRA – THE CIVIL EFFECTS OF MIFID II BETWEEN PRIVATE LAW AND REGULATION** 115

1. *Introduction* 117

2. *The role of private law in EU securities regulation* 119

3. The private enforcement of MiFID II conduct of business obligations ... 121

4. The de-centralised private enforcement of EU law: principles ... 124

5. The 'investor protection' purpose of conduct of business rules ... 126

6. The content of conduct of business rules ... 129

7. Arguments against the right-conferring nature of conduct of business rules… and the counter-arguments ... 132

8. The type of remedy: national divergences ... 134

9. An EU law perspective on remedies ... 135

9.1. Breaches of the suitability rule ... 135

9.2. Breaches of other conduct of business rules ... 139

9.2.1. Standard of proof ... 140

9.2.2. Causation ... 141

10. Concluding remarks ... 142

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

Summary: *1. Introduction – 2. EU Financial Legislation: sectoral & cross-sectoral approach – 3. ISD Directive – 4. MiFID I – 5. MiFID II – 6. Adapting MiFID conduct of business rules – 6.1. Centripetal forces – 6.2. Centrifugal forces – 6.3. "Claw back" mechanisms – 7. An example: suitability – 8. MiFID rules as enforceable private law provisions – 9. Conclusions*

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]

---

[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

---

[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

---

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,

---

[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.

---

[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]

---

[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;

---

[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]

---

[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]

---

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.

---

[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

---

[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

[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

---

[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

---

[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)

---

[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

---

[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

---

[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]

---

[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

---

[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

---

[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]

---

[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,

---

[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]

---

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

---

[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

---

[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

[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)

---

[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

[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.