

## The International Review of Financial Consumers

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### Financial Consumers and Applicable Provisions a European and Italian Perspective

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#### A B S T R A C T

In Europe, general legislation requires protection of the economic interests of consumers. This includes, for instance, the consumer protection from financial services, misleading advertising and unfair contract terms. However, only after the global financial crisis, the European Union (EU) has become aware of the lack of transparency, poor handling of conflicts of interest, over-indebtedness, and low awareness of risks of the consumers in dealing with financial services. This paper aims to investigate the financial knowledge and overconfidence in Europe, and to provide an overview of consumer protection policy in EU. Here, it will be analyzed the EU regulatory framework, whose aim is to ensure the stability of the financial markets and to establish specific and common rules for banks and investments companies among the Member States. Furthermore, it deals with protections of financial consumers in the Italian legislation and within a European context. It concludes providing the Italian financial system as best example of crisis management and resolution, by providing out-of-court settlements, collective redress and crisis management procedures, with the aims to establish a systemic stability and financial consumers' confidence in the bank system.

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*Keywords: Financial consumer; financial consumer protection; literacy, ADR; out-of-court settlement; access to justice; compulsory mediation; class actions*

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## I . Introduction

### A. The Importance of a Financial Literacy : A General Overview

Economic and technological developments have brought greater global connectedness and the massive changes in communications and financial transactions, as well as in social interactions and consumer behavior. Such changes have made it more important that individuals be able to interact with financial providers. In particular, consumers often need access to financial services in order to make and receive electronic payments like income,

remittances and online transactions, as well as to conduct face-to-face transactions in societies where cash and checks are no longer favored. All of these trends have transferred the responsibility of major financial decisions to individuals, who are expected to be sufficiently financially literate to take the necessary steps to protect themselves and ensure their financial well-being. In point of fact, however, this scenario is very different.

The recent collapse of the financial markets has highlighted consumers lack of financial knowledge that can go unnoticed for long periods of time before exploding on the surface. Accordingly, after the credit crunch, many countries have adopted measures to prevent similar crises in the future. Financial institutions, avoiding the risk of disputes with consumers and loss of reputation, have therefore started to provide detailed financial information

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**Table 1.** Level of Financial Skills

| Rank | Paese<br>2011    | Rank | Paese<br>2011        |
|------|------------------|------|----------------------|
| 1    | Denmark 8,31     | 31   | Spain 6,70           |
| 2    | USA 8,08         | 32   | Argentina 6,67       |
| 3    | Ireland 8,08     | 33   | Thailand 6,47        |
| 4    | Australia 8,00   | 34   | Japan 6,38           |
| 4    | Switzerland 8,00 | 35   | Greece 6,29          |
| 6    | Sweden 7,91      | 36   | Qatar 6,27           |
| 7    | Canada 7,86      | 37   | Slovak Republic 6,25 |
| 8    | Israel 7,83      | 38   | Hungary 6,21         |
| 9    | Finland 7,79     | 39   | Czech Republic 6,16  |
| 10   | Hong Kong        | 40   | Poland 6,04          |
| 10   | India 7,60       | 41   | UAE 6,00             |
| 12   | Netherlands 7,57 | 42   | Indonesia 5,86       |
| 13   | Norway 7,52      | 43   | Mexico 5,82          |
| 14   | Germany 7,50     | 44   | Italy 5,81           |
| 15   | Iceland 7,40     | 45   | Portugal 5,76        |
| 16   | Chile 7,33       | 46   | Korea 5,65           |
| 17   | Turkey 7,31      | 47   | Slovenia 5,52        |
| 18   | United Kingdom   | 48   | Jordan 5,50          |
| 19   | Belgium 7,24     | 49   | Ukraine 5,49         |
| 20   | Austria 7,18     | 50   | China Mainland 5,48  |
| 21   | Philippines 7,12 | 51   | Peru 5,41            |
| 22   | Taiwan 7,11      | 52   | Venezuela 5,37       |
| 23   | Malaysia 7,06    | 53   | Brazil 5,35          |
| 24   | New Zealand 7,04 | 54   | South Africa 5,01    |
| 25   | Singapore 6,94   | 55   | Lithuania 4,83       |
| 26   | Colombia 6,84    | 56   | Croatia 4,49         |
| 27   | Russia 6,75      | 57   | Estonia 4,42         |
| 28   | Luxembourg 6,72  | 58   | Romania 4,30         |
| 29   | Kazakhstan 6,72  | 59   | Bulgaria 3,73        |
| 30   | France 6,71      |      |                      |

Source: IMD World Competitiveness Yearbook

to financial consumers about the characteristics and costs of services, ensuring the transparency and correctness of contractual conditions as well as their rights and obligations in the financial transactions<sup>1</sup>. Financial education has therefore become a strong need, through which financial consumers make aware choices and decisions on their investments. Nevertheless, international analysis

<sup>1</sup> For the scope of this paper financial transactions mean banking and financial products.

shows a situation worrying in the baseline financial knowledge levels. A growing body of evidence suggests that many consumers still lack the knowledge they need to evaluate and make decisions about financial transactions and informed decisions.

A report of ABI, the association of Italian banks, informed that according to the World Competitiveness index of 2011 prepared by IMD (International Institute for Management Development), (see Table 1 below), the problem of financial illiteracy is a global phenomenon.

The data emerging from the above survey shows the difficulties of many countries in this area. According to the IMD world ranking, Italy, for instance, is at the forty-fourth place for the dissemination of financial and last among the G8 member states. A Doxa<sup>2</sup> survey conducted in the same year also shows that 50% of young people between 18 and 29 years does not know what is a bond, 83% cannot orientate in asset management, while only 50% of the holders of a counter current is able to correctly read the own bank statement. According to a research conducted by the European House - Ambrosetti<sup>3</sup>, the average level of financial culture in Italy, according to a scale of 1 to 10, is 3.5 percentage points, against 5.18 in Germany, 4.68 in the UK, 3.87 in France. In the UK a lack of financial education costs Britain £ 3.4bn a year<sup>4</sup>. A research conducted by YouGov's Financial Services team into the financial literacy of the UK reveals that young adults are least likely to understand financial literature, with just 8% of UK 18 to 24 year-olds admitting to having a 'high understanding', compared to at least 20% of older age groups. Generally, half of all UK adults (50%) modestly rate themselves as having some understanding of financial products and services and only 15% say they have a 'very good' understanding. A minority of just 5% admitted to having "no understanding". In addition, that research reveals that online sources are the first port of call for consumers who don't understand a term used in documentation for a financial product, with the majority of respondents (58%) turning to the internet<sup>5</sup>.

<sup>2</sup> Italian Institute of Statistical Research and Public Opinion Analysis.

<sup>3</sup> The European House-Ambrosetti-Consorzio Patti Chiari: L'educazione finanziaria in Italia: La prima misurazione del livello di cultura finanziaria degli italiani. Roma 25 November 2008.

<sup>4</sup> The Telegraph Journal, finance section, 7 January, 2013.

<sup>5</sup> See <https://yougov.co.uk/news/2012/06/07/britains-financial-literacy/>.

### 1. *The Role of the International Organizations in the Financial Education*

The Organization for Economic Co-operation and Development (“OECD”), is one of the most active international institution in the world who has been promoting the importance of financial literacy in the world, recommending that it should start as early as possible. To get this goal, OECD started an inter-governmental project since 2003 with the objective of providing ways to improve financial education and literacy standards through the development of common financial literacy principle, adopting the “Recommendation on Principles and Good Practices for Financial Education and Awareness” (OECD, 2005b). Alongside these recommendations, the publication “Improving Financial Literacy: Analysis of Issues and Policies” details the reasons for focusing on financial education, and provides a first international overview of financial education work being undertaken in various countries (OECD, 2005a). Recognizing the increasingly global nature of financial literacy and education issues, in 2008 the OECD created the International Network on Financial Education (INFE) to facilitate the sharing of experience and expertise among worldwide public experts and to promote the development of both analytical work and policy recommendations. In this regard, the OECD has tested 15 year-olds on their knowledge of personal finances and ability to apply it to their financial problems. This is the first large-scale international study to assess the financial literacy of young people, the data collection was completed in Fall 2015, and the results will be published in the next Program for International Student Assessment (“PISA”) study.

### 2. *European Union and Financial Literacy*

The European Commission has provided impetus in the development of financial education in the EU, taking several practical steps towards promoting and involving financial education to improve information and raise awareness of consumer rights and interests. In this regard, on 2007, the European Commission convened an Expert Group on Financial Education with the aim to promote the exchange of ideas, experiences and best practices in the area of financial education.<sup>6</sup> Next, it established

<sup>6</sup> You can get information on the EU Expert Group on <http://www.>

a European Database for Financial Education that lists and describes financial education resources that are available within member states.<sup>7</sup> Currently, the European Commission has providing sponsorship/patronage to Member States and private actors in the organization of national or regional conferences and other events, which give visibility and impetus to the promotion of financial education in the EU, and supports the continued development of the Dolceta online resource.<sup>8</sup> This project, started in 2003 and realized in collaboration with European Continuing Education Network and various European universities, has the objectives to educate students, vulnerable adults in the financial arena as well as to reduce the gap to university level and in the protection of academic consumption.

### 3. *National Strategies: The First Goal*

According to Article 165 of the Treaty on the Functioning of the European Union, EU Member States are responsible for legislating on education. On this ground, several European countries have gained experience in financial education implementing in primary and secondary schools target programs as well as setting forth strategy plans to reduce the financial illiteracy.

In Czech Republic, for instance, the strategy was approved in May 2010 by the Czech Government. The financial education became compulsory in high schools at the beginning of the 2012. The Government is also working with the OECD looking at how to measure financial literacy (pilot program). On the other hand, in Spain there is a national program that covers all the financial sectors, including pension funds, called “*Plan de Educación Financiera*”. This initiative is along similar lines to one conducted by the UK’s Financial Services Authority, and it is informed by the principles and guide-

[ec.europa.eu/](http://ec.europa.eu/)

<sup>7</sup> The EDFE was discontinued and taken offline on 17 June 2011. However, a survey of financial literacy schemes in the EU is available at: [http://ec.europa.eu/internal\\_market/finservices-retail/docs/capability/report\\_survey\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/capability/report_survey_en.pdf)

<sup>8</sup> The Commission’s on-line consumer education website to help teachers to incorporate financial matters into the school curriculum. With respect to consumer education in schools, the Commission will promote the sharing of best practices through an interactive community site for teachers. This new community site will replace the [dolceta.eu](http://dolceta.eu) site, and offer a platform for exchange of experiences, dialogue and teaching materials on consumer education.

lines of the OECD and European Commission. The Portuguese Parliament has adopted, instead, two acts addressing recommendations to the Government on possible sets of measures aimed at promoting financial literacy. In particular, one of the acts foresees in an express manner the objective that the Government takes into account the content of the *National Plan on Financial Education*, which is a joint initiative of the three sectorial national supervisory authorities. The Plan has considered the years 2011-2015 and it was decided that its governance model should include, apart from the Co-ordinating Commission (composed by representatives of the financial regulators), two Monitoring Committees and a Consultative Committee (these, including public entities, financial sector associations, consumer representatives, universities as well as other entities aiming at the promotion of financial literacy).

Other European countries are preparing national strategies, and several bills are pending in Parliament awaiting their approvals. In Italy, for instance, the Parliament is at present working on the adoption of a specific Bill on Financial Education, also considering some coordination issues.<sup>9</sup> In the meantime, a recent law (n. 107/2015, so called “Buona Scuola”), concerning the reform of the public school in Italy has, *inter alia*, launched financial education program involving all school grades. In line with international best practice, the project is competence based and designed to help students develop the skills and knowledge necessary to make informed financial decisions.

In Poland, the Polish National Strategy on Financial Education is still in the early stage of development and has not been implemented. On the other hand, in Romania the *Comisia de Supraveghere a Sistemului de Pensii Private* is involved in a working group on development of a national strategy of financial education. The purpose of this strategy is to create a framework that all organizations involved in financial education, and policymaking in this area, will find useful and provide guidelines on developing financial education programs for the next five years.

By contrast, there are some EU countries where there is no national strategy on financial education, although a special body has been set up with the aim to determine

principles on financial education initiatives themselves (such as in Ireland) or with the particular aim to improve financial literacy (such as in Denmark, Netherland and United Kingdom). In Ireland the National Steering Group on Financial Education was established by the then Financial Regulator (now Central Bank of Ireland) in late 2006, and included a range of stakeholders with an interest in personal finance and education. The purpose of the Steering Group was to encourage the development of personal finance education in the Republic of Ireland. The group conducted extensive work including a review of current practices and resources in financial education in Ireland and abroad and a financial competency framework was developed. This is a resource development tool that would support the creation of personal finance education initiatives and to define what a financially capable person should know and be able to do. While there is no ‘national strategy’ per se, the Steering Group published a report “Improving Financial Capability – a multi-stakeholder approach” in mid-2009, making commitments and recommendations intended to foster personal finance education in this country. The report sets out a roadmap for where the Steering Group saw financial education going in the future but there are no specific time spans.

In Belgium, on April 1, 2011, a law entered into force introducing the 'Twin Peaks' financial supervisory model. The law provides that the Financial Services and Markets Authority (“FSMA”) contributes to the financial literacy and education of financial consumers. The FSMA is currently exploring how it can best implement this new competence and take a coordinating or leading role by developing a network with relevant stakeholders and defining a strategy at national level. In Denmark, instead of launching a national strategy, a board called The Money and Pension Panel was established by the Danish Parliament in June 2007. The aim of the Panel is to further more comprehensive knowledge of and interest in financial matters among consumers. The main tasks of the Panel are from an objective point of view: (i) to provide consumer information about financial products and services; (ii) to carry out and publish financial market studies of e.g. prices, customer services and conditions at diverse financial suppliers; and (iii) to carry out consumer affairs studies thereby achieving a better understanding of consumer views, consumer behavior and consumer affairs with regards to the provision of financial services.

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<sup>9</sup> Senate Bill n. 1288, XVI Legislature, filed on 17 December 2008, assigned to the 10<sup>th</sup> Permanent Commission (Trade, Tourism and Industry) on 4 February 2009.

In Luxemburg, financial education is present at two different levels: at the level of continuous vocational training (CVT) and at an academic level. CVT or tailor-made training for the professionals of the financial industry is offered by private companies (such as the “Institut de Formation Bancaire Luxembourg”) as well as public institutions such as the Chamber of Commerce or the Chamber of Workers (“Chambre des Salariés”). In the early 1990s, at a time when the Government wanted to emphasize the growing importance of CVT to the economic and social development of Luxembourg, the law of 1<sup>st</sup> December 1992 created the National Institute for the Development of Continuous Vocational Training (INFPC), which is a state institution under the supervision of the Ministry of Education. The INFPC is responsible for the promotion of CVT and the development of CVT concepts, in association with private partners, such as training companies, and institutional partners, such as social partners. On the other hand, the academic level is developed via education programs and academic research in finance for university students. The Luxembourg School for Finance<sup>7</sup> created in 2003 as a Department of the Faculty of Law, Economics and Finance at the University of Luxembourg – is offering education programs and conducts academic research in finance at the highest level. It strives to attract students having a previous degree in finance or in a related field, as well as professionals seeking to obtain a greater theoretical foundation in finance to support their career objectives. In Sweden, in 2010, The Swedish Financial Supervisory Authority and several other stakeholders started to build a financial education network, supported by the Swedish Ministry of Finance, for raising self confidence in personal finances.

In UK the Financial Services & Markets Act 2000 provides for the regulation of financial services and markets, and until 2010 included provision for financial education, by providing a public awareness objective of “promoting public understanding of the financial system”. After the 2010, the Financial Services Act (“the ACT”) made a number of amendments regarding the provision of financial education. The Act, which comes into force on 1 April 2013, required to establish a new consumer financial education body (named the Money Advice Service), with the scope to raise the public’s understanding and knowledge of financial matters and improve their ability to manage their financial affairs. In addition, the ACT required creating a new regulatory framework for

the supervision and management of the UK’s banking and financial services industry, giving to the Bank of England macro-prudential responsibility for oversight of the financial system and day-to-day prudential supervision of financial services firms managing significant balance-sheet risk.

## II. Good Practices for Consumer Protection

### A. The European Framework

The European Council adopted its first special program for consumer protection and information policy in 1975,<sup>10</sup> where it defined five fundamental consumer rights: the right to protection of health and safety, the right to protection of economic interests, the right to claim for damages, the right to an education, and the right to legal representation (or the right otherwise to be heard). This program has served as a basis for an ever growing corpus of directives (that do not apply directly and need to be transposed into the national laws of each EU Member State) and regulations (that are self-executives) in the area of consumer protection. At present, around 90 EU directives cover consumer protection issues, and that is why the consumer *acquis* remains complex and sometimes inconsistent (in the case of the same directive, since it can be transposed into national law differently, but also because of differences between various directives).

#### 1. *The EU Directives in the Financial Sector*

One of the pivotal directives in the financial sector is represented by Directive 2004/39/EC on Markets in Financial Instruments Directive (“MiFID”)<sup>11</sup>. This

<sup>10</sup> Council Resolution on a preliminary program of the European Economic Community for a consumer protection and information policy, OJ C-092, 25 April 1975.

<sup>11</sup> The Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments has recently been recast in the framework of Directive 2014/65/EU (so-called MiFID 2), in an effort to incorporate the significant amendments made to the text. MiFID 2 provides for a new legal framework that better regulates trading activities on financial markets and enhances investor protection. The new rules revise the legislation currently in place and

Directive was adopted by European Union to protect investors/consumers, to promote fair, transparent, efficient and integrated financial markets as well as to safeguard market integrity by establishing harmonized requirements governing the activities of authorized intermediaries. Although the aims of the MiFID are to protect investors, surprisingly it does not contain neither references nor rules to improve the retail investor's procedural position by reversing the burden of proof in their favor. More specific is instead the Directive 2002/65/EC on Distance Marketing of Consumer Financial Services<sup>12</sup>. This latter Directive also refers to consumers<sup>13</sup>, but it leaves to the Member States the possibility of extending the scope of this Directive, and thus the qualification of 'consumer', to non-profit organizations and people making use of financial services in order to become entrepreneurs<sup>14</sup>. Moreover, it rules the burden of proof upon the supplier. As a matter of law, Art. 7, paragraph 3, provides that in those cases where the consumer exercises his right

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will apply from January 2017.

<sup>12</sup> The 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 whose text contains a direct obligation to inform customers of any risks involved in the financial services being offered, has been amended by the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market. In this regard, Article 9 (Unsolicited services) of Directive 2002/65/EC has been replaced by the following Article 9 of the Directive 2005/29/EC: "*Given the prohibition of inertia selling practices laid down in Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and without prejudice to the provisions of Member States' legislation on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take measures to exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent. Moreover, the Directive 2002/65/EC has been amended by the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market. In this regard, Article 4 of the Directive 2002/65/EC has been added: "Where Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market is also applicable, the information provisions under Article 3(1) of this Directive, with the exception of paragraphs (2)(c) to (g), (3)(a), (d) and (e), and (4)(b), shall be replaced with Articles 36, 37, 41 and 42 of that Directive". Additionally, Article 8 ("Payment by card") of the Directive 2002/65/EC has been deleted.*

<sup>13</sup> According to the Directive 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 states: "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 organizations and persons making use of financial services in order to become entrepreneurs".

of withdrawal from a distance contract, the supplier may not require the consumer to pay any amount for the service actually provided, unless he can prove that the consumer was duly informed about the exact amount payable. In addition, Art. 15 provides that the Member States may also shift the burden of proof to the supplier in respect of other suppliers' obligations to inform the consumer's consent to conclusion of the contract and, where appropriate, its performance. Similarly, Art. 33 of the Directive 2007/64/EC on Payment Service provides that the Member States may stipulate that the burden of proof concerning the compliance with the information requirements laid down in this Directive shall lie with the payment service provider.

Another pivotal provision is represented by the Directive 2004/109/EC<sup>15</sup>, concerning the harmonization of transparency requirements in relation to issuer disclosure for those whose securities are listed for trading on a regulated stock market within the EU and further market participants. This Directive guarantees investors a high level of protection and strengthen confidence in the market. Finally, the financial legislative framework is completed by the Directive 2003/71/EC<sup>16</sup> regarding the type of prospectus to be published when securities are offered to the public or admitted to market trading,

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<sup>15</sup> The aim of the Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 is to establish minimum requirements regarding to the financial information distribution all over the European Union and an increase in transparency at the capital markets and in investor protection to meet information deficits in a developing financial market environment. This Directive has been amended by the Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 establishing a European System of Financial Supervisors (ESFS), consisting of a network of national financial supervisors working in tandem with new European Supervisory Authorities (ESAs), created by transforming the existing European supervisory committees into a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA), thereby combining the advantages of an overarching European framework for financial supervision with the expertise of local micro-prudential supervisory bodies that are closest to the institutions operating in their jurisdictions. In addition, this Directive has established a European Systemic Risk Board (ESRB), to monitor and assess potential threats to financial stability that arise from macro-economic developments and from developments within the financial system as a whole. The ESRB provides an early warning of system-wide risks that may be building up and, where necessary, issue recommendations for action to deal with these risks.

<sup>16</sup> The Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or omitted to trading came into effect on 31 December 2003, has been also amended by the Directive 2010/78/EU.

and by the Directive of the 23<sup>th</sup> of July 2013, where the European Commission has decided to adopt a revision of the Payment Services Directive (PSD), the so called “PSD2”<sup>17</sup>. The scope of the latter Directive is to increase consumer rights when they send transfers and money remittances outside Europe or paying in non-EU currencies (the existing legislation addresses only transfers inside Europe and is limited to currencies of Member States) as well as when they are involved in unauthorized debits. Currently, in fact, the PSD protects rights of consumers in the event of unauthorized debits from an account within certain conditions. In order to enhance consumer protection and promote legal certainty further, the PSD2 will provide an unconditional refund right for consumers. This means that consumers would be allowed to ask for an unconditional refund even in the case of a disputed payment transaction. The only exceptions to this unconditional refund right will relate to cases where the merchant has already fulfilled the contract and the corresponding good or service has already been consumed. Moreover, the consumers will also gain a stronger position in case of disputes with their bank and other payment service providers: the new rules will oblige banks to answer in written form to any complaint within 15 business days. Finally, the PSD2 will oblige Member States to designate competent authorities to handle complaints of payment service users and other interested parties, such as consumer associations, concerning an alleged infringement of payment service providers of the directive. Payment service providers that are covered by this Directive on their side should put in place a complaints procedure for consumers that they can use before seeking out-of-court redress or before launching court proceedings.

On 26 November 2014 the Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) was published into the Official Journal of the EU. The Regulation aim is to ensure that retail investors are able to understand the key features and risks of retail investment products as well as and to compare the characteristics of different products levelling the playing field between different manufactures of investment products and those who sell such products. According to this Regulation, that will apply

only from 31 December 2016, the investment product manufacturers shall draw up a key information document for each investment product and publish the document on a website before the investment product can be sold to retail investors.

The further Directive 2014/65/EU (so-called MiFID 2), on Markets in Financial Instruments deserve also particular attention. The Directive revision of MiFID constitutes, in fact, an integral part of the reforms aimed at establishing a safer, sounder, more transparent and responsible financial system as well as at improving the organization, transparency and oversight of various market segments, especially in those instruments traded mostly over the counter. MiFID 2 amending MiFID includes: (a) a Regulation (MiFIR) setting out, *inter alia*, requirements in relation to the disclosure of trading transparency data to the public and transaction data to competent authorities, specific supervisory action and the provision of services by third-country firms without a branch; and (b) a directive, amending, *inter alia*, specific requirements regarding the provision of investment services<sup>18</sup>.

More specific are instead the two Directives recently adopted by the Council and the Parliament.<sup>19</sup> The first Directive, 2014/92/EU, concerns the ‘comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features’ (to be transposed by the Member States by 18 September 2016).<sup>20</sup> The second Directive 2014/17/EU regards the ‘credit agreements for consumers relating to residential immovable property’ (to be transposed by the Member States by 21 March 2016).

All those Directives have the aim of approximate the laws, regulations and administrative provisions of the Member States in the fields concerning the distance marketing of consumer financial services, the minimum re-

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<sup>18</sup> On 10 February 2016, the European Commission has proposed a one-year extension to the entry into application of the revised Markets in Financial Instruments Directive (MiFID II). See [http://europa.eu/rapid/press-release\\_IP-16-265\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-16-265_en.htm?locale=en) (last access 15 March, 2016).

<sup>19</sup> Older legislation in this area: Directive 2002/65/EC concerning distance marketing of consumer financial services, and Directive 2008/48/EC on credit agreements for consumers, are already in force.

<sup>20</sup> In 2011, the Commission issued a Recommendation on access to a basic payment account, where it presented general principles regarding access to basic payment accounts by European consumers in all European Union countries, stating that access should not be made conditional on the purchase of additional services.

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<sup>17</sup> See [http://ec.europa.eu/finance/payments/framework/index\\_en.htm](http://ec.europa.eu/finance/payments/framework/index_en.htm) (last access: 15 March 2016).

quirements regarding the financial information, as well as to protect investors as consumers in the financial market promoting a fair, transparent, efficient and integrated financial market. Under the above-mentioned Directives, however, only natural persons are qualified to be 'consumers', enjoying thus a higher level of protection. Accordingly, are excluded entrepreneurs, no-profit associations, companies and all persons who are acting for their business, trade or profession, except financial investors who, acting as natural person outside the scope of an economic activity, have to be intended as 'consumers'.<sup>21</sup> This interpretation is also followed by the Court of Justice of European Union (CJEU), which has excluded from the definition of 'consumer' start-up contracts, assignments of consumer claims, and mixed contracts.<sup>22</sup> This has been the case of the Directives on doorstep selling (85/577/EEC), consumer credit (2008/48/EC), unfair contract terms (93/13/EC), time shares 2008/122/EC), distance selling (97/7/EC), and consumer sales and guarantees (1999/44/E).

## B. LEGAL REMEDIES IN EU

### *1. Alternative Dispute Resolution (ADR) and the ADR Directive*

The ADR Directive ensures that consumers have access to ADR for resolving their contractual disputes with traders.<sup>23</sup> Access to ADR is ensured no matter what product or service they purchased (only disputes regarding health and higher education are excluded), whether the product

or service was purchased online or offline and whether the trader is established in the consumer's Member State or in another one. This Directive also established binding quality requirements for dispute resolution bodies offering ADR procedure to consumers. Member States' competent authorities, after their assessment, communicate to the European Commission the list of national dispute resolution bodies. However, these out-of-court mechanisms have been developed differently across the European Union. Some are the fruit of public initiatives both at central level (such as the consumer complaints boards in the Scandinavian countries) and at local level (such as the arbitration courts in Spain), or they may spring from private initiatives (such as the mediators/ombudsmen of the banks or insurance companies). Precisely because of this diversity, the status of the decisions adopted by these bodies differs greatly. Some are mere recommendations (such as in the case of the Scandinavian consumer complaints boards and most of the private ombudsmen), others are binding only on the professional (as in the case of most of the bank ombudsmen); and others are binding on both parties (arbitration).<sup>24</sup>

Recently, the European Commission has developed a web-based platform called The Online Dispute Resolution platform (ODR platform). The ODR platform's objective is to help consumers and traders resolve their contractual disputes about online purchases of goods and services out-of-court at a low cost in a simple and fast way, and establishes a common framework for ADR in the EU member states by setting out common minimum quality principles in order to ensure that all ADR-entities are impartial, independent, transparent and efficient. It allows consumers to submit their disputes online in any of the 23 official languages of the EU, and to transmit the disputes only to the quality dispute resolution bodies communicated by Member States. The ODR platform is accessible to consumers and traders since 15 February 2016.

Another financial dispute resolution network of national out-of-court complaint schemes in the European Economic Area countries (the European Union Member States plus Iceland, Liechtenstein and Norway) is FIN-NET. This

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<sup>21</sup> However, the Directive 2002/65/EC makes clear in Recital 13 that Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. This goes on to provide a number of examples, which include extending the application of the Directive to persons falling outside the Directive's definition of "consumer", such as small and medium-sized enterprises.

<sup>22</sup> ECJ judgment of 14 March 2003, C-361/89 - *Criminal proceedings v Patrice Di Pinto* [1991] ECR I-01189. See also *Cape Snc v Idealservice Srl*, C-541/99 [2002] All ER (EC) 657, [2003] 1 CMLR 42, [2002] ECR I-9049.

<sup>23</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) OJ L 165/63.

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<sup>24</sup> The Necessity of Alternative Dispute Resolution systems in Romania Best practices in the Member States. How to build up confidence between consumers and businesses? Report of 14 May, 2009. Available at: [www.eccromania.ro/media/pdf/raport\\_conferinta\\_adr\\_en.pdf](http://www.eccromania.ro/media/pdf/raport_conferinta_adr_en.pdf)



network, launched by the European Commission in 2001, is responsible for handling disputes between consumers and financial services providers. Within FIN-NET, the schemes cooperate to provide consumers with easy access to out-of-court complaint procedures in cross-border cases. If a consumer in one country has a dispute with a financial services provider from another country, FIN-NET members will put the consumer in touch with the relevant out-of-court complaint scheme and provide the necessary information about it.

### III. The Italian Framework and its Relationship with the EU Framework

The principal source of rules and regulations for the banking and financial sector is EU legislation. The tools used by the EU - regulations, directives, decisions, recommendations and opinions - vary depending on whether or not they are binding and on how they are applied in the member states as described in Article 288 of the Treaty on the Functioning of the European Union. Regulations have general application, are binding in their entirety and are directly applicable in the member states without the need for transposition. They are therefore the preferred tool for achieving full harmonization and for limiting national discretion, in part to avoid distortions in competition between economic actors caused by differences in legislation across member states. Directives are binding on member states as to the results to be achieved, but leave the choice of forms and methods to the national authorities. Regulatory and implementing technical standards play an increasingly important role in banking and financial regulation. They are developed by European supervisory authorities and adopted by the European Commission via regulations. The standards seek to harmonize the most complex and detailed aspects to create a complete, homogeneous and unified system of rules for the single market.

The main European legislation governing the supervisory duties of the Bank of Italy is Regulation (EU) No. 575/2013 and Directive 2013/36/EU. Regulation (EU) No. 575/2013 (the Capital Requirements Regulation - CRR) introduced prudential supervision rules directly applicable to all European banks and investment firms. The

Bank of Italy's regulatory powers over the subject matter are governed by the CRR (capital, minimum capital requirements and public disclosure) and therefore confined to those areas where the Regulation allows it very limited discretion to make the necessary adjustments for integration with Italy's law and specific circumstances. Directive 2013/36/EU (the Capital Requirements Directive IV - CRD IV) establishes the conditions for access to the activity of banks; the freedom of establishment of banks in the EU and freedom for them to provide their services; prudential control; additional capital buffers; and bank corporate governance. The Law No. 154 of the 7<sup>th</sup> of October 2014, named "Legge di delegazione europea 2013-bis", was enacted in order to implement the above EU directives, and thus the EU framework, into the Italian financial services sector.

#### A. Financial Services and Applicable Consumer Protection Provisions

The Italian financial services<sup>25</sup> sector is governed either by general consumer law or special provisions contained in the "Testo Unico Bancario"<sup>26</sup> (Consolidated Law on Banking) and in the "Testo Unico della Finanza"<sup>27</sup> (Consolidated Law on Finance). In addition, related regulations issued by the "Banca d'Italia" (Bank of Italy) and by the Italian Securities and Exchange Commission (Consob) provide further guidance. Finally, the Italian legislative decree No. 206/2005, a consolidated Act called "Consumers' Code"<sup>28</sup>, also plays an important role within the financial services scenario, ensuring a high level of protection to the consumers involved in financial trans-

<sup>25</sup> Italian financial regulation has been traditionally organized along functional lines. Financial services activities are divided among four main industries: banking, investment services, asset management, and insurance. Each industry has its own supervisor, legal framework, and rules. For the scope of this paper the banking sector will be dealt with only.

<sup>26</sup> Legislative Decree No. 385/1993. A Legislative Decree under the Italian legislation is act having force of law adopted by the Government under authorization of the Parliament (Art. 76, Italian Constitution). It is often usually employed in cases of highly technical matters.

<sup>27</sup> Legislative Decree No. 58/1998, as amended by Law no. 208 of 28 December, 2015.

<sup>28</sup> The text was approved by the Italian Council of Ministers of 22 July, 2005 and promulgated on 6 September 2005 (published in Italian Official Gazette on 8 October 2005, entered into force since 23 October 2005).

actions and banking practices

### 1. The Consolidated Law on Banking

The Consolidated Law on Banking is the main legislative source for the framework of the powers and liabilities of the regulatory authorities in Italy. It contains principles relating the carrying out of business by banks, other financial intermediaries, as well as by other entities operating in the banking sector. Part of the Consolidated Law on Banking provisions are addressed to all bank clients, such as corporates, bodies having a contractual relationship with the bank, professionals, whilst regulations on consumer credit concern only consumers.

In order to increase the consumer protection, the Legislative Decree No. 141/2010, which has implemented the EU Consumer Credit Directive (2008/48/EC) on Credit Agreements for Consumers, has introduced a set of provisions in the Consolidated Law on Banking regulating, *inter alia*, pre-contractual transparency duties, verification of the creditworthiness of consumers and the rights of consumers in case of withdrawal<sup>29</sup>.

The new rules on pre-contractual duties impose certain information obligations on lenders or intermediaries in order to make potential consumers aware of the terms of the proposed loan, or credit agreement, and its consistency with their needs. Such information must be provided in a particular format, including the standard European consumer credit information form<sup>30</sup>. Furthermore, those rules declare void all contractual clauses that impose costs on the consumers that are not fully included in the annual percentage rate disclosed in the pre-contractual documentation, providing also a series of consumers rights such as: a) a right of withdrawal (which can be exercised within 14 days of the signing of the credit agreement or the consumer's receipt of all the required pre-contractual information, if such information is provided after the agreement is signed); b) a right of early termination if the supplier connected with the credit agreement breaches its terms (if such a right is exercised, the lender must reimburse the instalments already repaid by the consumer,

plus any additional charges); and c) a right of early repayment at any time, with a reduction in the total cost of the credit equal to the interest and charges that would otherwise have fallen due during the remainder of the agreement.

Moreover, with regard to the consumer credit, consumers are also entitled to consult and obtain by the bank, or other regulatory authority, copies of all special information sheets containing details of the bank, the characteristics and inherent risks of the transaction or service concerned, the terms and conditions applying thereto as well as the most significant contract clauses. In addition, they are also entitled to receive paper or other hard copies of this notice and of the information sheets relevant to the transaction or service concerned if the bank uses remote communication techniques. Before signing it and subject to no conditions of any sort, the consumers may obtain a copy of the full contract as well as a summary of the terms, financial and otherwise, applying thereto to allow for a careful assessment of the same and on the understanding that delivery of such a copy does not entail an obligation on the part of the bank (or the customer) to conclude the contract. After the contract has been signed, the consumers are entitled to receive regular updates on the status and performance of their account - at the end of the contract period and once a year at a minimum - in the guise of a formal statement along with a summary of the contract's terms and conditions as well as to be informed about any unfavorable changes to the contract's terms and conditions. In the event of any unfavorable changes in rates, prices or other conditions, the consumers are entitled to withdraw from the contract within 60 days of receiving the bank's notice thereof - in writing or by any other authorized means - without incurring any penalties and on the same conditions as were applied beforehand<sup>31</sup>. Finally, they are also entitled to obtain within a maximum period of 90 days a copy of the documentation relevant to any transaction executed with the bank during the previous ten years.

If a bank, instead, is involved in the placement of government bonds and certificates, in addition to ensure the existence of disclosure, transparency and advertising rules, it must allow to the clients full understanding of such secured transaction. Moreover, if an offer is made

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<sup>29</sup> See Art. 124bis and Art. 125 of the Consolidated Law on Banking.

<sup>30</sup> The form includes key details such as the type of credit, the annual percentage rate, the number and frequency of payments, the total amount owed etc. Receiving the same form from each credit provider will allow consumers to easily compare and choose the best credit offered.

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<sup>31</sup> See Art. 118, paragraph 2, of the Consolidated Law on Banking.

in a place other than the bank's central or branch offices, the customer shall be given copies of this notice and of the information sheets relevant to the transaction or service concerned before signing the contract. The customer is, furthermore, entitled to receive all relevant information sheet before subscribing any structured securities. If the customer is a 'consumer', instead, he shall be supplied with the relevant information sheet before finalizing the purchase of any complex financial products; any contract clause providing for the interest rate or any other prices or terms to be modified to the consumer's detriment must be expressly approved as well as any contract clause relating to the capitalization of interest. Credit and debit interest accruing on current accounts shall be calculated at the same intervals, and any contract clauses purporting to set the interest rate or any other prices or terms by reference to custom shall be null and void, as will any clauses stipulating less favorable rates, prices or terms than those advertised in the relevant information sheets. Such clauses shall be replaced automatically by applying the conditions and prices that are foreseen by the law.

## 2. *The Consolidated Law on Finance*

The Italian securities regulations are instead provided for by the Consolidated Law on Finance and by the Consob under the Regulation No. 11522/98. The Consolidated Law on Finance provisions have the aim to provide protection for a general category of financial consumers related to authorized 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.

According to Art. 21, paragraph 1, of the Consolidated Law on Finance, as amended by article 14 of Law 262/2005, authorized intermediaries shall conduct an independent, sound and prudent management and make appropriate

arrangements for safeguarding the rights of customers<sup>33</sup> in respect of the assets entrusted to them. In doing this, they must act diligently, fairly and transparently in the interests of customers and the integrity of the market classifying, according to the minimum general criteria to be set forth in a specific regulation issued by Consob, the risk inherent in financial products<sup>34</sup> and individually managed investment portfolio. At the same time, they shall do acquire the necessary information from customers and operate in such a way that they are always adequately informed; in addition, they shall use publicity and promotional communications which are correct, clear and not misleading, and have resources and procedures, including internal control mechanisms, suitable for ensuring the efficient provision of services and activities.

Moreover, the authorized intermediaries in conducting financial investments shall: a) adopt all reasonable measures to identify and manage conflict of interest which may arise with the customer or between customers, also by the adoption of appropriate organizational measures, in order to avoid a negative impact on the interests of the customer; b) clearly inform customers, prior to acting on their behalf, of the general nature and/or sources of conflict of interest where measures taken pursuant are not sufficient to ensure, with reasonable certainty, that the risk of damaging the interests of the customer is avoided; c) perform independent, sound and prudent management and take measures to safeguard the rights of customers with regard to their assets.

Finally, in recommending the transaction to investors they shall also do evaluate the profile of each customer. In doing this, they shall check the customer experience (concerning investments in financial products), his financial situations as well as his investments objectives and the possibility to incur risks. In any case, the orders expressly given by the customer in writing or by telephone or electronic means shall be valid and binding for the intermediaries, on condition that, pursuant to Art. 21 of the Consolidated Law on Finance, procedures ensuring the possibility of ascertaining the provenance of the orders and retention of the related documentation. Art. 23, con-

<sup>32</sup> According to Art. 1, lett. r), of the Consolidated Law on Finance "authorized intermediaries" means investment companies (SIM), EU investment companies with branches in Italy, non-EU investment companies, asset management companies, harmonized asset management companies with branch in Italy, SICAVs and financial intermediaries entered in the register referred to in Art. 107 of the Consolidated Law on Banking and Italian banks, EU banks with branches in Italy and non-EU banks, authorized to engage in investment services or activities.

<sup>33</sup> In this context the term 'customers' include either consumers or professionals.

<sup>34</sup> 'Financial products' shall mean financial instruments and any other form of investment of financial nature as provided for in article 1, letter u), of the Consolidated Law on Finance.

cerning the discipline applicable to contracts for the provision of investment services or non-core services, provides for that such contracts under penalty of nullity shall be reduced to writing and a copy given to customers.

### *3. The Bank of Italy and the CONSOB*

The implementation of the Consolidated Law on Finance and Banking is granted by secondary legislation enacted by the Bank of Italy and by the Consob, which have equivalent powers of control and supervision over financial markets.

The Bank of Italy requires intermediaries (banks and financial intermediaries) to comply with principles of transparency and correctness in their relations with customers. In carrying out this task, the Bank of Italy has adopted several regulations governing the requirement for the pre-contractual transparency, the organization and effectiveness of the alternative dispute resolution system provided by the Consolidated Law on Banking, the authorization and supervision procedures over all supervised entities. One of those is the Regulation issued on 29 July 2009 for “Transparency of Banking and Financial Operations and Services” and for the “Correctness in Relations between Intermediaries and Clients” containing the new regulation on transparency in banking and financial services. Under this Regulation, Bank of Italy 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, who - taking into consideration the varying intensity of the degree of protection - can be identified as follow: a) ‘consumer’, namely the natural person who is acting for purposes which can be regarded as outside his trade or profession; b) ‘retail clients’, understood as consumers, non-profit entities and businesses having total revenues lower than Euro 5 million and fewer than 10 employees<sup>35</sup>; c) ‘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. The status of ‘consumer’ or ‘retail clients’ must be verified by inter-

mediaries before the conclusion of the contract, since some provisions apply exclusively to contracts entered into with consumers or ‘retail clients’.

On 17<sup>th</sup> June 2013, the Bank of Italy launched a public consultation concerning some changes to the provisions on transparency of banking and financial services and transactions, as well as on the correctness of the relationships between intermediaries and customers. The proposed changes are aimed at 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, simplifying the disclosure of the documentation to be provided to clients and clarifying the relevant requirements for banks and financial intermediaries.

The Consob, instead, is the public authority responsible for regulating the Italian securities market. It exercises its supervisory powers to ensure transparency and correct application of the rules of conduct of business by the banks and investment firms in the provision of investment services and activities. According to Art. 74, paragraph 1 and 3, of the Consolidated Law on Finance, the Consob shall supervise regulated markets with the aim of ensuring the transparency of the markets, the orderly conduct of trading and the protection of investors, by adopting, in cases of necessity and as a matter of urgency, all the measures required for the above-mentioned purposes.

In the financial market scenario, the Consob also plays an important role adopting proper measures either setting restrictions on short sale of shares issued by banks and insurance companies with the aim of ensuring the transparency, the orderly conduct of trading and the protection of investors<sup>36</sup>, or setting provisions ensuring adequacy evaluation with regard to the investment services and financial instruments suited to the customers, or potential customers<sup>37</sup>. In this regard, the Consob provide the intermediaries, in recommending investment services and financial instruments, shall obtain necessary details from their customers or potential customers in relation: a) to

<sup>35</sup> In fact, the Consolidated Law on Banking contains general rules protecting the “client”, and some specific provisions on the “consumer” applicable on the basis of the consumer definition.

<sup>36</sup> See Consob Resolution No. 16622/2008 on “Measures on short sales of securities aimed at ensuring the orderly conduct of trading and the integrity of the market”.

<sup>37</sup> See Consob Resolution No. 16190/07. This Resolution and annexed regulation were published in ordinary section no. 222 of Official Gazette no. 255 of 2.11.2007 and in CONSOB, Fortnightly Bulletin 10.2, October 2007. The Consob Resolution No. 16190/07 was later amended by Resolutions no. 16736 of 18 December 2008, no. 17581 of 3 December 2010 and no. 18210 of 9 May 2012, and no. 19094 of 8 January 2015).

awareness and experience of the investment sector relevant to the type of instrument or service; b) the nature, volume and frequency of financial instrument transactions performed by the customer and the period in which such transactions were executed. In addition, they have to obtain necessary information on the level of education, profession or, if relevant, the former profession of the customers; c) the data on the period for which the customer wishes to retain the investment, his preferences in relation to risk, his own risk profile and investment aims, where relevant. Where intermediaries providing investment consultancy or portfolio management services are unable to obtain the information required, they shall abstain from providing said services and to carry on<sup>38</sup>. Further, duties arise upon intermediaries in the case the customers give all information required. As a matter of law<sup>39</sup>, even if the intermediaries receive in full all details and information from the customer, they shall, however, assess whether the specific transaction recommended or executed as part of the provision of portfolio management services satisfies the correspondence with the customer's investment objectives. Moreover, the intermediaries shall verify the customer have necessary experience and awareness of the nature of that transaction to understand the risks involved in such a transaction or management of the portfolio. However, where investment consultancy or portfolio management services are provided to professional customers, not qualified as consumers, intermediaries may presume that they are financially able to face any investment risk compatible with their investment objectives, since those have the necessary level of experience and awareness in conducting such transactions.

The complex structure of the Italian banking and finance system represent, however, a veritable legislative labyrinth for the investors who, in conducting a specific transaction with the banking/financial institutions, have to be first wondering whether they are acting as 'consumers' or 'retail investors'. The notion of 'investor' in the financial market must be thus accordingly defined in order to apply the proper law, and to ascertain whether that individual will enjoy of the higher level of protection, under the provisions of the consumer law, or no.

<sup>38</sup> See Art. 39 Consob Resolution No. 16190/07.

<sup>39</sup> See Art. 40 Consob Resolution No. 16190/07.

#### 4. The Consumer Code

The EU consumer protection legislation has been collected into the Italian legislative decree No. 206/2005, a consolidated act called "Consumers' Code". The Consumers' Code harmonizes and consolidates the laws of purchase and consumption, in accordance with the principles of the EU legislation, so as to ensure a high level of protection to consumer and users in all contractual processes they take part in. Following the Consumer Code, the Italian Government approved a package of measures, designed by the Minister of Economic Development, with benefits to 'citizens-consumers' exploiting the effects of the liberalization processes on the national market<sup>40</sup>.

Art. 2 of the Consumer Code lists all the fundamental rights of consumers<sup>41</sup>, while Arts. 40-43 grant the consumers special protection in consumer credit contracts and financial services<sup>42</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>43</sup>. Here, for example, when marketing at a distance involves 'consumers', due account must be taken and the relevant Consumer Code provisions apply. In particular, among those contained in the section regarding the distance marketing of investment services and activities and financial products, it is worth mentioning: a) Art. 67<sup>quater</sup>, which indicates the information on the service provider to be supplied to the consumer prior to the conclusion of the distance contract or offer. Such information concern (i) the identity and the main business of the supplier, the geographical address at which the supplier is established and any other geographical address relevant for the custom-

<sup>40</sup> Decree-Law No. 7 dated 31 January 2007, converted in Law No. 40, dated 2 April 2007.

<sup>41</sup> Pursuant to Art. 2 of the Consumer Code the fundamental rights of the consumers are: a) health protection; b) product and service safety; c) adequate information and correct advertising; c-bis) exercise of commercial practices according to principles of good faith, correctness and loyalty; d) education to consumption; e) correctness, transparency and equity in contractual relations; f) promotion and development of free associations between consumers and users; g) delivery of quality and efficient public services.

<sup>42</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 (Section IV-bis of Chapter I of Title III of Part III: Art. 67bis to 67vicies bis). The beneficiary (Art. 67ter lett.d) of this protective legislation is thus the "consumer".

<sup>43</sup> Pursuant to Art. 3, paragraph 1, sub-paragraph a), of the Consumer Code, "consumer" means "any natural person who is acting for purposes which are outside his trade, business or profession".

er's relations with the supplier, (ii) the identity of the representative of the supplier established in the consumer's Member State of residence, if any, and the geographical address relevant for the customer's relations with the representative, (iii) when the consumer's dealings are with any professional other than the supplier, the identity of this professional, the capacity in which he is acting vis-à-vis the consumer, and the geographical address relevant for the customer's relations with this professional, (iv) where the supplier is registered in a trade or similar public register, the trade register in which the supplier is entered and his registration number or an equivalent means of identification in that register, (v) where the supplier's activity is subject to an authorization scheme, the particulars of the relevant supervisory authority; b) Art. 67*sexies* lists the information to be provided in respect of the financial service offered, such as (i) a description of the main characteristics of the financial service, (ii) the total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it, (iii) where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the supplier's control and that historical performances are no indicators for future performances, (iv) notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him, (v) any limitations of the period for which the information provided is valid, (vi) the arrangements for payment and for performance, (vii) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged; c) Art. 67*sexies*, concerning the distance contract itself, requesting the provider to supply information on (i) the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay, as well as the consequences of non-exercise of that right, (ii) the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently, (iii) information on any rights the parties may have to terminate the contract early or unilat-

erally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases, (iv) practical instructions for exercising the right of withdrawal indicating, inter alia, the address to which the notification of a withdrawal should be sent, (v) the Member State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract, (vi) any contractual clause on law applicable to the distance contract and/or on competent Court, (vii) in which language, or languages, the contractual terms and conditions, and the prior information referred to in such article are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract; d) Art. 67*octies*, on the redress mechanism (*i.e.* information on whether or not there is an out-of-court complaint and redress procedure for the consumer that is party to the distance contract and, if so, the methods for having access to it, and the existence of guarantee funds or other compensation arrangements).

## IV. Consumer's Financial Definition

### A. Acting Outside Trade or Profession

#### 1. The Notion of 'Consumer'

As we have seen, the "client-consumer" that purchases a consumer credit contract is protected by special legislation provided either by the Consumer Code or by the Consolidated Laws. Both legislations, however, make the identification of the 'consumer' quite confusing<sup>44</sup>. As a matter of fact, the Consolidated Law on Banking contains general rules protecting the 'client' and some specific provisions on the 'consumer' applicable on the basis of the consumer's definition. Moreover, Art. 121 of the Consolidated Law on Banking<sup>45</sup> repeats at the first para-

<sup>44</sup> Amato, C., Perfumi, C. *Financial Investors as Consumers and their protection: Recent Italian legislation from a European perspective*. In Op. J. Vol. 3/2010, Paper n. 3. (2010), pp. 6-24.

<sup>45</sup> Art. 121, letter b), of the Consolidated Law on Banking defines consumer: "any natural person who is acting for purposes which are

graph the definition proposed by the Consumer Code in Art. 3, by which consumer is identified as a “*natural person who is acting for purposes which can be regarded as outside his trade or profession*”<sup>46</sup>.

At the same time, the fourth paragraph of the Art. 121 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 the Interministerial Committee for Credit and Savings (CICR)”. 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 of the limits imposed by the CICR, the contract may no longer be regulated by consumer rules. It means, although a consumer is a natural person who is acting for purposes that can be regarded as outside one’s trade or profession, under certain circumstances that ‘natural person’ cannot be qualified as consumer, and the proper consumer rules do not apply.

## 2. Extension to business-persons

Some Courts propounded the view for a time, that a person should be protected as a consumer, if the relevant transaction does not belong to his core business activities<sup>47</sup>. The Italian Supreme Court, however, rejected this variant establishing a narrow definition of consumer, ruling that consumer is that person who is acting also for related purposes to his business activity<sup>48</sup>.

The definition of consumer thus appears to distinguish between two different types of information: the first is that a consumer can only be a physical person; the second is that the purpose of the activity concerned must be non-professional, that means 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 pro-

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outside his own trade, business and profession”.

<sup>46</sup> The same definition is contained in the Art. 1469*bis* of the Italian Civil Code: “a consumer is any natural person who, in contracts covered by this provisions, is acting for purposes which are outside his trade, business or profession”. This interpretation run in accordance with the purpose of the Directive 93/13/CEE on Unfair Terms in Consumer Contracts that expressly applies only to the persons acting for purposes which are outside trade, business or profession.

<sup>47</sup> Tribunale Roma, 20 of October 1999, *Giustizia civile* 2000, I, 2117.

<sup>48</sup> Supreme Court, 25 July 2001, No. 10127, *I Contratti* 2002, 338.

tection to legal persons, in particular to corporate entities, paying particular attention to those having a not-for-profit purpose, 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. However, this interpretation has been rejected both by the Italian Constitutional Court<sup>50</sup> which clarified that an extension of protection to legal persons is not provided for in Italian constitutional law, and by the Italian Supreme Court<sup>51</sup>, who have invoked the need for coherence towards European policy.

Nevertheless, recently the United Sections of the Italian Supreme Court<sup>52</sup> has extended the scope of consumer protection provisions under the Consolidated Law on Finance issuing a decision concerning the obligation for banks and financial intermediaries, engaging in “door-to-door” selling of financial instruments. The Court provided a withdrawal right to be exercised by retail clients within seven days of the signing of the relevant contract. This decision is important because it extends such obligation, originally provided by Art. 30, paragraph 6, of the Consolidated Law on Finance only in relation to the placement of financial instruments and portfolio management contracts entered into outside the registered office/place of business, also to other types of financial services and in particular to all investment services performed by financial salesmen through home visit whereas that need for investor’s protection, resulting from the “surprise effect” and “traditionally” typical and inherent in the placing of financial instruments investment service, effectively occurs. The regulatory framework is provided by Art. 30, paragraph 6, of the Consolidated Law on Finance according to which: “The enforceability of contracts for placing of financial instruments or the portfolio management concluded outside the registered office shall be suspended for a period of seven days beginning on the date of subscription by the investor. Within that period the investor may notify his withdrawal from the contract

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<sup>49</sup> Ebers. M. *The Notion of “Consumer”*. Consumer Law. Compendium, Part III. (2007), p. 13.

<sup>50</sup> Corte Costituzionale, 22 November 2002, No. 469, *Giustizia civile* 2003, 290 *et seq.*

<sup>51</sup> Cass. 14 April 2000, n. 4843, in *Foro Italiano*, (2000), I, 3196; Cass. 25 July 2001, n. 10127, in *Giurisprudenza italiana*, (2002), 543.

<sup>52</sup> The United Sections of the Italian Supreme Court, sentence n. 13905 of 3 June 2013.

at no expense and without any compensation for the approved person or the authorized person. This possibility shall be mentioned in the forms given to the investor. The same rules shall apply to contract proposals effected outside the registered office”, and the following paragraph 7, under which “failure to indicate the right of withdrawal in forms shall result in the nullity of the related contracts, which may be enforced only by the customer”. Regarding the scope of those provisions, two opposite interpretative orientations, either in doctrine and in case law, were formed over time, necessarily leading to the referral of the matter from the Supreme Court’s First Civil Section, by order of April 2012, to the United Sections, in order to reconcile the contrast. In particular, the dispute was related to the concept of “contract for placing of financial instruments”. The first orientation - prevailing, also because supported by two recent legitimacy judgments<sup>53</sup> and reassured by the concerned supervisory authority<sup>54</sup> - was upholding the technical and restrictive interpretation of the contract for the investment service of “placing of financial instruments” (service defined by Art. 1, paragraph 5, Consolidated Law on Finance) concept, recalled in article 30, paragraph 6, Consolidated Law on Finance. Consequently, that provision was held to be unenforceable for the other investment services of a typical “executive” nature, as, dealing on own account, execution of orders on behalf of clients and reception and transmission of orders.

Otherwise stated, the prevailing interpretation, adhering to the wording of the provision, was restricting the scope of application to the sales of financial instruments and products carried out by the intermediary on the basis of a mandate of placing of financial instruments conferred by the issuer or the offeror, on the assumption that the reason of the *ius poenitendi*<sup>55</sup> was to be inferred from the door-to-door selling of a contract promoted by the intermediary, with possible “surprise effect” for the client. On the contrary, the second and minority orientation, assuming that the Legislator had wanted to convey a

“nontechnical” meaning to the term “placing”, was upholding an application of the *ius poenitendi* extended also to investment services different from that of placing of financial instruments and portfolio management explicitly recalled by the concerned provision. In this regard, the minority orientation was giving a broad interpretation to the concept of “placing of financial instruments” provided by Art. 30, paragraph 6, Consolidated Law on Finance, thus supporting the applicability of that provision, in particular, also to the investment services of dealing on own account, execution of orders on behalf of clients and reception and transmission of orders, when promoted door-to-door by the intermediary.

In this scenario, the United Sections of the Supreme Court, diverging from the recalled recent legitimacy judgments and also disregarding the Consob, have joined the minority interpretation, stating the principle according to which the *ius poenitendi* granted to the investor by Art. 30, paragraph 6, Consolidated Law on Finance, and the prescription of nullity of the contracts in which that right has not been provided (as per paragraph 7) should be applied not only when the door-to-door selling of financial instruments by the intermediary has taken place within a placement carried out by the intermediary itself in favor of the issuer or offeror of such financial instruments, but also when the same door-to-door selling has taken place in the execution of a different investment service, where the same investor’s need of protection occurs.

The United Sections ruling will be influencing the decisions that have to be taken by national courts in cases relating to the provision of any sort of investment service having been accompanied by promotional activities by the intermediary (in particular, it has to be emphasized, would fall within this category also the combination of investment advice service with a typically “executive” investment service). Moreover, the principle expressed in the judgment in question would apply not only to the retail clients but also in respect of certain corporate investors and local entities.

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<sup>53</sup> See Supreme Court of Cassation, February 14, 2012, no. 2065, and March 22, 2012, no. 4564.

<sup>54</sup> See Consob Communication no. DIN/12030993 of April 19, 2012.

<sup>55</sup> *Jus Poenitendi* is the right of rescission or cancellation. The Consumer is the sole party entitled to cancel any order under a Contract in accordance with the Consumer Code, Art. 64 *et seq.* and obtain repayment of the sums paid at the moment of purchase. A Professional is not entitled to any such cancellation right.



## V. Remedies

### A. Alternative Dispute Resolution(ADR) and Access to Justice in the Italian Financial Sector

The European legislation on consumer credit and distance contracts for financial services as well as the compelling need of protection of investors against unfair terms in consumer contracts and against unlawful conducts perpetrated by financial intermediaries, have recently led the Italian Government to introduce either alternative, fast and cheap methods of dispute resolution as out-of-court dispute resolution processes or new remedies to access to justice<sup>56</sup>.

The Consolidated Law on Finance and the Consob lack, in fact, to state clearly what remedies are available to the investors in case the investment firm should breach any of its duties<sup>57</sup>. This omission explains why Italian Lower Courts have recognized different remedies in case of individual lawsuits: (a) reliance damages deriving from pre-contractual liability<sup>58</sup>; (b) expectation damages deriving from breach of the financial contract<sup>59</sup>; (c) invalidity of the financial contract absent the required written form or due to the violation of mandatory rules<sup>60</sup>.

In order to avoid this fragmentation, and also in compliance with the guidelines issued by the European legislation, the Italian Government updated the legislation for protecting savings and regulating financial markets enacting the Law no. 262/2005. Accordingly, it introduced two difference remedies available to investors: i) the guarantee indemnification fund within the settlement procedure

<sup>56</sup> Most of the Italian contemporary legislation on ADR – except for labor mediation and judicial conciliation in civil litigation – has its origin in Institutions of the European Community. One of the main document in this path may be identified in the “Commission Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market” of 16 November, 1993. This document conceived with the official purpose “to enable all the Community's consumers to gain access to justice and to deal with cross-border disputes” focused on both in-court and out-of-court dispute resolution procedures.

<sup>57</sup> Amato, C. *Financial Investors as Consumers in a European Perspective* (2012), p. 8.

<sup>58</sup> See Tribunale Udine, decision No. 376 of 5 March 2010.

<sup>59</sup> See Corte di Appello di Torino, decision No. 615 of 10 April 2012.

<sup>60</sup> See Tribunale Ravenna, decision 29 May 2010, available at: <http://www.unijuris.it/sites/default/files/sentenze/Tribunale%20di%20Ravenna%2029%20maggio%202010.pdf>

and the Conciliation and Arbitration Chamber, and the ii) no-fault indemnification fund<sup>61</sup>.

### B. Out-of-Court Remedies

#### 1. *The Guarantee Indemnification Fund within the Settlement Procedure and the Conciliation and Arbitration Chamber*

The Conciliation and Arbitration Chamber housed on Consob premises was founded on the provisions of the Italian Investment Protection Law (no. 262/2005), enacted by Legislative Decree 179/2007, and later governed in organizational and procedures terms first by Consob Regulation No. 16763 of 29th December 2008 (expired on 1st August 2012) and then by Consob Regulation No. 18275 of 18<sup>th</sup> July 2012<sup>62</sup>. With Resolution No. 18310 of 5 September 2012, the Commission approved new rules for the organization and operation of the Conciliation and Arbitration Chamber at the Consob. The Chamber<sup>63</sup> is the organization responsible for the administration of conciliation and arbitration proceedings involving disputes arising between investors<sup>64</sup> and financial inter-

<sup>61</sup> On 4<sup>th</sup> September 2012, the Bank of Italy published a consultation paper containing new rules on prudential supervision and risk containment for banks, which include, *inter alia*: (i) the establishment of an internal alert procedure; (ii) clearer provisions on the role of the chief risk officer; and (iii) the assignment to the banks' board of tasks originally belonging to the surveillance committee established pursuant to Legislative Decree 8<sup>th</sup> June 2001, No. 231. As result of the public consultation, some additional chapters (namely, nos. 7 (“Internal controls system”), 8 (“Informative system”) and 9 (“Business continuity”)) have been introduced in the Bank of Italy Circular 27<sup>th</sup> December 2006, No. 263 (“New Regulations for the Prudential Supervision of Banks on Highly Significant Transactions”), laying down new prudential supervisory instructions for Banks (See Bank of Italy on 2 July 2013 with the 15<sup>th</sup> amendment of Circular No. 263 of 27<sup>th</sup> December 2006).

<sup>62</sup> The Resolution and annexed regulation were published in the Official Gazette No. 176 of 30 July 2012 and in CONSOB's fortnightly bulletin No. 7, 2<sup>nd</sup> July 2012.

<sup>63</sup> Pursuant to the opinion of the Council of State of 20 October 2011, the Chamber without subjectivity, is “classified [...] as a technical body, instrumental to Consob but not separate to it” and whose functions, provided autonomously, in any case belong to Consob, which is the final arbiter of the related effects. The regulatory changes introduced in the more general system of civil mediation aimed at conciliation pursuant to Italian Legislative Decree No. 28 of 4 March 2010, the related enactment decrees of the Ministry of Justice, and the experience accrued in the overall Chamber activities derive from Consob.

<sup>64</sup> Under Art. 1, lett. b), of the Consob Resolution No. 16763, of 29 December 2008 (as amended by Consob with Resolution no. 18275 of 18 July 2012), “investors” shall mean investors other than the

mediaries<sup>65</sup> regarding compliance with disclosure obligations, correctness and transparency as envisaged in the contractual relations with customers and concerning investment or asset management services. It is composed of a President and two members, appointed by the Consob, chosen from amongst Consob employees who find themselves in a senior management position.

#### **i. Out-of-Court Settlement**

A petition to initiate the conciliation procedure may be presented exclusively by the investor when, in relation to the dispute no other conciliation procedures have been initiated, including by the initiative of the intermediary the investor used. In addition, a complaint has to be presented to the intermediary to which a specific response was provided, and a period of ninety days or any shorter period set by the intermediary for handling of the complaint has elapsed without the investor having received a response. Once the petition has been submitted, the Chamber appoints without delay a conciliator from among those listed. The conciliator shall conduct the meetings without procedural formalities and without the obligation to take minutes, in the manner in which he considers most appropriate given the circumstances of the case, the willingness of the parties and the necessity of reaching a solution to the dispute quickly. He also may hear the parties separately or conduct a cross-examination in order to better clarify the dispute and identify the points on which there is agreement, and may order the intervention of third parties, provided the parties agree to this and to covering the relative expenses<sup>66</sup>.

If conciliation proves successful, the content of the agreement shall be drafted in the form of a special report signed by the conciliator and the parties involved. Should the parties fail to immediately implement the conciliatory measures, subject to confirmation of its formal con-

sistency, the report shall be approved by decree of the President of the Court with jurisdiction over the district in which conciliation proceedings were held, and shall constitute a writ of execution for enforced expropriation, enforcement of specific performance and for registration as mortgage by order of the court. By contrast, where no agreement is reached and in the event of non-conciliation, at the joint request of all parties the conciliator shall formulate a proposal to which each party shall indicate its final position (*i.e.* the terms under which the party is willing to conciliate). The conciliator shall note these final positions in a special “conciliation failed” report.

#### **ii. Arbitration**

In case of breach of disclosure, required by Art. 21 of the Consolidated Law on Financial, investors may also ask for an arbitration redress procedure held by the Consob. In this regard, the parties may submit a joint written application to start an arbitration proceeding, which will be administrated by the Chamber under the provisions of the Consolidate Law on Finance and Consob enactment provisions. Disputes shall be settled by a single arbitrator, selected from among entries on the list held by the Chamber, unless the parties decide to refer the dispute to a panel of three arbitrators, with proceedings as indicated in Art. 810, subsection 1 of the Italian Code of Civil Procedure<sup>67</sup>. During their first meeting, the arbitrators shall ask the parties to deposit a sum as payment on account of arbitrator fees and defense costs to be incurred

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counterparties defined under Art. 6, paragraph 2<sup>quater</sup> d) and the professional clients under paragraphs 2<sup>quinqutes</sup> and 2<sup>sexies</sup> of Consolidated Law on Finance as amended.

<sup>65</sup> Under Art. 1, lett. c), of the Consob Resolution No. 16763, of 29 December 2008 (as amended by Consob with Resolution no. 18275 of 18 July 2012), “Intermediaries” shall mean the persons entitled pursuant to Art. 1, paragraph 1, let. r), of Consolidate Law on Finance, as amended, and the company Poste Italiane - Divisione Servizi di Banco Posta - authorized pursuant to Art. 2 of Italian Presidential Decree No. 144 of 14 March 2001.

<sup>66</sup> See Art. 12 of the Consob Resolution No. 16763 of 29 December 2008, as amended.

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<sup>67</sup> Pursuant to Art. 810 (Appointment of the Arbitrators) of the Italian Code of Civil Procedure: “Where, in accordance with the provisions of the submission to arbitration or of the arbitration clause, the arbitrators are to be appointed by the parties, each party, by means of a bailiff’s notification may inform the other party of its appointment of an arbitrator or arbitrators and request said other party to name its own arbitrators. The party so requested shall, within twenty days, serve notice of the personal data regarding the arbitrator or arbitrators appointed by it. Failing this, the party which has made the request may petition the President of the Court in whose district the arbitration has its seat, to make the appointment. If the parties have not yet determined the seat of arbitration, the petition is presented to the President of the Court in the place where the submission to arbitration or the contract to which the arbitration clause refers has been executed or, if such place is abroad, to the President of the Court of Rome. The President, having heard the other party where necessary, shall issue his order against which there shall be no recourse. The same provision is applied where the submission to arbitration or the arbitration clause has entrusted the appointment of one or more arbitrators to the judicial authority or where, if entrusted to a third party, that third party has failed to act”.

by the parties in order to obtain the award, deciding also the criteria for distribution of costs between the parties. The payment on account shall be determined by the Chamber on recommendation from the arbitrators.

The arbitrators shall pronounce the award within one hundred and twenty days of acceptance of the appointment. However, this deadline may be extended prior to its expiry for a period not exceeding one hundred and twenty days by the Chamber, following justified application from one of the parties or arbitrators, after consulting the other parties involved, or the by joint written declarations of the parties. The investor, however, can also opt for a fast-track arbitration procedure, which will be based solely on evidence submitted in advance by the parties with the application for arbitration and it more fast than the “full” arbitration. The option of recourse to fast-track arbitration must be expressly indicated in the arbitration agreement, and the application cannot be accepted if as part of the same dispute no complaint was issued to the intermediary to which specific response was provided, or if ninety days have lapsed, or shorter term as established by the intermediary for handling of the complaint, in which time the investor has received no response.

The fast-track arbitration shall be settled before a single arbitrator appointed by a joint application by the parties among entries on the list held by the Chamber, and has the aim to compensate the equity damages suffered by the investor as a result of intermediary default in terms of disclosure, correctness and transparency obligations envisaged in contractual relations with investors. The equity compensation will be determinate on the base of the documentary evidence provided, and consists of a lump sum appropriate to compensate the equity damages suffered as an immediate and direct consequence of default by the intermediary. This is an alternative redress. Should the claimant be unsatisfied with the arbitration decision, he, however, may file claim before the ordinary courts that will award all damages suffered by investors in addition to the equity damages eventually recognized.

## 2. No-Fault Indemnification Fund

The second remedy has been introduced by the Law No. 23/2006, then implemented by the Law No. 179/2007, which has established new procedures for the conciliation and arbitration system of compensation and guarantee fund for investors. This provision consists of a no-fault

indemnification fund based on the unlawful brokerage activities. To have access to this “fund” investors have to demonstrate their economic loss and provide evidence of the breach of broker’s duties as stated in Part II of the Consolidated Law on Finance.

This means that the broker’s activities are already judged as unlawful by an ordinary court or arbitrator, and the final judgment of the court or the arbitration award is not more subjected to appeal. The Fund, managed by the Consob, is exclusively created by collecting half of the total amount deriving from criminal fines eventually paid by financial brokers.

## 3. Mediation in consumer and financial litigation

The mediation proceeding provided for by the Legislative Decree No. 28/2010 (Mediation Law)<sup>68</sup> which implemented the Mediation Directive (2008/52/EC)<sup>69</sup>, and it is administered by a qualified mediation body, registered on a list kept by the Italian Ministry of Justice. Both the mediation bodies and the mediators themselves must, furthermore, meet some requirements in order to be qualified. As for the mediators, they must hold a university degree (not necessarily in law), or at least be enrolled in a professional association; moreover, they must have a certificate of good standing issued by their professional association and have attended a specific training on mediation theory and techniques<sup>70</sup>. The Mediation Law provides

<sup>68</sup> The Legislative Decree No. 28/2010 has been amended by the Law 9<sup>th</sup> August 2013, No. 98, converting the Law-Decree 21<sup>st</sup> June 2013, No. 69 (the so-called “Decreto del Fare”). The main changes concern, *inter alia*.; (i) the introduction (based on decision no. 13905 of the Joint Chambers of the Supreme Court of Cassation of 3<sup>rd</sup> June 2013) in Section 30, paragraph 6, of the Consolidated Law on Finance – which provides a withdrawal right for investors (the so-called “*jus poenitendi*”) in case of door-to-door selling - of a new period according to which the mentioned regime is applicable, as from 1<sup>st</sup> September 2013, not only to the services of placement of financial instruments and portfolio management, but also to the dealing for own account (pursuant to Section 1, paragraph 5, lett. a), of the Consolidated Law on Finance); (ii) the reintroduction, as from 20<sup>th</sup> September 2013, of the mandatory mediation in civil and commercial disputes (including those related to banking, financial and insurance contracts). As a result, the parties to a dispute must resort (assisted by a lawyer) to a mediator in an attempt to reach an out-of-court settlement.

<sup>69</sup> The European Council has in late April 2013 adopted two key legislative measures regarding dispute resolution. This includes a Directive on alternative dispute resolution and a Regulation on online dispute resolution. The aim is to offer consumers fast and cost-effective means to resolve disputes with businesses.

<sup>70</sup> See Art. 4 Ministerial Decree No. 180/2010 (as amended by the

three forms of mediation: a) voluntary mediation, spontaneously decide to avail themselves of mediation services; b) delegated mediation (whenever deemed necessary, the judge may refer the parties to mediation); and c) mandatory mediation. In this latter case, a large range of disputes<sup>71</sup> cannot be brought before civil courts unless the plaintiff had first attempted the mediation procedure.

The Italian Constitutional Court was called several times to judge on compliance of mandatory mediation attempts with Arts. 24, 25 and 111 of the Italian Constitution, according to which anybody has the right to access State justice. In at least three consistent judgments<sup>72</sup> the Court, considering that after mandatory mediation attempt parties are allowed to refer their dispute to the State judge, affirmed such compliance. Despite this, also a cause of many criticisms and protests, the law was challenged on various grounds before the Italian Constitutional Court<sup>73</sup>.

Nearly six months after its entry into force, the Italian Constitutional Court made invalid Art. 5 of the Mediation Law, finding it in breach of Art. 76 of the Italian Constitution. Relying on technical grounds, the Court found that by enacting the law, the government had exceeded the scope of both the Mediation Directive and Law No. 69/2009, which empowered the government to adopt a legislative decree introducing administered mediation procedures. The overall rationale embodied in the preamble to the directive was identified as follows: "Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements." The Mediation Directive, thus, defines 'mediation' as

"extrajudicial resolution of disputes", whereas the Italian government had conceived in mediation as a compulsory preliminary step of judicial litigation. Further confirmation of this misunderstanding is to be found in Art. 60 of Law No. 69/2009, which officially recognized mediation in civil and commercial disputes and delegated power to the Italian government to issue a Legislative Decree on mediation to implement the provisions of Mediation Directive. For this reason, the Italian Constitutional Court ruled that compulsory mediation was implemented in Italy in order to reduce the congestion of tribunals, rather than to create an alternative (*i.e.* more rapid and less expensive) form of dispute resolution and that mediation was pushed beyond its natural scope in an attempt to achieve economies in the administration of justice. At the same time, the Constitutional Court decision represents a setback for the promotion of alternative dispute resolution, which in a litigation-friendly country such as Italy would actually benefit individuals and businesses.

Nevertheless, on 15 June 2013, the Italian government issued a Law Decree<sup>74</sup> (so called "Decreto del Fare"), then converted in Law No. 98, on 9 August 2013, providing urgent measures that also involve important changes to Italian litigation system. It resurrected the mediation provision by announcing a new mandatory mediation for a wide range of classes of disputes, including banking and financial agreements.

#### *4. Conciliation in consumer and financial litigation*

The Consob conciliation procedure is modelled upon state-sponsored out-of-court commercial mediation (Legislative Decree No. 3/2005). Benefits of the procedure include the judicial enforceability of the settlement agreement and exemption from stamp duty. Confidentiality is strictly protected, and the mediator can meet the parties separately. If the parties agree in advance, the mediator can make a final settlement proposal on which both the investor and the financial intermediary have to take a stance, also stating under what conditions they could sign an agreement. This last proposal, together with the

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Ministerial Decree No. 145/2011) which entrusts the examination of applicants' professionalism and efficiency to the person in charge.

<sup>71</sup> Those matters include: i) banking and financial agreements; ii) rights *in rem*; iii) division of assets; iv) inheritance; v) family estates; vi) easements of real property or going concerns; vii) gratuitous loans for use; viii) medical liability; ix) defamation in the press and other media; x) insurance.

<sup>72</sup> See Italian Constitutional Court, decisions No. 82/1992, No. 376/2000 and No. 403/2007.

<sup>73</sup> The case was heard before the Italian Constitutional Court on 23<sup>rd</sup> October 2012, and on 6<sup>th</sup> December 2012 the decision was issued.

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<sup>74</sup> A decree-law is issued in special and urgent cases by the Government. It must be presented on the same day to Parliament for conversion into law, if it is not converted within sixty days of its publication it loses validity retroactively, but the Parliament may regulate by means of law any relation that have arisen by virtue of unconverted decree.

parties' positions, is recorded in the minutes, and could be taken subsequently into account by a judge in order to rule on the costs of judgment.

### 5. *Banking and Financial Arbitrator*

In the banking sector, a different - albeit similar in several respects - procedure has been introduced by article 128*bis* of the Consolidated Law on Banking, introduced in 2005 following the financial scandals of Cirio, Parmalat and the Argentinean Bonds, and then amended by the Legislative Decree No. 28 of 4 March 2010, and subsequently by the Law 9<sup>th</sup> August 2013, No. 98.

Article 128*bis* provides for a special alternative dispute resolution procedure (the Arbitro Bancario Finanziario, or ABF) applicable to all disputes arising between banks (and financial intermediaries) and clients in the context of banking and financial services/products (with the exclusion of investment services). The procedure applies to all bank-client litigation whether or not the client qualifies as a 'consumer'; only clients that are financial intermediaries themselves are excluded. The procedure applies to all disputes relating to rights and obligations regardless of the monetary value of the underlying contractual relationship. However, if the litigated matter includes a request for money, the procedure only applies if the requested sum does not exceed Euro 100,000.

Access to the procedure is voluntary for clients but mandatory for intermediaries. The procedure is managed by an Arbitration Tribunal which comprises five arbitrators appointed as follows: one each by intermediaries and consumers' associations respectively, and three (including the President) by the Bank of Italy. The procedure can only be initiated by clients, and the action starts with a complaint and then follows a typical litigation path. The possible outcomes of the procedure, however, are peculiar in several respects. The litigated matter is limited to the claims brought about by the client; the intermediary can defend itself but, it seems, cannot advance counterclaims. If the tribunal upholds the client's complaint, it orders the intermediary to comply with its decision within a fixed date.

The ABF's decisions, however, are not binding as those of a court judge, and therefore if the broker fails to comply with the above-mentioned decisions, this bad behavior is made public both either through the ABF's website or through two national newspapers, at the inter-

mediary's own expense. The law does not expressly provide for any appeal against the ABF's decisions. It does provide, however, that the decision does not prevent either party from returning to court or any other applicable dispute resolution system. This, together with the general, constitutionally granted right to justice, seems to imply that the intermediaries may request the redress of damages caused by the publication of their non-compliance to a decision if they can make a successful case that it was wrong on the merits.

### 6. *The Banking and Financial Ombudsman*

The Banking and Financial Ombudsman was set up in 1993 under an interbank agreement of 1992. It is an alternative Court, composed by five members, where the customer can try to resolve disputes with banks and financial intermediaries for free. The Ombudsman's powers are limited to matters relating to operations and investment services as well as other types of operations not covered by Title VI of the Consolidated Law on Banking (*i.e.* consumer credit and payment services), and its value jurisdiction is up to € 100,000.

To start the procedure, the consumer has to submit a written application to the ombudsman's offices. The application must be signed by the consumer who may, if he so wishes, be assisted by a lawyer, an accountant or an adviser. Before lodging a complaint with the Ombudsman, the consumer must first lodge a complaint with the bank concerned. However, if this procedure has not been followed, the Ombudsman's office will forward the complaint to the bank which has 60 days (90 in the event of financial transactions) to respond. The Ombudsman has unofficial investigatory powers so it draws up an adversarial report with the bank and obtains all the documentation considered necessary. After evaluated all documents the Ombudsman issues a reasoned decision which may concern only compensation for damages sustained by the applicant. The decision is not binding between the parties, who are however free, if unsatisfied, to apply before the ordinary courts.

The arrangements for financial out-of-court redress, however, vary from country to country - and there are some significant gaps. Most other member states still have separate ombudsmen schemes for the various different areas of financial services. In Belgium, for example, there are two banking ombudsmen, because they have

a post-office bank as well as ordinary banks. But the most complicated is Germany, where they have four different types of banks with redress schemes at federal and regional levels. Altogether, they have 14 different banking ombudsman schemes. Although complaint-handling is generally quite well-developed for banking – it's often less so for insurance and investment. So it's in those sectors that there are still quite a lot of gaps.

### C. Court Remedies

The Italian legal system provides not only individual actions in order to ascertain and block the unlawful broker's activities, but also different kinds of collective remedies with the aim to handle those claims that concern a plurality of individuals. Further to the cumulative action, where multiple plaintiffs may grant the same lawyer proxies to act on their behalf against the same defendant in the same proceedings, the Consumer Code sets forth rules for both an injunctive Class Action and for a Class Action for monetary recovery. As a matter of law, pursuant to Art. 140 of the Consumer Code, consumer associations can bring representative action for injunctive relief in favor of all consumers (not only association members), asking for the cessation of unlawful conduct (the so called "Representative Action"); moreover, pursuant to Art. 140*bis* of the Consumer Code, each member of the same category may start a Class Action seeking compensation for damages and/or restitution of undue payments.

#### 1. *Collective Injunctions*

Highly recommended by the European legislation<sup>75</sup>, collective injunctions represent an efficient alternative redress to ordinary individual claims. The Directive on Injunctions (Directive No. 2009/22/EC) ensures the defense of the collective interests of consumers in the internal market by providing means to bring action for the cessation of infringements of consumer rights<sup>76</sup>. The consumers

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<sup>75</sup> See Directive on Injunctions 2009/22/EC.

<sup>76</sup> For the purposes of the Directive 2009/22/EC an infringement means any act contrary to the Directives listed in Annex I, as transposed into the internal legal order of the Member States which harms the collective interests. The Annex I includes the Directive on distance marketing of financial services, but any other violations of financial services legislation are not mentioned.

(that is, consumer representative body, excluding individual claimants) can thus claim interest damaged by unlawful practices carried out by professionals infringing European law, asking for the cessation or prohibiting defendants from any infringement, requiring accordingly adequate measures to eliminate the effects caused by that infringement as well as compensation for damages and loss suffered.

By contrast, the Italian financial legislation grants standing to consumer associations representing collective consumer interests against any violations of investment services activities. So, for instance, Art. 32*bis* of the Consolidated Law on Finance refers back to Arts. 139 and 140 of the Italian Consumer Code, and both provisions regulate collective injunctions issued as redress for damages.

#### i. **Area of application**

Consumer associations (officially registered with the Ministry of the Economic Development) may initiate representative actions in order to stop behavior prejudicial to the interests of the consumers and users and/or to adopt the measures aimed at amending and/or removing the harmful effect. Pursuant to Art. 37 of the Consumer Code, a representative action may be further started in order to obtain the cessation of the use of unfair terms and conditions in consumer contracts causing a significant imbalance in the parties' rights and obligations, to the disadvantage of consumers. The procedure starts with a formal warning notice, sent by the consumer associations, in which has given a term of at least 15 days to cease the challenged behavior. The procedure is the one of an ordinary civil trial; accordingly, class actions for injunctive relief are tried and decided by a single Judge. The extension of the class is defined by the plaintiff claim and the Judge can also order interim and urgency measures anticipating the decision. It worth to notice that the only reliefs available in the class actions are injunctive reliefs, whilst monetary compensation is not possible. The decision has effect on all the class members.

#### 2. *Class Actions*

The class action came into force since the beginning of 2010. This new legal institute allows each consumer to act for the protection of a determined class of persons' rights, also through consumer associations. Art. 49 of

Law no. 99/2009 amending article 140*bis* of Consumers' Code<sup>77</sup>, regulates the class action. The same article also provides that the abovementioned action can be applied only with reference to the offenses completed after the date of entry into force of Law No. 99/2009 (therefore, after 15 August 2009). 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. It had been argued whether investors might be included under the definition of 'consumer' (as intended by Art. 3 of the Consumer Code), and thus under the range of subjective application of class actions, or no. 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.

#### **i. Area of Application**

Pursuant to Art. 140*bis* of the Consumer Code, the Class Action aims to protect: a) the contractual rights of a plurality of consumers and users who find themselves in an identical situation vis-à-vis the same defendant, including the rights related to agreements entered into through standard forms and conditions; b) the identical rights that end-users of a certain product have vis-à-vis the related manufacturer, even without any direct contractual relationship (such as product liability); and c) the identical rights to compensation for the prejudice suffered by the same consumers and users as a consequence of unfair business practices or unfair competition".

It is argued whether the extension of the Class Action is applicable to the financial products, and therefore to the investors. As a matter of law, the investors have their own regulation (the Consolidated Law on Finance), and there is no sense to provide this 'category' of another redress. However, Art. 32*bis* of the Consolidated Law on Finance 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 and ss. of the Consolidated Law on Finance, thus remaining outside the coverage range of class actions

<sup>77</sup> Art. 140*bis* of the Italian Consumer Code was introduced by Art. 2, paragraph 446, of Law No. 244/2007.

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<sup>78</sup>.

However, since the provisions concerning the distance marketing of consumer financial services has been introduced into the Consumer Code, accordingly the financial services providing the distance selling methods should implicitly be included within the area of application of Art. 140*bis* of Consumer Code, and a Class Actions concerning that services can be thus brought.

#### **ii. The Procedure**

Pursuant to Art. 140*bis* of the Consumer Code, all class members may start a Class Action acting as a class representative, also through consumers' associations or committees. The claim is put forward with a writ of summons, notified also to the office of the Public Prosecutor at the Court in charge, who may only intervene for the judgment on admissibility. Upon first hearing, the Court shall decide by order on the admissibility of the claim; however, it may suspend judgment when there is an ongoing inquest before an independent Authority on the facts which are relevant to the decision, or a trial before the administrative judge. The claim is declared inadmissible if clearly unfounded or there is a conflict of interest, if the judge does not recognize the identity of the individual rights, and when the proposing party seems incapable of adequately protecting the class's interests<sup>79</sup>. If instead the claim is declared admissible, the Court sets the terms and methods of the most appropriate form of public notice in the order with which it admits the action, so that those belonging to the class can join promptly. By the same order the Court: a) determine the characteristics of the individual rights involved in the judgment, specifying the criteria according to which individuals seeking to join are included in the class or must be regarded as excluded from the lawsuit; b) establish a peremptory time limit that does not exceed one hundred and twenty days from the deadline for public notification.

<sup>78</sup> Amato, C., Perfumi, C. *Financial Investors as Consumers and their protection: Recent Italian legislation from a European perspective*. In Op. J. Vol. 3/2010, Paper n. 3. (2010), p. 10.

<sup>79</sup> See Tribunale of Torino, 27 May 2010, ord. - Est. Panzani - R. rappresentato da Codacons c. Intesa Sanpaolo s.p.a.

By this date, the adhesion contracts shall be lodged at the registry, even by the claimant<sup>80</sup>.

The order with which the Court admits the action also determines the course of the procedure. In the same or subsequent order, which can be modified or revoked at any time, the Court may prescribe measures aimed at preventing undue repetitions or complications in the presentation of evidence or arguments. If the Court grants the claim, it shall issue a verdict by which the final amounts due to those who have joined the act shall be paid, or shall establish the homogeneous calculation criterion to pay these sums. As far as the kind of recoverable damages possible, the Italian legal system aims at consenting the full recovery of all the suffered damages, both economical (pecuniary loss, out-of-pocket expenses, loss of profit) and non-economical. Under the Italian law, non-economical damages include: (a) biological damages (which represent all damages to the psycho-physical integrity of a person, directly relating to the health of such person and as such can be proven by way of medical assessments), (b) moral damages (pain and suffering), and (c) the so-called “existential damages” (any event which impacts on the normal life or on the relationships of a person and which negatively affects the existence of such person in a consistent manner). Moral and existential damages are recoverable only in cases provided for by the law, mainly in cases of criminal offences (Art. 2059 of the Italian Civil Code) or breach of human rights recognized by the Italian Constitution. All damages suffered, however, have to be a direct consequence of the defendant’s behavior, so ‘indirect’ damages are not recoverable. The decision becomes enforceable one hundred and eighty days from publication, and the ruling establishes that the trial is also binding upon the members. After the decision no further class action can be put forward for the same facts and against the same company after the closing date for joining assigned by the judge, but single action of those individuals who do not join collective action can be brought without any prejudice.

#### D. A way forward for the Italian financial framework in EU?

It seems that in the Italian system we find a growing

need for protection of weaker parties, also as regards financial contracts. 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 behavior 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” successively confirmed by a Parliamentary Act (Law n° 126/2008), 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. 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. Finally, recent legislative and regulatory provisions 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 (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).

All these provisions have led the Italian financial framework to an efficient and well-regulated system, providing consumers with five key elements: (i) Transparency, by providing full, plain, adequate and comparable (and understandable) information about the prices, terms and conditions (and inherent risks) of financial products and services; (ii) Choice, by ensuring fair, non-coercive and reasonable practices in the selling and advertising of financial products and services, and collection of payments; (iii) Redress, by providing inexpensive and speedy mechanisms to address complaints and resolve disputes; (iv) Privacy, by ensuring protection over third-party access to personal financial information; and (v) Trust, by ensuring that financial firms act professionally and deliver what they promise, (vi) Financial education, by providing consumers the knowledge needed to an appropriate use of financial products and services; (vi) ADR, providing several out-of-court procedures.

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<sup>80</sup> See Art. 140bis, paragraph 9, Consumer Code.



## VI. Final Remarks

The global financial crisis and its origins revealed some fundamental flaws in financial consumer protection frameworks. One of the main reasons for the negative development of the financial services market was the lack of consumer confidence. In turn the main reason for lack of consumer confidence in the financial service scenario was a lack of mechanisms for protection of consumer rights. Based on an assessment of the current situation, this paper has shown alternative ways and mechanisms for the protection of consumer provisions, with respect to financial services in the bank sector. In analyzing the current situation and listing a set of effective mechanisms for protection of financial consumers, this paper has also discussed the main impact on the Italian system of the European legislation concerning financial markets. In particular, such impact has consisted in rendering financial institutions more transparent and therefore more trustworthy, and in improving the relationship between public institutions and citizens.

However, it is argued that the Italian's mechanism for financial consumer protection cannot be the function of one actor alone, it must be based on the common development of multiple market actors. Different actors, thus, must work together in establishing a framework for the protection of financial consumers' rights, build a system that will be effective in the long run, restore

consumers' confidence in the financial sector, improve its public reputation, and finally, to shift the development model of the insurance sector from one of expansion to one of intensification. The courts will also play a very significant role since they will be called to decide, in case of litigation, whether the granting of credit was responsible or not. The supervisory authorities, also, will play a crucial part concerning the supervision of compliance with these provisions and the imposition of sanctions in case of infringements of the national provisions. In this regard, Governments, financial institutions and agencies of Member States, should call for the establishment of an unified European agency or advisor board with the aims to require to financial institutions of Member States to regularly demonstrate, through third-party testing of random samples of their customers, that a good proportion of their customers know, at the time they can use this knowledge, the key pertinent "costs, benefits, and risks" of the products they have bought. And, demonstrating sufficient customer comprehension could be a precondition financial agencies must meet before enforcing a term or charging a fee or firms could be sanctioned (or rewarded) for demonstrating low (or high) comprehension levels.

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