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## ***FINANCIAL INVESTORS AS CONSUMERS AND THEIR PROTECTION:***

### ***RECENT ITALIAN LEGISLATION FROM A EUROPEAN PERSPECTIVE***

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# ***FINANCIAL INVESTORS AS CONSUMERS AND THEIR PROTECTION:***

## ***RECENT ITALIAN LEGISLATION FROM A EUROPEAN PERSPECTIVE***

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Cristina Amato and Chiara Perfumi♦

### **Abstract:**

The present paper is firstly concerned with protections of investors in the Italian legislation and within a European context. Part I shall discuss in detail the definition of ‘investors’ as consumers in the European as well as in the Italian legislation. Part I shall therefore provide the reader with sufficient constructive elements in order to understand the present inconsistencies of definitions that instead deserve the utmost attention at both European and national levels. Secondly, in contrast with a legislative policy that seems to encourage recourse to private remedies, the argument supported in Part II of this paper questions the effectiveness of excessive private remedies if they are not buttressed by a consistent and rational framework. After dealing with the Italian offer of out-of-court settlement procedures (guarantee indemnification funds; no-fault funds) and collective redress procedures (collective injunctions; damages class actions; compulsory settlement), the argument put forward in Part II of this paper is that private remedies and access to justice lack clarity and are still excessively complex. An efficient protective system should first seriously enforce public remedies available (criminal sanctions and fines); secondly, it should simplify remedies and access to justice through the establishment of a hierarchy of remedies mandatory settlement attempts should come first, leading to an indemnity guarantee and excluding other ordinary suits. Only in case of failure an ordinary lawsuit may then be brought, either via individual actions or through class actions for damages, leading eventually to the awarding of economic damages. Last: access to indemnity funds should be permitted only in cases of defendant insolvency.

*Key words:* Financial Investors – Consumers – Italian Legislation – European Legislation – Indemnification Fund – Collective Injunction – Damages Class Action

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## Summary

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## Introduction: The Peculiarity of Italian Financial Markets

In the last decade, the Italian financial market has been gradually and profoundly transformed. After the scandals of Cirio, Parmalat<sup>1</sup> and the Argentinean Bonds, the market-oriented system has become exposed to a dangerous instability<sup>2</sup>.

The major objective of the domestic regulation on financial markets has rested upon solidity and transparency of parties as a structural principle in a ‘commercial-banking’ perspective, whilst protection of savers (i.e. people who have invested saved monies in financial instruments of some sort) has until very recently been a ‘secondary and indirect’ purpose limited to the specific case of consumer law<sup>3</sup>. The distinction between ‘saver/investor’ and ‘consumer’, overtaken by Community policies, has been taken into consideration by national authorities on financial markets.

The implementation of EC Directives on consumer credit and distance contracts for financial services, on the one side, and the compelling need of protection of investors against abuses perpetrated by

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<sup>1</sup> On this issue see : G. Ferrarini, P. Giudici, ‘Scandali finanziari e ruolo dell’azione privata: il caso Parmalat’, in F. Galgano and G. Visintini (eds.), *Mercato finanziario e tutela del risparmio. Trattato di diritto commerciale e di diritto pubblico dell’economia*, (CEDAM, Padova, 2006), v. XLIII, 197. G. Ferrarini and P. Giudici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case (May 2005)*, ECGI - Law Working Paper No. 40/2005. Available at SSRN: <http://ssrn.com/abstract=730403> or doi:10.2139/ssrn.730403.

<sup>2</sup> G. D’Alfonso, ‘Violazione degli obblighi informativi da parte degli intermediari finanziari: la tutela del risparmiatore tra rimedi restitutori e risarcitori’, *La responsabilità Civile*, 12 (2008), 965.

<sup>3</sup> G. Alpa and P. Gaggero, ‘Profili della tutela del risparmiatore’, *Società*, 5 (1998), 520. See M. Bessone, ‘Mercato finanziario, tutela del risparmio e pubblica vigilanza. Lo scenario internazionale ed il mercato italiano’, in P. Perlingieri and E. Caterini (eds.), *Il diritto dei consumi*, (Rende: Edizioni scientifiche calabresi, 2005), II, 21.

financial intermediaries on the other have recently led to the introduction of different remedies aimed to provide them access to justice.

Scope of the present contribution is first to discuss in detail the definition of ‘investors’ as consumers in the European as well as in the Italian legislation. Part I shall therefore provide the reader with sufficient constructive elements in order to understand the present inconsistencies of definitions that instead deserve the utmost attention at both European and national levels.

## **Part I - The Financial Consumer and the Applicable Provisions in Italy.**

### 1. European Perspectives on “Customer Protection” and Financial Markets.

EC financial-services law has developed in two different directions: by the enactment of rules on prudential and market supervision on the one hand, and by contract-related rules governing the provision of particular financial services on the other<sup>4</sup>. The European Treaties offer several possible legal bases for regulating the purchase of financial services products, relating to promotion of the internal market or to consumer protection. Arguably, ‘the legal bases indicate a hierarchy of policy objectives which prioritises the internal market above consumer protection’<sup>5</sup>.

The sectors involved in this evolution are normally limited to three main directories<sup>6</sup>: markets, instruments and financial intermediaries. However, there is a fourth one, that is, consumer-savers and their adequate protection.

The consumer purchasing financial services suffers from psychological and clear inferiority complexes in his/her contractual position, from the point of view of information and actual freedom of choice. This situation is even more evident as regards the four main pillars of the financial markets, which are banking, insurances, investments and thrift savings plans. Therefore, the way forward to protect savers and purchasers of financial products is to move towards the implementation of the transparency principle<sup>7</sup> and personal autonomy.

Protection of the consumer/saver/insured party means, at the same time, to enable a correct functioning of the market, as it avoids the dispersion of capital, profiting the community as a whole and

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<sup>4</sup> Green Paper on Financial Services Policy (2005-2010) (COM(2005) 177 final). See on the economic and policy context for a single market in financial services: M. Kenny, ‘The Protection of Non-Professional Sureties in Europe: the uncommon core of European Private Law?’, in A. Colombi-Ciacchi (ed), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, (Nomos: Baden-Baden), p. 362.

G. Ferrarini, ‘Contract standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture’, *European Review of Contract Law*, (2005), 19.

<sup>5</sup> J. Long, ‘Navigating the Maze: Reviewing the Information Disclosure Requirements in the Financial Services Acquis’, *European Business Law Review*, (2008), 493.

<sup>6</sup> C. Iurilli, ‘Short selling, intermediazione finanziaria, asimmetrie informative ed esperienza dell’investitore’, *La responsabilità Civile*, 10 (2006), 795.

<sup>7</sup> G. Chinè, ‘La tutela del risparmiatore nel diritto vivente’, *Il Corriere del Merito*, 8-9 (2005), 873.

an adequate level of social justice. The contract must thus to be appreciated as the expression of individual freedom in the market to purchase according to a conscious and informed decision.

The integration of different interests related to the respect of competition rules, on one hand, and the making of fair contracts, on the other, lead to the signing of a contract freely and consciously entered into by the parties and the realisation of a free and efficient market<sup>8</sup>.

This need for protection can, perhaps, be better expressed by constitutionally-oriented considerations (i.e. from a fundamental rights perspective) providing the judiciary 'with a powerful tool to adapt traditional contract law instruments to contemporary democratic and social values', making the contract an important vehicle for social justice policies<sup>9</sup>.

For these reasons, the protection of financial services consumers must not disregard the subjective characterization of the investor according to his/her low professional, moderately professional or highly professional level of investing sophistication.

At the same time, the nature of this protection must be objective, considering that the financial market regulatory system does not only involve private law principles, but also, and especially, public law ones as well, which concern the safeguarding of the entire financial system<sup>10</sup>.

The aim of protection, in fact, is the solidity, the reliability and the efficiency of the market, whereas investor protection is connected to the reliability of the system, which in turn is based on the principles of proper disclosure, transparency of contractual operations and good faith, all aimed at meeting the individual's needs in the market<sup>11</sup>.

However, in order to appreciate the real scope of this regulatory policy and the degree of protection granted, a clear delimitation of the definition of investor must be given.

Only in some cases the investor is considered as a consumer, thus enjoying a higher level of protection. Most financial instruments are purchased by customers using professional intermediates.

The Directive on distance marketing of consumer financial services<sup>12</sup> refers to consumers<sup>13</sup>, but it leaves to the Member States the possibility of extending the scope of the directive to non-profit organisations

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<sup>8</sup> See F. Camilletti, 'L'art. 2 del codice del consumo e dei diritti fondamentali e i diritti fondamentali del consumatore nei rapporti contrattuali', *Contratti*, 10 (2007), 907; F. Scaglione, 'Buona fede in contrahendo e ordine pubblico economico nel sistema del diritto privato del mercato', *Giurisprudenza italiana* (2008) 1.

<sup>9</sup> A. Colombi Ciacchi, 'The Constitutionalisation of European Contract Law', *European Review of Contract Law*, (2006), 180. See the European perspective on the phenomenon in C. Mak, *Fundamental Rights in European Contract Law*, (Kluwer Law International, 2008). Perplexities on the protection of weaker parties from risky financial transaction are considered by O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, (Sellier: München, 2007), 272 ff.

See, for example, the surety protection models. This approximation is only desirable if it can offer a useful instrument at national level according to the specificity of the internal socio-economic context and legal culture. See A. Colombi Ciacchi, 'Formal and Substantive Disparity in European Suretyship Law: A Comparative Summary', in A. Colombi Ciacchi (ed), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, (Nomos: Baden-Baden), 395.

<sup>10</sup> C. Iurilli, 'Short selling', 795.

<sup>11</sup> C. Iurilli, 'Short selling', 795.

<sup>12</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

and people making use of financial services in order to become entrepreneurs, as such could find themselves unprepared to properly judge such investments, similar to that of an ordinary consumer<sup>14</sup>. However, the strict interpretation given by the ECJ<sup>15</sup> seems to bar any extensions of the concept of consumer even if national laws would allow that<sup>16</sup>.

Nevertheless, in an effort to supersede the narrow subjective range of application of consumer law<sup>17</sup>, some scholars try to set aside all different contractual relationships affected by asymmetries between the supplier and recipient, in the light of a more general policy of ‘customer protection’<sup>18</sup>.

The Markets in Financial Instruments Directive<sup>19</sup> (hereinafter, ‘MiFID’) seems to follow this trend. It is directed at protecting retail clients that are not necessarily consumers. Similarly, the Rome I Regulation<sup>20</sup> concerns situations where there are ‘contracts concluded with parties regarded as being

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<sup>13</sup> Dir. 2002/65, art. 2d) : ‘consumer means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’.

<sup>14</sup> Recital 29: ‘This Directive is without prejudice to extension by Member States, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs’.

<sup>15</sup> The classic definition of ‘consumer’ as ‘a natural person who, in the transaction covered by the relevant directive, is acting for purposes which can be regarded as outside his trade or profession’ has been given a narrow interpretation by the ECJ, that has excluded, for instance, start-up contracts, assignments of consumer claims, and mixed contracts. This has been the case of the Directives on doorstep selling, consumer credit, unfair contract terms, timeshares, distance selling, and consumer sales and guarantees. Actually, certain authors have highlighted the fact that ‘this concept has usually been taken over to contract law directives, without reflecting that the case law originated from the specifics of the jurisdiction rules under the Brussels Convention, where special jurisdiction is an exception to the general principle *actor sequitur forum rei*’: H.-W. Micklitz and N. Reich, ‘Cronica de una Muerte Anunciada: The Commission Proposal for a « Directive on Consumer Rights », *Common Market Law Review*, (2009), 482. Interpreting these rules, the ECJ has developed, in conformity with the information model, ‘a European consumer image’, according to which the ‘reasonably well informed and reasonably observant and circumspect consumer’ prevails: G. Straetmans, ‘Some Thoughts on the Future European Consumer Acquis’, in *European Business Law Review*, (2009), 429.

<sup>16</sup> *Cape snc v Ideal Service srl*, 21 November 2001, Joined Cases C 541-542/99. The Spanish government contended that ‘the definition of consumer given by the Directive does not make it impossible for Member States, when transposing it, to treat a company as a consumer in their domestic law, but the decision clearly stated on the point affirming that: ‘it must be observed that Article 2(b) of the Directive defines a consumer as ‘any natural person’ who fulfils the conditions laid down by that provision, whereas article 2(c) of the Directive, in defining the term ‘supplier or seller’, refers to both natural and legal persons. It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision. ‘Accordingly, the answer to the second and third questions must be that the term ‘consumer’, as defined in Article 2(b) of the Directive, must be interpreted as referring solely to natural persons’. See on this point : G. Straetmans, ‘Some Thoughts on the Future European Consumer Acquis’, *European Business Law Review*, 2009, 442.

<sup>17</sup> The consumer acquis has been limited by the Commission to eight directives currently under review, but ‘given that consumer protection as such embraces far more than the acquis, account will have to be taken of the case-law of the Court in particular, and of the broad definition in the B2C directive in future policy initiatives’: L.W. Gormley, ‘The Consumer Acquis and the Internal Market’, *European Business Law Review*, ?? (2009), 420.

<sup>18</sup> V. Roppo, ‘From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?’, in *European Review of Contract Law*, (2009), 304. Therefore, as it has been argued, ‘the extent to which consumers are to be “protected” is part of the larger debate on how interventionist States ought to be’: H. Unberath and A. Johnston, ‘The Double-headed Approach of the ECJ Concerning Consumer Protection’, *Common Market Law Review*, ?? (2007), 1237.

<sup>19</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

<sup>20</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

weaker, those parties should be protected by conflict of- law rules that are more favourable to their interests than the general rules' (Recital 23)<sup>21</sup>.

Consumer protection rules are thus conceived here as special rules for specific cases based both normatively and conceptually on the more general rules of private law<sup>22</sup>. Besides, since the DCFR does not contain a specific chapter relating to contracts involving the supply of financial services<sup>23</sup>, the inclusion of the already existing PEL FSC in the DCFR, as supported by many authors, 'would make an important contribution to the creation of a coherent structure of rules on service contracts in general, and financial-service contracts in particular'<sup>24</sup>.

The EU institutions, instead, through the Proposal for a Directive on Consumer Rights seem to go in the opposite direction<sup>25</sup>, that would split the retail market into two separate markets as it contains, on the one hand, rules that are only applicable to consumers, narrowly defined (art. 2(1)) but, on the other hand, a quite broad substantive scope aimed at regulating a wide spectrum of subject (art. 3)<sup>26</sup>.

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<sup>21</sup> Recital 23 reads: 'As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of- law rules that are more favourable to their interests than the general rules'. Then, Recital 24 contains a more specific reference to consumer contracts. Financial services such as investment services and activities and ancillary services provided by a professional to a consumer (Art. 6) are specifically concerned by the proper functioning of the internal market as it creates a need for certainty related to the law applicable and the free movement of judgments (Recital 29). Therefore, for conflicts-of-law rules in Member States, art. 6 provides for designation of the same national law irrespective of the country of the court in which an action is brought.

<sup>22</sup> See M. Hesselink, 'The Consumer Rights Directive and the CFR : two world apart?', *European Review of Contract Law*, (2009), 299.

<sup>23</sup> As concern the aspects at stake, it has to be underlined that in the Draft on the Common Frame of Reference (hereinafter: 'DCFR') the definition of consumer is extended to mixed contracts, whilst its subjective range of application is maintained: even though Small and Medium Enterprises (hereinafter: 'SME') are often in very similar positions than consumers there is a sharp contrast between the way consumers and small businesses are treated. See M. Hesselink, 'Common Frame of Reference & Social Justice', *European Review of Contract Law*, (2008), 264.

In any case, from the reactions to the Green Paper it results that several stakeholders asked for clarification regarding the relationship between the future horizontal instrument and other EU legislation or ongoing legislative procedures, other directives (*i.e.* Directive on Distance Marketing of Financial Services) and the Draft of a Common Frame of Reference (DCFR).

A consumer organisation argued that all consumer directives should be included and this should comprise also the Financial Services Directive: see DG Health and Consumer Protection, 'Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis', p. 34. Available at: [ec.europa.eu/consumers/rights/detailed\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf).

In the same line, several businesses, preferred the horizontal instrument as a common denominator to all the Consumer *Acquis*, including a limited scope to only few items, (like, for example, the notion of consumer) they suggested anyway that it must include in that case also financial services: DG Health and Consumer Protection, 'Preparatory Work', 43.

Finally, some others note that , in particular, the financial sector may be worried by the possibility that the introduction of a horizontal instrument would supersede specific financial services legislation (vertical instruments such as MiFID and the UCITS Directive, which regulate the activities of asset managers and fund managers and distributors), imposing additional burdens and possibly interfering with the basic principles of operation and management of funds activities (e.g. the UCITS Directive and MiFID already regulate the provision of information requirements): DG Health and Consumer Protection, 'Preparatory Work', p. 44.

<sup>24</sup> O. Cherednychenko and E.C. Jansen, 'Principles of European Law on Financial Service Contracts?', *European Review of Private Law*, (2008), 443: "Given that financial-service contracts are not 'regulated specifically' in the DCFR, the provision of Article II – 1:108(1) under (a) does not apply. This implies that the rule of Article II – 1:108(1) under (b) applies and that only the 'rules applicable to contracts generally' apply to that part of the mixed contract that involves the supply of a financial service. The further corollary of this is that, in the context of either the Principles of European Law (PEL) or the DCFR, genuine financial-service contracts are only governed by general contract law provisions".

<sup>25</sup> Proposal for a Directive on Consumer Rights of 8 October 2008, COM (2008) 614 Final.

<sup>26</sup> See M. Hesselink, 'The Consumer Rights Directive', 295.

In any event, according to Art. 3(2) of the Proposal, financial services should be exempted, with the exception to certain off-premises contracts<sup>27</sup>.

## 2. Protection of Financial Investors As ‘Consumers’ in the Italian Legal System: The state of the Art.

### 2.1. *The ‘Investor’ in the Italian Financial Market.*

The client of a banking/financial institution must face a veritable ‘legislative forest’ of provisions: therefore the actual notion of ‘investor’ must be defined according to Italian law in order to verify, therefore, the law applicable.

Traditionally, the investor’s contractual position is governed both by general consumer law and special legislation provided by the *Testo Unico Bancario*<sup>28</sup> (Consolidated Act on Banking, hereinafter: ‘T.U.B.’) and by the *Testo Unico della Finanza*<sup>29</sup> (Consolidated Act on Finance, hereinafter: ‘T.U.F.’), as well as related regulations issued by the Banca d’Italia (Bank of Italy) and by the Italian public financial authority for regulating the Italian securities market (CONSOB)<sup>30</sup> aimed at their implementation.

The ‘T.U.B.’ is exclusively devoted to the banking sector. Part of this legislation is addressed to all bank clients according to a ‘neutral’ notion aiming to include professional, as well as corporate, bodies having a contractual relationship with the bank, whilst rules on consumer credit concern only ‘consumers’ pursuant to the definition provided by the Consumer Code<sup>31</sup>, as we shall see here below.

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<sup>27</sup> The provisions of the Directive on consumer rights cover contracts relating to financial services “only insofar as this is necessary to fill the regulatory gaps” (par. 11). Anyway, according to the Draft Report in the Proposal for a Directive of the European parliament and of the Council on Consumer Rights prepared by the Committee on the Internal Market and Consumer Protection (2008/0196(COD)) the current reading of art. 3 should be modified. The reporter, Andreas Schwab, proposes a different version of art. 4, par. 1° concerning the scope of “targeted full harmonisation” measures. Therefore, this article should not apply to contracts falling within the scope of Directive 2002/65/EC. These contracts are moreover excluded from the application of consumer information and withdrawal right rules for distance and off-premises contracts (art. 4b, par. 2a).

<sup>28</sup> Legislative Decree no. 385 of 1 September 1993, Consolidated Law on Banking.

<sup>29</sup> Legislative Decree no. 58 of 24 February 1998, Consolidated Law on Financial Intermediation, implemented by Consob Regulation no. 11971 of 14 May 1999.

<sup>30</sup> Banca d’Italia and Consob equally share powers of control and supervision over financial markets. Their roles are defined according to the purpose pursued, that is the fairness of behaviours (Banca d’Italia) and the supervision of market stability (Consob): B. Cavallo, ‘Dissesti finanziari e sistema istituzionale: il ruolo delle attività di controllo’, in F. Galgano and G. Visintini (eds.), *Mercato finanziario e tutela del risparmiatore. Trattato di diritto commerciale e di diritto pubblico dell’economia*, (CEDAM: Padova, 2006), v. XLIII, p. 15.

<sup>31</sup> See Articles 121-126. Article 121 of the ‘T.U.B.’ repeats at the first paragraph the definition of consumer as ‘natural person who is acting for purposes which can be regarded as outside his trade or profession’. At the same time, the fourth paragraph enumerates those cases excluded from its range of application. (Letter a), for example, refers to ‘financing instruments that have an aggregate value inferior or superior to limits imposed by a CICR resolution producing effects since the 30th day from its publication on the *Gazzetta Ufficiale*. Consequently, if the person that received the financing is a ‘natural person who is acting for purposes which can be regarded as outside his trade or profession’, but the financial operation has a greater value, the contract can no longer be regulated by consumer rules).

See G. Carriero, *Autonomia Privata e disciplina del mercato. Il credito al consumo*, 2<sup>nd</sup> edn, (Giappichelli: Torino, 2007), p. 66; R. Lener, *Forma contrattuale e tutela del contraente « non qualificato » nel mercato finanziario*, (Giuffrè: Milano, 1996), pp. 53-55.

The ‘T.U.F.’ aims to provide protection for a general category of ‘investors’ related to financial intermediaries<sup>32</sup>, against unreliable financial investments going beyond ordinary risk standards proper to these types of transactions, respecting the duties of care and fairness, and, more generally, contributing to the efficient functioning of financial markets<sup>33</sup>.

The implementation of these Acts is hence granted by secondary legislation enacted by the *Banca d'Italia* (Bank of Italy) and *Commissione Nazionale per le Società e la Borsa*<sup>34</sup> (CONSOB). Both authorities have equivalent powers of control and supervision over financial markets. Their role is defined according to the purpose pursued, that is, the fairness of given behaviour (Banca d'Italia) and the supervision of market stability (Consob).

Finally, the Consumer Code (d.lgs. n. 206/2005, enacted in October 23, 2005) grants the consumer special protection in consumer credit contracts<sup>35</sup> and financial services<sup>36</sup>, where consumer is meant to be a “natural person who is acting for purposes which can be regarded as outside his trade or profession”<sup>37</sup>.

The implementation of the definition of consumer in Italian legislation relating to the financial markets is emblematic of the truly passive nature of the reception of mass (standardised) contracts in our legal system<sup>38</sup>. Consumer legislation actually exists only in the areas where EC law imposes such protective rules (i.e. consumer credit and distance marketing of consumer financial services); where, instead, the European legislature did not intervene, different criteria have been used (i.e., estate intermediation, securities’ public offers, banking transparency).

Together with rules directly regulating contracts, professionals especially qualified for the provision of financial services are bound by a set of rules of conduct aimed at governing and orienting their professional activity.

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<sup>32</sup> Art. 5.1b. See V. Roppo, ‘Sui contratti del mercato finanziario, prima e dopo la MiFID’, *Rivista di diritto privato*, 3 (2008), 485.

<sup>33</sup> Art. 21. There is a sharp contrast, in Italy, between some authors and the case law on the definition of these obligations and the applicable remedy (contract liability or nullity). See: Trib. Genova (Genoa), 18 April 2005; Trib. Genova, 15 March 2005; Trib. Mantova (Mantua), 1 December 2004; Trib. Venezia (Venice), 22 November 2004; Trib. Firenze (Florence), 19 April 2005; Trib. Roma, 25 May 2005; Cass. Sez. Un., 19 December 2007, n. 26725, *Contratti*, 3 (2008), 221.

A. Di Majo, ‘Prodotti finanziari e tutela del risparmiatore’, *Corriere giuridico*, (2005), 1285; V. Roppo, ‘La tutela del risparmiatore fra nullità e risoluzione (a proposito di Cirio bond & tango bond)’, *Danno e Responsabilità*, 6 (2005), 604; V. Roppo, ‘La tutela del risparmiatore fra nullità, risoluzione e risarcimento (ovvero l’ambaradan dei rimedi contrattuali)’, *Contratto e impresa*, 3 (2005), 896; R. Calvo, ‘Il risparmiatore disinformato tra poteri forti e tutele deboli’, *Rivista trimestrale di diritto e procedura civile*, 4 (2008), 1431; F. Galgano, ‘Il contratto di intermediazioni finanziaria davanti alle sezioni unite della cassazione’, *Contratto e impresa*, 1 (2008), 1; P. Morandi, ‘Prestazione dei servizi di investimento: forma dei contratti e regole di condotta degli intermediari finanziari’, *Obbligazioni e contratti*, 11 (2008), 919.

<sup>34</sup> The *Commissione Nazionale per le Società e la Borsa* (CONSOB) is the public authority responsible for regulating the Italian securities market.

<sup>35</sup> Articles 40-43.

<sup>36</sup> The Directive 2002/65/CE concerning the distance marketing of consumer financial services has been directly inserted as a new Section of the Consumer Code (article 67 bis to 67 vicies bis): Art. 7, l. n. 229 of 29 July 2009. A new Section IV bis of Chapter I of Title III of Part III has therefore been introduced. The beneficiary (art. 67 ter1.d) of this protective legislation is thus the “consumer”, defined in art. 3 a.

<sup>37</sup> Art. 3a.

<sup>38</sup> R. Lener, *Forma contrattuale e tutela del contraente «non qualificato»*, p. 49.

Thus, in this regard, an important role is played by financial operator self-regulation through the enactment of codes of conduct<sup>39</sup>, alternative dispute resolution procedures and, quite often, by certain initiatives undertaken at the professional industry-wide level, in agreement with user/client associations.

## *2.2. Recent Regulations issued by Banking Authorities.*

In this context, on the 18<sup>th</sup> of March 2009 Banca d'Italia published a document opened to public consultation containing (what should be) the new regulation on transparency in banking and financial services, now contained in the final version of 29<sup>th</sup> July 2009<sup>40</sup>.

This new regulation aims to establish a sort of balance between efficiency needs and solidity of the banking and financial systems, on the one hand, and the protection of clients on the other. Major objectives are, therefore, the protection of clients and the promotion of competition, attempting to mitigate the risks to which the market is normally exposed.

In order to fulfil these objectives and to provide emphasis to the issues at stake, Banca d'Italia provides a series of graduated measures in relation to the nature of the services provided and the characteristics of the clientele to which they are targeted.

On the basis of the principle of proportionality, duties differ according to the features of services provided and their recipients. They are thus classified as follows, taking into consideration the varying intensity of the degree of protection:

- 'consumer', namely the natural person who is acting for purposes which can be regarded as outside his trade or profession;
- 'retail clients', understood as consumers, non-profit entities and businesses having total revenues lower than Euro 5 million and fewer than 10 employees<sup>41</sup>;
- 'client', that is every natural person or legal person that has a contractual relationship, or that is willing to enter into such, with an intermediary.

Some provisions apply exclusively to contracts entered into with consumers or 'retail clients'. The status of 'consumer' or 'retail clients' must be verified by intermediaries before the conclusion of the contract. They can eventually change the characterisation of such status in the contract, once signed, only if the parties request such and so long as applicable conditions have been duly met<sup>42</sup>.

It should be highlighted that in the document under consideration, the word 'consumer' appears to have a clear predominance over the other categories of clients.

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<sup>39</sup> G. Carriero, 'Codici deontologici e tutela del risparmiatore', *Il Foro italiano*, 10 (2005), 196.

<sup>40</sup> On the meaning of « transparency » in banking, see G. Alpa and P. Gaggero, 'Trasparenza bancaria e contratti del consumatore', p. 73 ss.

<sup>41</sup> This category was created previously by Consob Regulation n. 16190 of 29 October 2007, intended as 'non professional clients'.

<sup>42</sup> See the final version of 29 July 2009, p. 3.

Moreover, previous regulatory measures implemented in 2003 did not refer to any 'weaker party', as had been done before in the Instructions on Banking Supervision<sup>43</sup> and the 'consumer' was only referred to 'as natural person who is acting for purposes which can be regarded as outside his trade or profession' only in few cases.

That was the case, for example, of rules mentioning the duty to advise the consumer on his/her rights introduced under the Consumer Credit Directive<sup>44</sup> and of the duty imposed on the bank to deliver an informational prospectus to the consumer before the purchase of complex financial products.

As a result, while previous measures did not consider the nature of the recipient, being thus neutral, the new legislation appears more calibrated to their specific needs in the financial market<sup>45</sup>.

Moreover, for those 'clients' that do not fall within the two preceding categories, general contract law must be applied.

Following the approach of the Civil Code model, different provisions cover standard contracts, on the one hand, and individually negotiated contracts, on the other.

The reinforced procedural protections require duties of transparency that correspond to general duties applicable to all recipients of financial services, except for those duties that expressly and solely refer to 'consumers' or 'retail clients'.

Finally, the new Section V is entirely devoted to distant means of communication, in order to define the scope of application of rules on pre-contractual information disclosure and as regards communications that are not required concerning offers executed through distant means of communications.

In this regard, different provisions are afforded for cases in which intermediaries deal with consumers and those in which they deal with professionals.

### 2.3. *Special Consumer Protection Legislation.*

The "client-consumer" that purchases a consumer credit contract is protected by special legislation currently located in the Consumer Code (Arts. 40-43) and the 'T.U.B.' (Articles 121-126), all of which makes the identification of the consumer quite confusing<sup>46</sup>.

In fact, the TUB contains general rules protecting the 'client', and, some specific provisions on the 'consumer' applicable on the basis of the consumer's definition<sup>47</sup>.

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<sup>43</sup> See G. Carriero, 'Trasparenza delle condizioni contrattuali', *Diritto delle banche e dei mercati finanziari*, 2003, p. 4.

<sup>44</sup> Penultimate alinea, par. 2, Sezione II.

<sup>45</sup> P. Carrière and M. Bascelli, 'Trasparenza delle operazioni e dei servizi finanziari: le nuove regole della banca d'Italia', *Contratti*, 6 (2009), 611.

<sup>46</sup> See R. Clarizia, 'La nozione di consumatore nel codice del consumo e con riguardo ai contratti di credito al consumo', *Diritto dell'Internet*, (2006), 354 ; G. Carriero, *Autonomia Privata e disciplina del mercato*, p. 47.

<sup>47</sup> The lack of coherence in the same text is therefore frustrating: R. Lener, *Forma contrattuale e tutela del contraente 'non qualificato'*, p. 52.

Article 121 of the ‘T.U.B.’ repeats at the first paragraph the definition proposed by the Consumer Code according to which consumer is identified as a “natural person who is acting for purposes which can be regarded as outside his trade or profession”.

The definition stresses two main aspects: a consumer can only be a physical person; and moreover, the purpose of the activity concerned must be non-professional, that is, the scope of the activity must be the satisfaction of some personal or family need.

Having regard to the first condition, Italian experts have increasingly proposed the extension of consumer protection to legal persons, in particular to corporate entities, paying particular attention to those having a not-for-profit purpose<sup>48</sup>, such as associations, committees and consortia carrying out both external and internal activities<sup>49</sup>. This way, it would be possible to provide a more coherent definition of the “weaker” contractual party<sup>50</sup>.

Nevertheless, this interpretation has been rejected both by the Constitutional Court<sup>51</sup> and the Supreme Court, the Corte di Cassazione<sup>52</sup>, who have invoked the need for coherence towards European policy.

Having regard to the second aspect, related to the proper notion of ‘consumer’, the nature of the purpose is ascertained through a subjective test (often ignored by Italian courts of first instance) aimed at confirming how consumers act, taking into account form, circumstances of time and place, and

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<sup>48</sup> P. Bonofiglio, ‘L’ambito soggettivo di applicazione dell’art. 1469 *bis* c.c.’, (comment on C.cost., 22 November 2002, n. 469, *Nuova Giurisprudenza Civile Commentata*, (2003), 182...

<sup>49</sup> E. Battelli, ‘Consumatore: nozione, clausole abusive e foro del consumatore’, *Il Corriere del merito*, (2006), 6; R. Bin, ‘Clausole vessatorie: svolta storica (ma si attuano così le direttive comunitarie?)’, *Contratto e impresa/Europa*, (1997), 436; G. Carriero, ‘Autonomia privata e disciplina del mercato’, p. 67. R. Lener, *Forma contrattuale e tutela del contraente « non qualificato » nel mercato finanziario*, Milan 1996, p. 49.

<sup>50</sup> The target of consumer policy is thus to balance the asymmetry between the conflicting interests, giving consideration to the specific position of the weaker party. In determining the scope of protection, consideration should be given to the fact that the overall balance of the contract is acquired through the power of disposal apt to the professional market operators. In view of this, consumer protection could certainly be extended to incorporated entities should they act outside the range of the by-laws. This position has been adopted by the Italian Courts of first instance: in different circumstances they have forced the statutory rule denouncing discrimination: GdP Aquila, (ord.) 3 November 1997, *Giustizia civile*, (1998), I, 2314, case comment L. Gatt, ‘L’ambito soggettivo di applicazione della normativa sulle clausole vessatorie’; Trib. Bologna, 3 October 2000, *Corriere giuridico*, (2001), 525 comment by R. Conti, ‘Lo status di consumatore alla ricerca di un foro esclusivo e di una stabile identificazione: il Tribunale qualifica il condominio come un ente di gestione sfornito di personalità giuridica estendendone la tutela consumeristica’. See C. Amato, *Per un diritto europeo de consumatori*, (Giuffrè: Milan, 2003), p. 20.

<sup>51</sup> C.cost. (ord.) 30 June 1999, n. 282, *Foro Italiano*, (1999), I, 3118, comment by A. Palmieri, ‘L’ibrida definizione di consumatore e i beneficiari (talvolta pretermessi) degli strumenti di riequilibrio contrattuale’; C.cost. (ord.) 22 November 2002, n. 469, *Foro Italiano*, (2003), I, 332, case comment by A. Palmieri, ‘Consumatori, clausole abusive e imperativo di azionabilità della legge: il diritto privato europeo conquista la Corte Costituzionale’; A. Plaia, ‘Nozione di consumatore, dinamismo concorrenziale e integrazione comunitaria del parametro di costituzionalità: le persone giuridiche proprio per l’attività abitualmente svolta hanno cognizione idonea per contrattare su un piano di parità’; *Nuova Giurisprudenza Civile Commentata*, (2003), 178 case comment by P. Bonofiglio.

Recently: C.cost. (ord.) 16 July 2004, n. 235, *Foro Italiano*, (2005), I, 992, case comment by A. Palmieri, ‘Alla (vana?) ricerca del consumatore ideale?’.

<sup>52</sup> Cass. 14 April 2000, n. 4843, in *Foro Italiano*, (2000), I, 3196; Cass. 25 July 2001, n. 10127, in *Giurisprudenza italiana*, (2002), 543 case comment by Fiorio, ‘Professionista e consumatore, un discrimine formalista?’; in *Contratti*, (2002), 338 ‘La nozione di consumatore secondo la Cassazione’; *Giustizia civile*, (2002), I, 688, case comment by F. Di Marzio, ‘Ancora sulla nozione di ‘consumatore’ nei contratti’; *Vita notarile*, (2001), 1330.

For this reason, even though this aspect is not expressly taken into account in the issue at stake, it is important to raise the problem, since it seems that the main obstacle has to be overcome through the European legislation.

payment conditions: the ambiguous definition is apparently directed to persons that ‘...act for extraneous purposes’, thus allowing for different interpretations of the disposition<sup>53</sup>.

Thus, the fourth paragraph of article 121 subsequently enumerates cases excluded from the range of application, making its scope more restricted than the one proper to consumer law.

Letter a), for example, refers to ‘financing instruments that have a global value inferior or superior to limits imposed by a CICR resolution producing effects from the 30<sup>th</sup> day of its publication in the *Gazzetta Ufficiale*’ (Italian Official Journal).

Consequently, if the person that received the financing is a ‘natural person who is acting for purposes which can be regarded as outside his trade or profession’, but the financial operation has a greater value, the contract may no longer be regulated by consumer rules.

In a different way than consumer credit legislation, actually remained in the TUB, Directive 2002/65/CE concerning distance marketing of consumer financial services has been reflected in a new Section of the Consumer Code (Article 67 *bis* to 67 *vicies bis*)<sup>54</sup>.

Hence, the importance of this statutory provision does not depend on the specific protection rules (restating the same regulatory terms introduced in 2005), but rather on the systematic effects on the coordination between rules,<sup>55</sup> as such set of rules is only applicable to the client that actually meets the objective and subjective standards of a consumer.

Moreover, the definition of ‘financial service’ is directly provided by the Consumer Code in articles concerning distance marketing of consumer financial services, under Article 67 *ter*(b), but it does not exactly correspond to that given under Art. 33(3), related to unfair terms in consumer contracts. The latter, in fact, cross-referenced general principles expressed in points h) and m) of the second paragraph concerning permanent contracts for financial services. In this case, the professional has both a right of withdrawal and a *jus variandi* within a reasonable period of time, thus reducing the degree of protection granted to consumers<sup>56</sup>.

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<sup>53</sup> Therefore, there is a creeping distinction between the consumer and the physical person who is acting for purposes that can be regarded as outside one’s trade or profession, but whose purchase cannot be objectively qualified as a consumer contract according to the law.

See, for a consumer credit issue: Trib. Bologna, 18 January 2006, *Diritto dell’internet*, (2006), 354.

Consumer conduct may be defined as ‘contractual’ according to the concrete use of the contract. On the contrary, the purpose of the contract can be understood as having a positive or negative value. In the first case it is defined as the “consumeristic” purpose, whilst in the second as a ‘non professional’ one: E. Gabrielli, ‘Il consumatore e il professionista’, in E. Gabrielli and E. Minervini (eds.) *I contratti dei consumatori*, 2 vols (UTET, Turin, 2006), 13.

<sup>54</sup> Art. 7, l. n. 229 of 29 July 2009. Thus a new Section IV bis of Chapter I of Title III of Part III has been introduced.

See F. Bravo, ‘Nozione di «servizi finanziari» di cui al d.lgs. n. 190 del 2005 sulla «Commercializzazione a distanza di servizi finanziari ai consumatori» e collocabilità della disciplina nel codice del consumo’, *Rivista Trimestrale di Diritto e Procedura Civile*, 2 (2007), 585.

<sup>55</sup> F. Bravo, ‘Commercializzazione a distanza di servizi finanziari ai consumatori’, *Contratti*, 4 (2008), 373.

<sup>56</sup> F. Bravo, ‘Commercializzazione a distanza di servizi finanziari ai consumatori’, 373.

#### *2.4. Transition*

It thus seems that in the Italian system we find a growing need for protection of weaker parties, also as regards financial contracts, even if traditionally they were regulated up until a few years ago only under market principles.

Different remedies have thus been introduced in order to provide adequate investor protection.

On the one hand, in fact, case law shows a certain tendency to act against non-transparent behaviour by economic actors/operators and, on the other, of the legislator (or delegated authorities) to establish a set of rules allowing consumers to attack the “stronghold” of banking interests.

In the same vein, several legislative provisions, such as the so-called ‘*decreto Bersani-bis*’ (second Bersani decree), introduced important changes concerning loans by giving a new basis to the relationship between the client and the bank, by granting the former new advantages in 2008<sup>57</sup>. Class actions have thus been allowed under Article 32-*bis* of the ‘T.U.F.’, applying Articles 139 and 140 of the Consumer Code to consumer associations<sup>58</sup>.

Finally, recent legislative and regulatory provisions<sup>59</sup> have introduced an indemnity guarantee fund as well as a no-fault fund, thus creating an alternative compensatory system aimed at compensating damages suffered by a general category defined as ‘non professional’ savers/investors<sup>60</sup>.

### **Part II - The Law in Action: Providing Investors with Adequate Protection**

#### 1. Remedies and Access to Justice: A European Perspective

Institutional investors are the most significant focus of reform efforts on the securities markets. In the Italian as well as European contexts, the most debated issues mainly concern investment firm conduct and related liabilities, on one hand, and, on the other, great concern is devoted to controversial related issues of remedies and access to justice.

Recent legislation has faced both issues in the effort to regulate the financial market. Part II of this paper shall therefore address the complex statutory provisions dealing with protection of investors, highlighting the main contents and goals achieved by the European and Italian legislative frameworks. In dealing with the subject at stake a warning is necessary: there are several and scattered provisions in the European as well as in Italian legal systems that still do not form a coherent statutory framework able to offer efficient and simple purchaser protection in the securities market.

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<sup>57</sup> It was successively confirmed by a Parliamentary Act, Law n. 126/2008.

<sup>58</sup> M.C. Paglietti, V. Zeno-Zencovich, ‘Verso un ‘diritto processuale dei consumatori?’’, *La Nuova giurisprudenza civile commentata*, 6 (2009), 251.

<sup>59</sup> L. n. 266, 23 December 2005, Articles 343-345.

<sup>60</sup> L. n. 262, 28 December 2005, n. 262 *Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari*, as implemented by D.lgs. n. 179/2007 and by Consob Regulation n. 16190/2007.

In addition to consumer contracts, commercial and financial contracts have been deeply influenced by European legislation. Although the statutory framework remains fragmented and inconsistent in several parts – the implementation into the Italian legal system being of no help - it has renewed and refreshed the old-fashioned Italian Civil Code in the commercial and financial areas, providing it with an independent regulation which had previously been called for by several known scholars. In particular, and as regards the commercial area only, the new European legislation has dealt with consumer credit contracts, banking, sale of goods – movable and immovable property, and distance selling; in the financial investments' activities there have been several incursions of the European legislator at different stages: the pivotal principles and rules have been provided in Directive 2004/39/EC (MiFID) regarding markets in financial instruments, as completed by Dir. 2006/73<sup>61</sup>. Another pivotal piece of legislation is Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004, concerning the harmonization of transparency requirements in relation to issuer disclosure for those whose securities are listed for trading on a regulated stock market (amending Directive 2001/34/EC). Finally, the legislative framework is completed by Dir. 2003/71 regarding the type of prospectus to be published when securities are offered to the public or admitted to market trading and by Dir. 2002/65 on distance marketing of consumer financial services.

As this paper addresses investor protection, investment products and investment firm conduct shall be dealt with, whilst commercial issues will be excluded<sup>62</sup>. In this legal area the general principles adopted at a European level may be summarised in a first set of guidelines: fair dealing and transparency (see Art. 14 MiFID<sup>63</sup>), disclosure (see art. 19 MiFID<sup>64</sup>, Dir. 2004/109<sup>65</sup>, Dir. 2003/71<sup>66</sup>; Dir 2002/65 on

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<sup>61</sup> Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. See also Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transactional reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive.

<sup>62</sup> A complete review of the commercial area legislation is provided by V. Buonocore, 'Problemi di diritto commerciale europeo', *Giurisprudenza commerciale*, I (2008), 3 ff., footnotes 31-37.

<sup>63</sup> Directive 2004/39/EC (MiFID) of the European Parliament and of the Council of 21 April 2004, regarding markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC (implemented into the Italian system through D.lgs. 17 September 2007, n. 164).

*Article 14 - Trading process and finalisation of transactions in an MTF:* '1. Member States shall require that investment firms or market operators operating an MTF, in addition to meeting the requirements laid down in Article 13, establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders. 2. Member States shall require that investment firms or market operators operating an MTF establish transparent rules regarding the criteria for determining the financial instruments that can be traded under its systems.'

<sup>64</sup> *Article 19 - Conduct of business obligations when providing investment services to clients:* '1. Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8 [...].'

distance marketing of consumer financial services<sup>67</sup>), adequacy (see Art. 13 MiFID<sup>68</sup>) and appropriateness (Dir. 2003/71, Art. 7, par. 2 lett. b)<sup>69</sup>). All the above-stated principles have been implemented in the Italian system by way of the ‘T.U.B.’, (Title VI in particular) and the ‘T.U.F’ (Part II in particular: see par. 2 for more).

A second set of guidelines coming from the European legislation consists both of the preference for collective redress procedures compared to individual claims, and of the adoption of extra-judicial (outside of court) instruments of dispute resolution. As regards collective redress procedures, Art. 52, par. 2<sup>70</sup>, MIFID (introduced into Part II, Title II, capo IV-*bis* ‘T.U.F.’) suggests that Member States maintain a list of ‘bodies’ who shall have recognised standing on behalf of consumers in order to ensure that the national provisions for the implementation of the MiFID Directive shall be applied. As in Dir. 93/13 (regulating unfair terms in consumer contracts) the *rationale* behind this provision is rooted in the pragmatic understanding that, for several reasons, investors (as well as consumers) are not strong enough to bring forward suits. This may be true because often the action would involve small claims, or because investors are not sufficiently aware of their rights, nor of the available redress procedures. On the contrary independent public entities (as in the case of England & Wales), or consumers associations (as in the case of Italy) are meant to represent investors’ collective interests as a ‘class’, different in their nature from individual interests. Special attention to consumers’ collective interests has been provided by European legislators through Dir. 98/27, now superseded by Dir. 2009/22, where the importance of protecting collective interests as opposed to individual interests is stressed. Whereas “ collective

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<sup>65</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to disclosure about issuers whose securities are admitted to trading on a regulated market (amending Directive 2001/34/EC), implemented into the Italian system by D.lgs. 6 November 2007, n. 195.

<sup>66</sup> The entire Directive is devoted to appropriate information to the public, as clearly stated in:

*Article 1- Purpose and scope* ‘1. The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.’

This directive has been recently – although not significantly - amended by Dir. 2008/11.

<sup>67</sup> The need to inform investors in distance selling of financial products is clearly stated in recital (21): ‘The use of means of distance communications should not lead to an unwarranted restriction on the information provided to the client. In the interests of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the contract. The consumer should receive, before conclusion of the contract, the prior information needed so as to properly appraise the financial service offered to him and hence make a well-informed choice. The supplier should specify how long his offer applies as it stands.’

The directive has been recently – although not significantly - amended by Dir. 2007/64.

<sup>68</sup> *Article 13 - Organisational requirements*: 1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8 [...].

<sup>69</sup> *Article 7 - Minimum information*: [...] 2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following: [...] (b) the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities. The information required in a prospectus shall be appropriate from the point of view of the investors concerned for non-equity securities having a denomination per unit of at least EUR 50 000.

<sup>70</sup> *Article 52 - Right of appeal*: [...] 2. Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied: (a) public bodies or their representatives; (b) consumer organisations having a legitimate interest in protecting consumers; (c) professional organisations having a legitimate interest in acting to protect their members.’

interests mean interests which do not include the accumulation of interests of individuals who have been harmed by an infringement..." (see Recital 3, Dir. 2009/22). This Directive applies to consumers' collective interests included in previous Directives listed in Annex I. Among them Dir. 2002/65 concerning distance marketing of consumer financial services appears, and this implicitly means that: *i.* investors are included in the consumer-wide class; and *ii.* collective redress should be encouraged and/or improved under national legislation. As we shall see further on (see par. 2.2.2.), a new form of collective redress remedy has recently been introduced into the Italian system under the form of a 'class action'.

As regards out-of-court settlements Art. 53 Dir. 2004/39/EC (MiIFD) suggests that Member States encourage 'the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate'. As we shall see further on (see par. 2), extra-judicial (out of court) mechanisms have in fact been successfully introduced into the Italian legal system.

## 2. Extra-Judicial Remedies for Investor Complaints and Access to Justice: An Italian Perspective

The main impact on the Italian system of the abovementioned European legislation concerning financial markets consists of the following: a) rendering investment firm behaviour more transparent and therefore more trustworthy; b) improving the relationship between public institutions and citizens (see Art. 5 'T.U.F.', according to which: "to improve the fiduciary relationship between investors and institutions" is one of the main goals of financial brokers' discipline).

In particular, the general principles introduced by the EU legislation have been spread-out over layered levels into the 'T.U.B.' and "T.U.F.", and at present, transparency, fair dealing and duties of disclosure represent an essential part of the Italian (commercial and) financial legal system.

The most significant provisions are represented by Art. 21 'T.U.F.', which expressly requires fair dealing of investments firms (lett.a)), and which expressly adopts the 'know your customer rule' (lett. b), while lett. d) of the above-mentioned provision requires adequate organisational arrangements. It is also important to cite the regulations enacted by the Italian financial regulatory Authority (CONSOB): not only is the 'know your customer rule' described in more detail, but also the principle of adequacy is detailed and transformed into the 'suitability rule' (see Arts. 39 and 40 of regulation n. 16190/07)<sup>71</sup>. As for the liability arising from investment firm breaches of the adequacy/suitability rule, most Italian

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<sup>71</sup> On the 'suitability rule' and 'know your customer rule', see R. Bruno, 'L'esperienza dell'investitore e l'informazione "adeguata" e "necessaria"', *Giur. comm.*, 2 (2008) 389; M. Guernelli, 'L'intermediazione finanziaria tra tutela del mercato, legislazione consumeristica e orientamenti giurisprudenziali', *Giur.comm.*, 2 (2009) 360.

investment contracts transfer this risk to clients, by introducing contractual terms stating that the client has been exhaustively informed about the risks and consequences of the transaction, thus assuming that the client is fully aware of his/her commitments. Apart from this unlawful contractual practice, which should probably be considered as an unfair infringement of consumer rights under Dir. 1993/13, neither the ‘T.U.F.’ nor the regulatory instruments enacted by CONSOB have clearly stated the remedies available to investors should the investment firm breach any of its above-listed duties. This statutory silence explains why Italian lower Courts have recognised different remedies in case of individual lawsuits<sup>72</sup>: reliance damages deriving from pre-contractual liability, expectation damages deriving from breach of the financial contract, invalidity of the financial contract absent the required written form or due to the violation of mandatory rules.

In order to avoid the practical uselessness of remedies taken from the general law of contract, and also in compliance with the guidelines suggested at the European level (see par. 1 above), two different remedies have recently been introduced by Law 2005/262 for the protection of savings/investments: a) the ‘guarantee indemnification fund’; and b) the no-fault indemnification fund.

#### a) Guarantee Indemnification Fund Within The Settlement Procedure and the Arbitration Chamber

This procedure was introduced by Art. 27 L. 2005/262, as implemented by D.lgs. 2007/179 (arts. 2-5) and subsequent regulations enacted by the Italian Financial Regulatory Authority’ (CONSOB)<sup>73</sup>. In case of breach of disclosure duties required by Art. 21 ‘T.U.F.’ on financial brokers, investors may ask for a settlement or an arbitration redress procedure held by CONSOB. Should the financial broker be found

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<sup>72</sup> See on this issue: A. Tucci, ‘La violazione delle regole di condotta degli intermediari fra “nullità virtuale”, culpa in contrahendo e inadempimento contrattuale’, *Banca, borsa, titoli di credito*, 5 (2007), 621; A. E. Fabiano, ‘La negoziazione di bond e le conseguenze della violazione degli obblighi di informazione dell’intermediario tra responsabilità per inadempimento e nullità del contratto’, *Banca, borsa, titoli di credito*, 3 (2007) 324; E. Lucchini Guastalla, ‘Violazione degli obblighi di condotta e responsabilità degli intermediari finanziari’, *Responsabilità civile e previdenza*, 4 (2008), 741. See also C. Amato, ‘Financial Contracts And ‘Junk Titles’ Purchases: A Matter of (In)Correct Information’, Cambridge University Press, 308 ff. The chaos of different civil remedies has been recently solved by the Italian Supreme Court (*Corte di Cassazione*) by applying different principles and rules. According to the highest Italian Court, disclosure duties belong to the so-called ‘rules of fair dealing’. Consequently, the proper remedies to be applied to breaches of those rules cannot be premised upon the validity/invalidity of the contract itself; rather, they must be based upon the content of the agreement, as it relates to the defendant’s behaviour. This leads to the conclusion that broker liability depends, as to its nature and discipline, on the content of the informational disclosure, as well the context regarding the very moment such was delivered to the investor. In sum, financial broker liability can be either pre-contractual, if it concerns conduct and a set of disclosure delivered *before* signing the purchase of specific titles; or, to the contrary, it may be contractual, if it concerns the financial providers’ conduct *in the course of the performance* of the purchase contract, resulting in a breach of contract. In both cases, the client-investor shall be awarded either reliance damages, in the former instance, or expectation damages, in the latter. See Cass. 29/09/2005, n. 19024, in *Danno e resp.*, 2006, p. 25, comment by V. Roppo, G. Afferni, ‘Dai contratti finanziari al contratto in genere: punti fermi della Cassazione sulla nullità virtuale e responsabilità precontrattuale’, *Danno e resp.*, 1 (2006), 30 ss.; Cass. Sez. Un., 19.12. 2007, nn. 26724 and 26725, *Danno e resp.*, 4 (2008), 525; Cass. 17/02/2009, n. 3773, *Danno e resp.*, 5 (2009) 503.

<sup>73</sup> See regulation n. 16763, 29 December 2008.

to be in breach of his/her duty, he/she will be compelled by the settlement or arbitration board to pay the economic loss suffered by the claimant. It is clearly an indemnity - that is set in compliance with CONSOB Regulations – as opposed to and different from full compensatory damages. The arbitration agreement inserted into financial contracts is binding only for brokers, not for investors, but – as we shall deal later - the settlement proceeding has now become mandatory. Standing is recognised for consumer associations pursuant to Art. 140 of the Consumer Code (see further, par. 2.2.).

This remedy is alternative to ordinary claims. Should the claimant be unsatisfied with the arbitration board's damage award, he/she may file claim in the ordinary courts that will – if the case so requires - award all damages suffered by investors in addition to the damages already recognised. This redress procedure still maintains the function of deterrence, and at the same time it provides a quick (although not cheaper) arbitration procedure.

#### b) No-fault Indemnification Fund

The second remedy originally introduced under the Budget Law of 23/12/2006, n. 266, and now implemented by L. 2007/179 (Arts. 8-9) consists of a *no-fault* indemnification fund, based on the absolute liability deriving from financial investment's brokerage activities (as regulated by Part II of the 'T.U.F.'). What is relevant for investors in order to obtain damages is that they provide evidence of the breach of brokers' duties and demonstrate the remoteness of the economic loss suffered by claimant. The indemnity is awarded only if a judicial decision or arbitration award has been delivered, and all sums investors already received from an ordinary judgment must be deducted. The fund is exclusively created by collecting half of the total amount deriving from criminal fines eventually paid by financial brokers, and it is managed by CONSOB. The latter has a right of recourse (taking action) against the defendant.

Subsequent to the recent financial scandals<sup>74</sup> in Italy, the goal of this remedy is to provide compensation to investors in cases of financial fraud. Notwithstanding CONSOB's right of recourse, the deterrent function of the remedy is thus almost completely ignored.

The main differences between the indemnification through settlement and/or arbitration procedure and the no-fault fund may be summarised thus:

- in case of a no-fault indemnity there must be a judicial or arbitration decision assessing any liability deriving from the breach of obligations stated in Part II of the 'T.U.F.'; and

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<sup>74</sup> Regarding Cirio, Argentine and Parmalat bonds scandals, see C. Amato, 'Financial Contracts And 'Junk Bonds' Purchases in the Italian Legal System: A Matter of (In)Correct Disclosure', footnotes 31-36, proceeding of Durham Conference 'Conceptualising Unconscionability in Europe', forthcoming (Cambridge University Press).

- the indemnity therefore awarded shall be imposed, deducting any sums already awarded the claimant, whether he/she applied for an ordinary judgment or for arbitration redress procedures leading to the indemnity guarantee.

### 3. Collective Redresses

#### a) *Collective Injunctions*

As regards access to justice, individual claims will certainly be dealt with by judges or arbitrators. However, this solution has two significant disadvantages: *i.* it is subject to uncertainty as regards the applicable remedies (nullity/avoidability of contracts, breach of contract, pre-contractual liability: see text par. 2 and footnote 72 hereabove); and *ii.* overly high costs must be borne by individuals, especially where the financial loss suffered is not significant.

In this perspective, collective injunctions, as well as class actions, do represent efficient alternative remedies to ordinary individual claims. As already stated in par. 1, collective injunctions are highly recommended by the European legislature. After numerous attempts, the recently issued Directive on injunctions (Dir. 2009/22) has drawn a line between individual claims and collective injunctions. First, there is a difference in the protected interests: collective interests ‘do not include the accumulation of interests of individuals who have been harmed by an infringement’ (see recital 3 Dir. 2009/22). To the contrary, they consist of a *different* interest damaged by unlawful practices carried out by professionals infringing Community law. Secondly, the Directive at stake allows claimants (that is, associations, excluding individual claimants) to seek an order for the following, *i.* requiring the cessation or prohibiting defendants from any infringement; *ii.* requiring measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement advertising the prohibitory/mandatory injunctions on national and/or local newspapers; and *iii.* that the losing defendant may payment to the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within the deadline specified by the courts or administrative authorities, such to be a set amount for each day’s delay or any other amount provided for under applicable national legislation, with a view to ensuring compliance with the decisions (see Art. 2 Dir 2009/22).

This provision (Art. 2 Dir. 2009/22) involves unlawful practices infringing Community law as outlined in the Directives listed in Annex I; such include the Directive on distance marketing of financial services, but any other violations of financial services legislation is not mentioned. Italian financial

legislation, to the contrary, grants standing to consumer associations representing collective consumer interests against *any* violations of investment services activities: Art. 32-*bis* 'T.U.F.'<sup>75</sup>, in fact, refers back to Arts. 139 and 140 of the Italian Consumer Code, and both provisions regulate collective injunctions issued as redress for damages. Moreover, according to Art. 7 D.lgs. 2007/179, consumer associations may utilise an extra-judicial mechanism connected to indemnity arbitration procedures. These inconsistencies between Italian (financial) legislation and European general provisions on consumer protection still create great confusion, and thus leads to ineffective investor protection.

#### b) *Class Actions for Damages*

After a difficult gestational period, class actions have finally been introduced into the Italian consumer protection system<sup>76</sup> pursuant to Art. 140-*bis* of the Consumer Code. The new procedure became effective on 1 January 2010, although it may only be enforced against infringements of consumer law enacted after 15 August 2009. As we will state hereafter, it is a remedy that is certainly inspired by American-style class actions, although it has been extensively adapted to Italian procedural systems, and is definitely unknown in the European framework.

As a preliminary matter, it should be highlighted that Art. 140-*bis* Consumer Code sufficiently defines the range of application of the collective redress procedure: the subjective range is restricted to 'consumers and users of public services', whilst the objective range of application is limited only to specific situations. In other terms, it is not a *general* procedural instrument. In particular, it had been argued whether investors might be included under the definition of 'consumer', and thus under the range of subjective application of class actions. While previous drafts of the law dealing with class actions did contain a clear reference to investors, in the present version of Art. 140-*bis*, all references to investors have been removed.

It is true that investors have separate regulatory options under the 'T.U.F.'. In the above-mentioned Art. 32-*bis* the 'T.U.F.' refers to 'collective injunctions' (orders), rather to 'class actions for damages'. By the same token, consumer credit statutory regulations are dealt with under Arts. 121 ss. of the T.U.B., thus remaining outside the coverage range of class actions under the Consumer Code. Although the literal meaning - as well as the overall framework of the statutory provisions - do not leave any further objection to the argument excluding investors from class actions, this argument is nonetheless still not convincing.

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<sup>75</sup> Provisions added by D.lgs. 2007/164 (implementing the MiFID Directive).

<sup>76</sup> The class action as described in the text was designed by Law 2009/99.

First, as the drafts of the law highlight, the recent financial scandals and the recent emergence of a new generation of organised financial trading systems do lead one to believe that investors and “savers” need to be protected through the same legal instruments available to *any* consumer.

Secondly, as often recalled in this paper, the discipline concerning the distance marketing of consumer financial services has recently been introduced into the Consumer Code. This means that financial services are implicitly included within the range of application of Art. 140-*bis* only if they are provided using distance selling methods. Clearly, it would be notably inconsistent to exclude from the purview of Art. 140-*bis* and from class actions financial contracts entered into through procedures other than through distance selling. In other words, the literal exclusion of investors from class action procedures is probably due to a rather clumsy introduction of a brand new procedural instrument whose range of coverage is not yet completely clear to the legislature itself, rather than resulting from a conscious choice made by the Italian legislature.

At any rate, Italian class actions – whether they will eventually be available to investors or not – do differ from those following the American model (as provided for under Rule 23 of the *Federal Rules of Civil Procedure*) at least in three major ways:

1. Italian class action suits may be brought not only by individuals, but also by associations (i.e. consumers’ associations);
2. the participation in a class action is only possible through an ‘opt in’ system, while in the USA the opposite ‘opt out’ system has been chosen; and
3. no punitive damages may be awarded.

Class actions for damages also differ from collective injunctions in three key ways:

1. class actions represent the collective redress of *individual* although homogeneous interests, while collective injunctions are meant as suits brought in order to protect *collective* interests;
2. consequently, class actions may not only be brought by individuals, but also by representative associations: an option not permitted in the case of collective injunctions, where standing is only given to associations; and
3. the remedies obtained through class actions aim to award damages, whilst injunctions aim at prohibiting – in different ways – infringements of the law.

## Final remarks

Protection of investors is far from being satisfactory: at a European, as well as national, level there are still non-standardised substantive and procedural rules governing the provision of financial services in the marketplace and investment firms' behaviour. Evidence of this statement of principle can be found in the narrow definition of consumer that does not fit into the definition of 'investor' or in the stratified legislation that – in both the European, as well as in the Italian legal systems - evidences inconsistencies and fragmented provisions.

As a consequence of the unsatisfactory statutory regulations, private remedies and access to justice lack clarity and are still excessively complex. They overlap and co-exist without offering practical and simplified solutions to investors. A weak party – provided that this definition is fully accepted – is also weak in seeking justice and redress. Too many remedies function too close together (leading to confusion and overlap) and/or too many redress suits are too similar in their procedural goals, thus potentially confusing investors, rather than protecting them.

A recent Italian Law (4 March 2010, n. 28) decided to require a compulsory settlement attempt before commencing individual or collective suits. In particular, the settlement proceeding provided for by Law 2007/179 (as implemented by Consob Regulation n. 16763, of 29 December 2008), with reference to financial contracts entered into among non-professional investors and brokers has now become mandatory<sup>77</sup>. This means that the indemnity guarantee (see par. 2.1.1.) can be more easily awarded through settlement proceedings managed by CONSOB and triggered by an individual, and not necessarily by a consumer association. Moreover, according to the abovementioned recent Law 2010/28 (Art. 12) the settlement agreement has immediate executory effects *vis-à-vis* defendants. This procedure may finally render overall consumer protection more effective, provided the following occur:

- Public remedies are seriously enforced. Although the Italian 'T.U.F.' (as well as the European MiFID Directive) contain special provisions addressing criminal sanctions and fines, national implementation of these provisions is still poor and does not achieve the goal of deterrence.
- Investors' protection is reviewed at the European level, first by including this definition in consumer protection legislation; and secondly by simplifying remedies and access to justice through the establishment of a hierarchy of remedies. The first remedy should consist of mandatory settlement attempt, leading to an indemnity guarantee and excluding other ordinary

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<sup>77</sup>See P. Stella, *L'enforcement nei mercati finanziari* (Giuffrè, Milan, 2008), p. 449 ff., where the A. regrets that important provisions like those provided for in the Law 2007/179 are not sufficiently supported by the overall enforcement system. And in fact, the importance of the enforcement of rules is the object of the abovementioned book, facing in a comparative and satisfactory manner the issue of enforcing investors' protective rules.

suits<sup>78</sup>. Should settlement not be reached, an ordinary lawsuit may then be brought, either via individual actions or through class actions for damages, leading eventually to the awarding of economic damages. Access to indemnity funds should be permitted for individuals or for investor associations only in cases of defendant insolvency.

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<sup>78</sup> Although warning is given by S. Mulreed, in 'Private Securities Litigation Reform Failure: How Scierter Has Prevented The Private Securities Litigation Reform Act of 1995 from Achieving Its Goals', *San Diego L. Rev.*, 42 (2005) 779, 791-792. The Author argues that poor financial regulation may trigger 'strike suits', that is, opportunistic plaintiffs' behavior bringing frivolous lawsuits which place a corporation in a situation where it would rather prefer excessive settlements than proceeding with the full litigation process (trial, etc.).