CONSUMER CREDIT, DEBT AND INVESTMENT IN EUROPE

Edited by
JAMES DEVENNEY
and
MEL KENNY

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780107013025

First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing-in-Publication Data
Consumer Protection in Europe: Theory and Practice (Conference) (2008: Leeds, England)
Consumer credit, debt and investment in Europe / edited by James Devenney
and Mel Kenny.
pages cm
Includes bibliographical references.
ISBN 978-1-107-01302-5
1. Consumer protection–Law and legislation–European Union countries–Congresses.
2. Consumer credit–Law and legislation–European Union countries–Congresses.
3. Investments–Law and legislation–European Union countries–Congresses.
I. Devenney, James, editor of compilation. II. Kenny, Mel, editor
of compilation. III. Title.
KJE6377.A8C66 2008
346.2407'5–dc23
2011046213

ISBN 978-1-107-01302-5 Hardback

CONTENTS

Foreword vii
GERAINT HOWELLS

Introduction 1
MEL KENNY AND JAMES DEVENNEY

1 Vulnerability and access to low cost credit 4
ORKUN AKSELI

2 Information disclosure in the EU Consumer Credit Directive: opportunities and limitations 21
CATHERINE I. GARCIA PORRAS AND WILLEM H. VAN BOOM

3 European regulation of consumer credit: enhancing consumer confidence and protection from a UK perspective? 56
SARAH BROWN

4 The development of responsible lending in the UK consumer credit regime 84
KAREN FAIRWEATHER

5 The French Consumer Credit Act (2010): a missed opportunity 111
MARINE FRIANT-PERROT

6 The legal framework for consumer credit in Romania: facts and prospects 127
RODICA DIANA APAN

7 The legal regulation of pawnbroking in England, a brief history 142
WARREN SWAIN AND KAREN FAIRWEATHER

8 Mortgage finance: who's responsible? 160
SARAH NIELD

9 Fairness and efficiency in the law of guarantees 182
GERARD MCCORMACK

10 A comparative analysis of bank charges in Europe: *OFT* v. *Abbey National plc* through the looking glass 211
MEL KENNY AND JAMES DEVENNEY

11 Designing a framework for protecting bank depositors 234
ANDREW CAMPBELL

12 The legal matrix for retail investment services in the EU: where is an individual investor? 253
OLHA O. CHEREDNYCHENKO

13 Financial investors as consumers: recent Italian legislation from a European perspective 279
CRISTINA AMATO AND CHIARA PERFUMI

14 Conclusions: consumer credit, debt and investment in Europe 306
MEL KENNY AND JAMES DEVENNEY

Index 316

13

Financial investors as consumers: recent Italian legislation from a European perspective

CRISTINA AMATO AND CHIARA PERFUMI

Introduction: the peculiarity of Italian financial markets

Since the turn of the century, the Italian financial market has been gradually and profoundly transformed. After the scandals of Cirio, Parmalat[1] and the Argentinean Bonds, the market-oriented system has become exposed to a dangerous instability.[2]

The major objective of the domestic regulation of financial markets has rested upon ensuring the 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.[3] The distinction between 'saver/investor' and 'consumer', subscribed to in Community policies, has been taken into consideration by national financial market regulators.

Associate Professor of Comparative Law, Brescia University, and Research Assistant, Brescia University, respectively

[1] On this issue see: G. Ferrarini and 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* (Padua: CEDAM, 2006), vol. 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 http://ssrn.com/abstract=730403 or doi:10.2139/ssrn.730403.

[2] 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.

[3] 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.

The implementation of EC Directives on consumer credit and distance contracts for financial services on the one side and the compelling need to protect investors against abuses perpetrated by financial intermediaries on the other have recently led to the introduction of different remedies aimed at providing them with access to justice.

The scope of the chapter is first to discuss in detail the definition of 'investors' as consumers in the EU as well as in the Italian legislation. Part I will therefore provide the reader with sufficient constructive elements in order to understand the present inconsistencies of definitions that now 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 chapter questions the effectiveness of excessive private remedies if they are not buttressed with a consistent and rational framework.

Part I The financial consumer and the applicable provisions in Italy

European perspectives on 'customer protection' and financial markets

EU 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.[4] 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'.[5]

[4] 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* (Baden-Baden: Nomos, 2007), 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*, 1 (2005), 19.

[5] J. Long, 'Navigating the Maze: Reviewing the Information Disclosure Requirements in the Financial Services Acquis', *European Business Law Review*, 19 (2008), 493.

The sectors involved in this evolution are normally limited to three main classifications:[6] 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, insurance, investment and savings plans. Therefore, the way forward to protect savers and purchasers of financial products is to move towards the implementation of the transparency principle[7] and ensuring personal autonomy.

Protection of the consumer/saver/insured party means, at the same time, enabling a correct functioning of the market, as it avoids the dispersion of capital, profiting the community as a whole and an adequate level of social justice. The contract must thus 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.[8]

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.[9]

[6] C. Iurilli, 'Short selling, intermediazione finanziaria, asimmetrie informative ed esperienza dell'investitore', *La Responsabilità Civile*, 10 (2006), 795.

[7] G. Chinè, 'La tutela del risparmiatore nel diritto vivente', *Il Corriere del Merito*, 8–9 (2005), 873.

[8] 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.

[9] A. Colombi Ciacchi, 'The Constitutionalisation of European Contract Law', *European Review of Contract Law*, 2 (2006), 180. See the European perspective in C. Mak. *Fundamental Rights in European Contract Law* (The Hague: 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*

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

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

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.[11]

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 is the investor considered to be a consumer, thus enjoying a higher level of protection. Most financial instruments are purchased by customers using professional intermediatries.

The Directive on the distance marketing of consumer financial services[12] refers to consumers,[13] but it leaves to the Member States the possibility of extending the scope of the directive to non-profit organisations and people making use of financial services in order to become entrepreneurs, as such could find themselves unprepared to judge such investments properly, similar to an ordinary consumer.[14] However, the

of the Weaker Party (Munich: Sellier, 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. 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* (Baden-Baden: Nomos, 2007), 395.

[10] C. Iurilli, 'Short selling', 795. [11] *Ibid.*

[12] 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.

[13] Directive 2002/65, Art. 2(d): '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'.

[14] 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.'

strict interpretation given by the ECJ[15] seems to bar any extensions of the concept of consumer even if national laws would allow this.[16] Nevertheless, in an effort to supersede the narrow subjective range of application of consumer law,[17] some scholars try to set aside all different contractual relationships affected by asymmetries between the supplier and the recipient, in the light of a more general policy of 'customer protection'.[18]

[14] 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*, 46 (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', *European Business Law Review*, 20 (2009), 429.

[15] *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*, 20 (2009), 442.

[16] 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*, 20 (2009), 420.

[17] V. Roppo, 'From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?', in *European Review of Contract Law* 5 (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*, 44 (2007), 1237.

The Markets in Financial Instruments Directive[19] (hereinafter 'MiFID') seems to follow this trend. It is directed at protecting retail clients that are not necessarily consumers. Similarly, the Rome I Regulation[20] concerns situations where there are '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' (Recital 23).[21]

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.[22] Besides, since the DCFR does not contain a specific chapter relating to contracts involving the supply of financial services,[23] the inclusion of the pre-existing PEL FSC in the DCFR, as

[19] 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. The MiFID is currently under review.

[20] 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).

[21] 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 about 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.

[22] See M. Hesselink, 'The Consumer Rights Directive and the CFR: Two Worlds Apart?', *European Review of Contract Law*, 5 (2009), 299.

[23] As concerns 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 to consumers, there is a sharp contrast between the way consumers and small businesses are treated. See M. Hesselink, 'Common Frame of Reference and Social Justice', *European Review of Contract Law*, 5 (2008), 264.

In any case, from the reactions to the Green Paper it resulted 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 have been included and this should have comprised also the Financial Services Directive: see DG Health and Consumer Protection, 'Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis', 34. Available at ec.europa.eu/consumers/rights/detailed_analysis_en.pdf.

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'.[24]

Instead, the EU institutions, through the Directive on Consumer Rights, seem to be proceeding in the opposite direction;[25] a direction 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 subjects (Art. 3).[26]

In any event, according to Art. 3 of the Directive, contracts for financial services are exempted, with the exception of certain off-premises contracts.

Protection of financial investors as 'consumers' in the Italian legal system: the state of the art

The 'investor' in the Italian financial market

The client of a banking/financial institution faces a veritable 'legislative forest' of provisions. Therefore the actual notion of 'investor' must be defined according to Italian law in order to verify the applicable law.

In the same sense, several businesses would have preferred the horizontal instrument as a common denominator to all the Consumer *Acquis*, including a limited scope to only a few items (like, for example, the notion of consumer) they suggested anyway that it must have included 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', 44.

[24] O. Cherednychenko and E. C. Jansen, 'Principles of European Law on Financial Service Contracts?', *European Review of Private Law*, 16 (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.'

[25] Directive on Consumer Rights 2011/83/EU of 25 October 2011.

[26] See Hesselink, 'The Consumer Rights Directive', 295.

Traditionally, the investor's contractual position is governed both by general consumer law and by special legislation provided by the *Testo Unico Bancario* (Consolidated Act on Banking, TUB) and by the *Testo Unico della Finanza*[27] (Consolidated Act on Finance, TUF), 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)[28] aimed at their implementation.

The TUB is exclusively devoted to the banking sector. Part of this legislation is addressed to all bank clients according to a 'neutral' notion including professional as well as corporate bodies having a contractual relationship with the bank. Meanwhile, rules on consumer credit concern only 'consumers' pursuant to the definition provided by the Consumer Code,[29] as we shall see below.

The TUF aims to protect a general category of 'investors' investing through financial intermediaries[30] providing protection against the excessive risks of unreliable financial investments, that are investment transactions in which the determination of duties of care and fairness are especially important. The TUF also has the purpose of contributing to the efficient functioning of financial markets.[31]

[27] Legislative Decree no. 58 of 24 February 1998, Consolidated Law on Financial Intermediation, implemented by CONSOB Regulation no. 11971 of 14 May 1999.

[28] 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 risparmio. Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padua: CEDAM, 2006), vol. XLIII, 15.

[29] See Art. 121–6. Art. 121 of the TUB 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*, 2nd edn (Turin: Giappichelli, 2007), 66; R. Lener, *Forma contrattuale e tutela del contraente 'non qualificato' nel mercato finanziario* (Milan: Giuffré, 1996), 53–5.

[30] Art. 5.1b. See V. Roppo, 'Sui contratti del mercato finanziario, prima e dopo la MiFID', *Rivista di Diritto Privato*, 3 (2008), 485.

[31] 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).

The implementation of these Acts is provided for through secondary legislation enacted by the Banca d'Italia and the Commissione Nazionale per le Società e la Borsa[32] (CONSOB). Both authorities have equivalent supervisory powers 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 23 October 2005) grants the consumer special protection in consumer credit contracts[33] and financial services,[34] where the consumer is defined as a 'natural person who is acting for purposes which can be regarded as outside his trade or profession'.[35]

The implementation of the definition of the 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.[36] Consumer legislation actually exists only in the areas where EU law imposes such protective rules (i.e. consumer credit and distance marketing of consumer financial services); where, however, EU law does not intervene, different criteria have been used (i.e. estate intermediation, securities public offers, banking transparency).

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 (Rome), 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 nulità, 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.

[32] The Commissione Nazionale per le Società e la Borsa (CONSOB) is the public authority responsible for regulating the Italian securities market.

[33] Arts. 40–3.

[34] 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 (Art. 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*ter*1.d) of this protective legislation is thus the 'consumer', defined in Art. 3 a.

[35] Art. 3a.

[36] R. Lener, *Forma contrattuale e tutela del contraente 'non qualificato'*, 49.

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 their professional activity.

Thus, in this regard, an important role is played by self-regulation through the enactment of codes of conduct,[37] by alternative dispute resolution procedures and, quite often, by certain initiatives undertaken at the professional industry-wide level, in agreement with user/client associations.

Recent regulations issued by banking authorities

In this context, on 18 March 2009, the Banca d'Italia published a consultation document on proposals for a new regulation on transparency in banking and financial services, proposals now contained in the Provisions for Transparency of operations on banking and financial services of 29 July 2009.[38]

This new regulation aims to establish a 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, objectives thereby attempting to mitigate the risks to which the market is normally exposed.

In order to fulfil these objectives and underscore the issues at stake, the 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, taking into consideration the varying intensity of the degree of protection, as follows:

'the consumer': 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 5 million Euros and fewer than ten employees;[39]

'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.

[37] G. Carriero, 'Codici deontologici e tutela del risparmiatore', *Il Foro Italiano*, 10 (2005), 196.

[38] On the meaning of 'transparency' in banking, see Alpa and Gaggero, 'Trasparenza bancaria e contratti del consumatore', 73ff.

[39] This category was created previously by CONSOB Regulation n. 16190 of 29 October 2007, intended as 'non-professional clients'.

Some provisions apply exclusively to contracts entered into with consumers or 'retail clients'. The status of 'consumer' or 'retail client' must be verified by intermediaries before the conclusion of the contract. The provisions can subsequently change the characterisation of such status in the contract, once signed, only if the parties request such a change and so long as applicable conditions have been duly met.[40]

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.

Moreover, previous regulatory measures implemented in 2003 did not refer to a 'weaker party', as had been done in the Instructions on Banking Supervision;[41] and the 'consumer' was referred to 'as natural person who is acting for purposes which can be regarded as outside his trade or profession' only in a few cases.

That was the case, for example, in rules mentioning the duty to advise the consumer on his/her rights introduced under the Consumer Credit Directive[42] and of the duty imposed on the bank to deliver a 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.[43]

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 protection requires 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'.

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

[40] See the final version of 29 July 2009, 3.
[41] See G. Carriero, 'Trasparenza delle condizioni contrattuali', *Diritto delle Banche e dei Mercati Finanziari* (2003), 4.
[42] Penultimate alinea, para. 2, Sezione II.
[43] P. Carrière and M. Bascelli, 'Trasparenza delle operazioni e dei servizi finanziari: le nuove regole della banca d'Italia', *Contratti*, 6 (2009), 611.

required concerning offers executed through distant means of communications. In this regard, the Authority makes a clear distinction between cases in which intermediaries deal with consumers and those in which they deal with professionals. Finally, a new Section VII on consumer credit has been introduced to implement Directive 2008/48/EC.

Special consumer protection legislation

The 'client-consumer' purchasing under the terms of a consumer credit contract is protected by special legislation currently located in the Consumer Code (Arts. 40–3) and the TUB (Title VI, Section II), all of which makes the identification of the consumer quite confusing.[44]

Art. 121 of the TUB repeats in the first paragraph the definition of consumer as a 'natural person who is acting for purposes which can be regarded as outside his trade or profession'.[45] At the same time, there is an enumeration of those cases excluded from the range of application of the TUB.

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 30th day of its publication in the *Gazzetta Ufficiale*' (Italian Official Journal).

Consequently, if the person receiving 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 lesser or greater value, the contract may no longer be regulated by consumer rules.

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 academic experts have increasingly proposed the extension of consumer protection to legal persons, in particular to corporate entities, paying particular attention

[44] 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*, 47.

[45] Thus, the TUB contains general rules protecting the 'client', and, some specific provisions on the 'consumer' applicable on the basis of the consumer's definition. The lack of coherence in the same text is therefore frustrating: Lener, *Forma contrattuale e tutela del contraente 'non qualificato'*, 52.

to those having a not-for-profit purpose,[46] such as associations, committees and consortia.[47] Such an extension would allow the provision of a more coherent definition of the 'weaker' contractual party.[48]

Nevertheless, this interpretation has been rejected both by the Constitutional Court[49] and by the Supreme Court, the Corte di Cassazione,[50] both of which have argued the need for coherence towards EU policy.

[45] G. 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.

[46] G. 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 direttiva comunitarie?)', *Contratto e Impresa/Europa* (1997), 436; Carriero, 'Autonomia privata e disciplina del mercato', 67. R. Lener, *Forma contrattuale e tutela del contraente 'non qualificato'*, 49.

[47] 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* (Milan: Giuffré, 2003), 20.

[48] C.cost. (ord.) 30 June 1999, n. 282, *Foro Italiano* (1999), I, 3118, case 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?'

[49] Cass. 14 April 2000, n. 4843, *Foro Italiano* (2000), I, 3196; Cass. 25 July 2001, n. 10127, *Giurisprudenza italiana* (2002), 543, case comment by Fiorio, 'Professionista e consumatore, un discrimine formalista?', *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.

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 payment conditions: the ambiguous definition is apparently directed to persons that 'act for extraneous purposes', thus allowing for different interpretations of the disposition.[51]

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.

In a different way, Directive 2002/65/EC on the distance marketing of consumer financial services has been directly reflected in a new section of the Consumer Code (Art. 67*bis* to 67 *vicies bis*).[52] Moreover, the insertion of these rules in the Consumer Code has been quite controversial and has been criticised along the same lines as the consumer credit legislation, which actually remained in the TUB.[53]

Hence, the importance of this statutory provision depends not on the specific protection rules (restating the same regulatory terms introduced in 2005), but rather on the systematic effects on the coordination between rules,[54] 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 Art. 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

[51] 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. (Turin: UTET, 2006), 13.

[52] 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.

[53] 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.

[54] F. Bravo, 'Commercializzazione a distanza di servizi finanziari ai consumatori', *Contratti*, 4 (2008), 373.

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.[55]

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.[56] Class actions have thus been allowed under Art. 32-*bis* of the TUF, applying Arts. 139 and 140 of the Consumer Code to consumer associations.[57]

Finally, recent legislative and regulatory provisions[58] 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 of individuals defined as 'non-professional' savers/investors.[59]

[55] *Ibid.* [56] It was successively confirmed by a Parliamentary Act, Law n. 126/2008.
[57] M.C. Paglietti and V. Zeno-Zencovich, 'Verso un "diritto processuale dei consumatori"?', *La Nuova Giurisprudenza Civile Commentata*, 6 (2009), 251.
[58] L. n. 266, 23 December 2005, Art. 343–5.
[59] L. n. 262, 28 December 2005, *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.

Part II The law in action: providing investors with adequate protection

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 in the European context, the most debated issues mainly concern investment firm conduct and related liabilities, on one hand, and, on the other, the controversial related issues of remedies and access to justice.

Recent legislation has addressed both issues in the effort to regulate the financial market. Part II of this chapter therefore tackles the complex statutory provisions dealing with the protection of investors, highlighting the main contents and goals achieved by the EU and Italian legislative frameworks. In dealing with this subject a warning is necessary: there are several, scattered provisions in the European and Italian legal systems that do not form a coherent statutory framework able to offer efficient and simple consumer protection on the securities market.

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 of EU law 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 prominent scholars. In particular, as regards the commercial area, new EU legislation has dealt with consumer credit contracts, banking, sale of goods, moveable and immoveable property, and distance selling. Similarly, as regards financial investments activities, there have been several incursions by the European legislator with pivotal principles and rules being provided in Directive 2004/39/EC (MiFID), as completed by Directive 2006/73/EC.[60] Another important piece of legislation is

[60] 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.

Directive 2004/109/EC concerning the harmonisation 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 Directive 2003/71/EC regarding the type of prospectus to be published when securities are offered to the public or admitted to market trading and by Directive 2002/65/EC on distance marketing of consumer financial services.

As this chapter addresses investor protection, investment products and investment firm conduct will be dealt with, whilst commercial issues will be excluded from our survey.[61] In the area of investor protection the general principles adopted at EU level may be summarised in a first set of guidelines: fair dealing and transparency (Art. 14 MiFID[62]), disclosure (Art. 19 MiFID,[63] Directive 2004/109/EC,[64] Directive 2003/71/EC;[65] Directive 2002/65/EC on distance marketing of consumer financial

[61] A complete review of the commercial area legislation is provided by V. Buonocore, 'Problemi di diritto commerciale europeo', *Giurisprudenza Commerciale*, 1 (2008), 3 ff., notes 31–7.

[62] 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.'

[63] *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.'

[64] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation 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.

[65] 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 Directive 2008/11.

services[66]), adequacy (Art. 13 MiFID[67]) and appropriateness (Directive 2003/71/EC, Art. 7, para. 2 at (b))[68]). All the above-mentioned principles have been implemented in the Italian system by way of the TUB (Title VI in particular) and the TUF (Part II in particular: see para. 2).

A second set of guidelines stemming from EU legislation consists both of the preference for collective redress procedures over individual claims, and of the adoption of extra-judicial instruments of dispute resolution. As regards collective redress procedures, Art. 52, para. 2,[69] MiFID (introduced into Part II, Title II, capo IV-*bis* TUF) 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 shall be applied. As in the Unfair Contract Terms Directive 93/13/EC 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 initiate legal action. This may be true because often the action would involve small claims, or because investors are not sufficiently aware either of their rights or of the available redress procedures. On the contrary, independent public

[66] 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 Directive 2007/64.

[67] *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.'

[68] *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.'

[69] *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.'

entities (as in the case of England and Wales), or consumers associations (as in the case of Italy) are meant to represent investors' collective interests as a 'class'. Special attention to consumers' collective interests has been provided by European legislators through Directive 98/27/EC, now superseded by Directive 2009/22/EC, where the importance of protecting collective interests is underscored. Whereas 'collective interests mean interests which do not include the accumulation of interests of individuals who have been harmed by an infringement' (Recital 3, Directive 2009/22). This Directive applies to consumers' collective interests included in previous Directives listed in Annex I. Among them Directive 2002/65/EC concerning distance marketing of consumer financial services, implying that: (i) investors are included in the consumer classifcation; and (ii) collective redress should be encouraged and/or improved under national legislation. As we shall see, a new form of collective redress remedy has recently been introduced into the Italian system in the form of a 'class action'.

As regards out-of-court settlements, Art. 53 Directive 2004/39/EC (MiFID) 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, out of court mechanisms have been successfully introduced into the Italian legal system.

Extra-judicial remedies for investor complaints and access to justice: an Italian perspective

The main impact on the Italian system of the above-mentioned EU law on 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 (Art. 5 TUF, according to which 'to improve the fiduciary relationship between investors and institutions' is one of the main goals).

In particular, the general principles introduced by EU law have been spread out into the TUB and the TUF, 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 TUF, which expressly requires fair dealing of investments firms (letter (a)), and which adopts the 'know your customer rule' (letter (b)), while letter

(d) 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' (Arts. 39 and 40 of Regulation 16190/07).[70] As for the liability arising from investment firm breaches of the adequacy/suitability rule, most Italian investment contracts transfer this risk to the 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 Directive 1993/13/EEC, neither the TUF nor the regulatory instruments enacted by CONSOB have clearly stated the remedies available to investors should the investment firm breach any of its specified duties. This statutory silence explains why Italian lower courts have recognised different remedies in the case of individual lawsuits:[71] reliance damages deriving from pre-contractual liability;

[70] On the 'suitability rule' and 'know your customer rule', see R. Bruno, 'L'esperienza dell'investitore e l'informazione "adeguata" e "necessaria"', *Giurisprudenza Commerciale.*, 2 (2008), 389; M. Guernelli, 'L'intermediazione finanziaria tra tutela del mercato, legislazione consumeristica e orientamenti giurisprudenziali', *Giurisprudenza Commerciale.*, 2 (2009), 360.

[71] 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', in M. Kenny, J. Devenney and L. Fox-O'Mahony (eds.), *Unconscionability in European Private Financial Transactions* (Cambridge: Cambridge University Press), 308ff. 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 as the context regarding the very moment such was delivered to the investor. In sum, either financial broker liability can be pre-contractual, if it concerns conduct and a set of disclosures delivered *before* signing the purchase of specific titles; or, to the contrary, it may be

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 ensure the utility of remedies taken from the general law of contract, and also in compliance with the guidelines suggested at the EU level, two different remedies have recently been introduced by Law 2005/262 for the protection of savings/investments: (*i*) the 'guarantee indemnification fund' and (*ii*) the no-fault indemnification fund.

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).[72] In the case of breach of disclosure duties required by Art. 21 TUF on financial brokers, investors may ask for a settlement or an arbitration redress procedure held by CONSOB. Should the financial broker be found 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, set in compliance with CONSOB Regulations, as opposed to full compensatory damages. The arbitration agreement inserted into financial contracts is binding only for brokers, not for investors, but, as we shall see, settlement proceedings have now become mandatory. Standing is recognised for consumer associations pursuant to Art. 140 of the Consumer Code.

This remedy is alternative to ordinary claims. Should the claimant be unsatisfied with the arbitration board's damage award, he/she may file a claim in the ordinary courts that will, if the case so requires, award 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, albeit inefficient, arbitration procedure.

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 will be awarded either reliance damages, in the former instance, or expectation damages, in the latter. See Cass. 29 September 2005, n. 19024, *Danno e Resp.*, 1 (2006), 25, comment by V. Roppo and 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 ff.; Cass. Sez. Un., 19 December 2007, nn. 26724 and 26725, *Danno e Resp.*, 4 (2008), 525; Cass. 17 February 2009, n. 3773, *Danno e Resp.*, 5 (2009), 503.

[72] See regulation n. 16763, 29 December 2008.

No-fault indemnification fund

The second remedy originally introduced under the Budget Law of 23 December 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 TUF). 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 the claimant. The indemnity is awarded only if a judicial decision or arbitration award has been delivered, and all sums investors have already received must be deducted. The fund is 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 against the defendant.

Subsequent to the recent financial scandals[73] 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 lost.

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

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

Collective injunctions

As regards access to justice, individual claims will be dealt with by judges or arbitrators. However, this solution has two significant disadvantages: (*i*) it is subject to uncertainty as regards the applicable

[73] Regarding Cirio, Argentine and Parmalat bonds scandals, see C. Amato, 'Financial Contracts and "Junk Bonds" Purchases', footnotes 31–6, and proceedings of Durham Conference 'Conceptualising Unconscionability in Europe', forthcoming (Cambridge University Press).

remedies (nullity/avoidability of contracts, breach of contract, pre-contractual liability);[74] and (*ii*) excessive 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, represent efficient alternative remedies to ordinary individual claims. As previously stated, collective injunctions have been heavily promoted by the EU. After numerous attempts, the recent Injunctions Directive 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' (Recital 3, Directive 2009/22). On the contrary, they consist of a *different* interest damaged by unlawful practices carried out by professionals infringing EU law. Secondly, the Directive allows claimants, that is associations rather than 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 defendant make 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 (Art. 2, Directive 2009/22).

This provision (Art. 2, Directive 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 no other violations of financial services legislation are 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* TUF[75] 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

[74] *Ibid.* n. 72.
[75] Provisions added by D.lgs. 2007/164 (implementing the MiFID Directive).

associations may utilise an out of court mechanism connected to indemnity arbitration procedures. These inconsistencies between Italian financial legislation and the general provisions of EU law on consumer protection create great confusion and serve to render investor protection ineffective.

Class actions for damages

After a difficult genesis, class actions have finally been introduced into the Italian consumer protection system[76] pursuant to Article 140-*bis* of the Consumer Code. The new procedure became law on 1 January 2010. It is a remedy inspired by American-style class actions, although it has been extensively adapted to the Italian procedural system, and is novel in the broader European framework.

As a preliminary matter, it should be highlighted that Article 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 to specific situations. In other words, it is not a *general* procedural instrument. In particular, it has been disputed whether investors might be included under the definition of 'consumer' and thus within the subjective range of 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 Article 140-*bis*, all references to investors have been removed.

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

First, as the drafts of the law highlight, the recent financial scandals and the 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.

[76] The class action as described in the text was designed by Law 2009/99.

Secondly, as often recalled in this chapter, greater discipline in the distance marketing of consumer financial services has recently been introduced in the Consumer Code. This means that financial services are implicitly included within the range of application of Article 140-*bis* only if they are provided using distance selling methods. Clearly, it would be quite inconsistent to exclude from the purview of Article 140-*bis* and from class actions financial contracts entered into through procedures other than 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 ambit is not yet clear to the legislature itself.

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

1 Italian class actions may be brought not only by individuals, but also by associations (i.e. consumer associations);
2 the participation in a class action is only possible through an 'opt in' system, while in the USA an 'opt out' system operates; 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 to protect *collective* interests;
2 consequently, class actions may be brought not only 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

The protection of investors is far from satisfactory: at an EU as well as a national level, divergent substantive and procedural rules still govern the provision of financial services and investment firms' behaviour. Evidence

of this statement of principle can be found in the narrow definition of the consumer that does not fit with the definition of the 'investor' or in the stratified legislation that, in both the EU and the Italian legal systems, evidences inconsistencies and fragmented provisions.

As a consequence of the unsatisfactory statutory regulations, private remedies and access to justice 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 terms of access to justice and redress. Too many remedies function too closely together 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. This means that the indemnity guarantee can be more easily awarded through the CONSOB settlement proceedings, triggered by an individual, and not necessarily by a consumer association. Moreover, according to the 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 TUF (as well as the MiFID Directive) contains special provisions addressing criminal sanctions and fines, national implementation of these provisions is still poor and fails to act as a deterrent.
- Investors' protection is reviewed at EU 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 the mandatory settlement attempt, leading to an indemnity guarantee and excluding other ordinary suits.[77] Should settlement not be reached,

[77] Although warning is given by S. Mulreed, in 'Private Securities Litigation Reform Failure: How Scienter Has Prevented the Private Securities Litigation Reform Act of 1995 from Achieving Its Goals', *San Diego Law Review*, 42 (2005), 779, 791–2. The author argues

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.

that poor financial regulation may trigger 'strike suits', that is, opportunistic plaintiffs' behaviour bringing friviolous lawsuits which place a corporation in a situation where it would prefer excessive settlements rather than proceeding with the full litigation process (trial, etc.).