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10. MiFID I & MiFID II and private law: towards a European principle of civil liability?

Marnix W. Wallinga

1 INTRODUCTION

The MiFID I and MiFID II conduct of business rules, which regulate the provision of investment services such as investment advice and asset management,[1] aim at realising policy goals, such as a high level of investor protection and the integrity and well-functioning of the financial markets.[2] The conduct of business rules regimes contained in MiFID I and MiFID II include duties of investment firms to avoid conflicts of interests, to provide adequate risk information disclosure and to ensure the suitability of recommended investments for individual investors. Many of these duties have originally been formulated by civil courts when adjudicating individual disputes between investment firms and retail investors, often revolving around claims for compensation of investment losses. The MiFID I and MiFID II information disclosure and suitability rules, for instance, are similar in substance to duties of care which have developed within private laws of Member States across the EU.[3] However, through their inclusion into MiFID I and MiFID II, these duties have been translated into

[1] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [2004] OJ L145/1 (MiFID I); Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L173/349 (MiFID II).

[2] This fits into the development of what has been described by Micklitz as 'European regulatory private law', see H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) YEL 3, at 29; H.-W. Micklitz, 'The Concept of Competitive Contract Law' (2005) PSILR 549, at 554–555.

[3] See in detail M.W. Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses. A Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law* (Springer 2020, forthcoming), §§5.2–5.4.

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regulatory financial supervision standards which set standards of behaviour for firms when providing investment services.[4]

This development gives rise to the question about the role of civil liability for breach of the MiFID I and MiFID II conduct of business rules as a regulatory device for ensuring investor protection. The potential of private enforcement of the conduct of business rules by national civil courts has not been fully explored. Yet, combining the existing public supervision and administrative enforcement regime with civil liability of firms for losses suffered by investors has the potential to increase investor protection in the EU.[5]

Scholarship dealing with the relationship between MiFID I and MiFID II and private law often focuses on the interaction between the conduct of business rules contained therein and traditional private law duties of care.[6] The potential effect of the conduct of business rules, and EU financial market regulation more generally, however, extends well beyond the question of whether breach of such rules by an investment firm constitutes breach of a private law duty of care and, consequently, gives rise to breach of contract or the commission of a tort. The wider category of private law norms which the MiFID I and MiFID II conduct of business rules can impact on includes, in addition to breach of a duty of care, the issues of causation, attributability of damage, the requirement of relativity (or proximity), contributory negligence and limitation (or prescription). These well-established private law norms are used in national legal systems to establish whether and, if so, to what extent an investment firm can be held liable. MiFID I and MiFID II could have a significant effect on such norms.[7]

This chapter aims to contribute to our understanding of the relationship between the MiFID I and MiFID II conduct of business rules and civil liability

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[4] The rise of administrative enforcement of transaction-related financial supervision standards has resulted in the development of what Cherednychenko describes as 'European supervision private law', see O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) ERPL 37.

[5] It is accepted among law and economics scholars that combining public supervision and administrative enforcement with private enforcement through liability to pay damages is essential for achieving desired policy goals, see H. Jackson & M. Roe, 'Public and Private Enforcement of Securities Laws: Resource-based Evidence' (2009) JoFE 207; R. La Porta, F. Lopez-De-Silanes & A. Shleifer, 'What Works in Securities Laws' (2006) JoF 1.

[6] See, for instance, O.O. Cherednychenko, 'Contract Governance in the EU: Conceptualising the Relationship between Investor Protection Regulation and Private Law' (2015) ELJ 500.

[7] For a comprehensive comparative study on the interaction between these private law norms and MiFID I and MiFID II, see Wallinga (n. 3).

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of investment firms at EU and national level. In particular, it aims to explore whether there is a need for a European principle of civil liability in EU investor protection regulation. Against this backdrop, I will first take a closer look at the relationship between the MiFID I and MiFID II conduct of business regime and civil liability under EU law (Section 2). This analysis will focus on the duties to disclose adequate risk information and to recommend suitable investments. Afterwards, I will discuss the relationship between these conduct of business rules under MiFID I and MiFID II and national private laws in three Member States, i.e. the Netherlands, Germany, and the UK (Section 3). Given that investors can experience particular difficulties in proving the causal link between a firm's breach of duty and the suffered losses, I will then turn to the issue of causation (Section 4). Finally, the main findings will be presented to answer the question of whether a European principle of civil liability should be introduced in a future recast of MiFID II (Section 5).

2 INTERACTION BETWEEN MIFID I & MIFID II AND CIVIL LIABILITY UNDER EU LAW

2.1 National Civil Courts Bound by MiFID I and MiFID II?

The relationship between MiFID I and MiFID II and private law has provoked a debate in legal scholarship.[8] The main issue is whether national civil courts are obligated to give effect to the MiFID I and MiFID II conduct of business rules in general private law and, in particular, require investment firms to compensate clients for losses caused by breach of these rules.[9]

The relationship between the MiFID I and MiFID II conduct of business rules and national private law depends, in the first place, on what the directives require from Member States in terms of their implementation.[10] Directives must, in principle, be transposed into national law in order to have effect in national legal systems. Member States are generally free to choose the form – public law, private law or a combination of both – as long as the effectiveness

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[8] For an overview of the debate, see ibid.

[9] In this respect: S. Grundmann, 'Das grundlegend reformierte Wertpapierhandelsgesetz – Umsetzung von MiFID II (Conduct of Business im Kundenverhältnis)' (2018) ZBB 1, at 3 and 4; D. Busch, 'The Private Law Effect of MiFID: The Genil Case and Beyond' (2017) ERCL 70, at 86, 90.

[10] In contrast to the situation under MiFID I, the MiFID II conduct of business rules have been elaborated in a MiFID II Delegated Regulation (No. 2017/565). Considering the hierarchy between the measure in which a delegated rule-making power is laid down and a delegated act which is adopted under that power, it is argued that the fact that conduct of business rules are laid down in a Directive should be the guiding principle in establishing the MiFID II regime's relationship with private law.

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of a particular directive is ensured.[11] This freedom of implementation can be restricted, if necessary, with a view to realising the directive's objectives.

The harmonisation scope of a directive, which determines its 'legislative field', is of particular importance in the present context.[12] Issues that fall outside that field remain, in principle, unharmonised. There are several indications that enforcement of the conduct of business rules through private law rules on civil liability falls outside of the harmonisation scope of MiFID I and MiFID II. First of all, these directives are drafted primarily from the perspective of public enforcement by supervisory authorities through administrative law means.[13] In particular, MiFID I and MiFID II require Member States to designate public competent authorities to perform tasks formulated in the directives and to provide them with the powers necessary to impose effective, proportionate and dissuasive sanctions and measures to enforce the conduct of business rules.[14]

At the same time, MiFID I and MiFID II are silent on the liability of firms to pay damages for breach of the conduct of business rules. The Commission tried to remedy this during the consultation phase leading up to the adoption of MiFID II and requested input on whether a 'principle of civil liability applicable to investment firms' should be adopted.[15] However, the proposed principle, which would clearly have brought private enforcement of the conduct of business rules through civil liability within the ambit of MiFID II, was ultimately rejected. The Commission acknowledged that such a sensitive issue as the relationship between MiFID I and MiFID II and civil liability should be decided upon at the highest political level.

In the meantime, MiFID II contains a novel element in the form of art. 69(2) final part MiFID II.[16] This provision requires Member States to provide a mechanism in national law under which compensation can be paid or other remedial action can be taken where losses are incurred as a result of breach of MiFID II. This requirement is laid down in a provision on supervisory powers which competent authorities have to be provided with and, as such, is not concerned with enforcement of the conduct of business rules through private

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[11] S. Prechal, *Directives in EC Law* (OUP 2005) 73.

[12] On this in further detail, see R. Schütze, *European Union Law* (CUP 2018) 570.

[13] MiFID I and MiFID II also oblige Member States to provide for the possibility for specified bodies to take action before a court or competent authority in the interests of investors and to set up procedures for the out-of-court enforcement.

[14] MiFID I, arts 48, 50 and 51; MiFID II, arts 67, 69 and 70.

[15] Commission, Public Consultation. Review of the Markets in Financial Instruments (MIFID), Brussels: 8 December 2010, 63.

[16] Recommendation by the Committee on Economic and Monetary Affairs for First Reading, 5 October 2012 (A7-0306/2012) (MiFID II), art. 72(ha).

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law means. Instead, it points to an obligation of the Member States to provide for an administrative mechanism that would enable competent authorities to ensure investor redress.[17] Such a mechanism calls to mind, for instance, the compensation powers of the UK Financial Conduct Authority (FCA).[18]

Genil v Bankinter is the first case in which the Court of Justice of the European Union (CJEU) has shed light on the relationship between MiFID I and private law in general.[19] The Court had to rule on the question about the contractual consequences of breach of the MiFID I suitability and appropriateness rules by investment firms. According to the CJEU, in the absence of relevant EU legislation, this issue is a matter for the internal legal order of the Member States, subject to the general principles of equivalence and effectiveness.[20] The CJEU provided the question with an answer rooted in public supervision and administrative enforcement,[21] which seems to illustrate that enforcement of the conduct of business rules through civil liability falls outside of the harmonisation scope of MiFID I. Nevertheless, the CJEU stopped short of making a definitive choice with regard to the effect of the MiFID I conduct of business rules in private law. This can be due to a rather specific formulation of the referred question or the CJEU's reluctance to adopt a one-size-fits-all approach to such a sensitive issue.[22]

The responsibility of Member States, including national courts, to ensure the effectiveness of EU law is also of importance in determining the relationship between the MiFID I and MiFID II conduct of business rules and civil liability. The million-dollar question, which was raised by Tison already in 2010,[23] is whether sufficiently effective investor protection under MiFID I and MiFID II requires that investors are able to bring claims for damages for breach of the conduct of business rules on the basis of national private law. Effectiveness more generally (*effet utile*) could serve as the basis for an obligation of

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[17] Similarly: F. Della Negra, 'The Effects of the ESMA's Powers on Domestic Contract Law' in M. Andenas & G. Deipenbrock (eds), *Regulating and Supervising European Financial Markets: More Risks than Achievements* (Springer 2016) 155.

[18] The FCA can award restitution to investors or apply to the court for such an award as well as require firms to operate a redress scheme for widespread mis-selling (FSMA 2000, ss. 382, 384, and 404–404G).

[19] CJEU EU , 30 May 2013, ECLI:EU:C:2013:344, C-604/11 (*Genil v. Bankinter*).

[20] Ibid., para. 57.

[21] The CJEU focuses on the power to impose administrative measures and sanctions which competent authorities have to be provided with (MIFID I, art. 57; MiFID II, art. 70) in answering the question, see also *Genil v Bankinter*, para. 57.

[22] In this regard: Cherednychenko (n. 6) at 505; S. Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) ERCL 275.

[23] M. Tison, 'De civielrechtelijke dimensie van MiFID in rechtsvergelijkend perspectief' (2010) *Ondernemingsrecht* 303.

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Member States to provide private law effects, in general, and the remedy of damages, in particular, in case of breach of the conduct of business rules.[24] For that to be the case such has to be necessary to realise the full effectiveness of MiFID and MiFID II and, especially, to ensure the practical effect of the conduct of business rules.[25] The fundamental right to an effective remedy under the principle of effective judicial protection (codified in art. 47 of the EU Charter of Fundamental Rights and enshrined in art. 19(1) Treaty on European Union (TEU)) could also provide the basis for such a Member State obligation if there does not exist a remedy in national law that ensures respect for the rights conferred by EU law.[26]

Given MiFID I and MiFID II's focus on public supervision and administrative enforcement, it remains unclear whether the directives are designed to enable investors to claim compensation from investment firms for breach of the conduct of business rules. In any case, the fact that the conduct of business rules aim to protect investors does not automatically mean that these rules seek to confer rights upon investors to compensation based on civil liability.[27] It is also uncertain from *Genil v Bankinter* what, according to the CJEU, MiFID I and MiFID II require from Member States when it comes to private law effects in general, and the remedy of civil liability in particular. The rejected adoption of a principle of civil liability in MiFID II rather suggests that the directives are not designed to create rights to claim damages through private law rules on civil liability. That MiFID I and MiFID II promote the use of

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[24] See, e.g., CJEU, 20 September 2001, C-453/99 (*Courage v Crehan*), para. 26. In this regard for instance: M. Tison, 'The Civil Law Effects of MiFID in a Comparative Law Perspective' in S. Grundmann et al. (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus J. Hopt zum 70. Geburtstag* (De Gruyter 2010) 2624; R. Veil, 'Anlageberatung im Zeitalter der MiFID' (2007) WM 1821, 1825.

[25] This line of reasoning was developed primarily in the field of competition law, see, e.g., CJEU 20 September 2001, C-453/99 (*Courage v Crehan*), para. 26; CJEU, 13 July 2006, C-295/04 (*Manfredi and others*), but has also been applied outside this field in CJEU 17 September 2002, C-253/00 (*Muñoz*), para. 30.

[26] In general on the role of the fundamental right to an effective remedy in developing rights and remedies, see H.-W. Micklitz, 'The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies' in H.-W. Micklitz & B. de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012); C. Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (OUP 2014). On the relationship between effectiveness more generally and the principle of effective judicial protection, see J. Krommendijk, 'Is there Light on the Horizon?' (2016) 53 CML Rev 1395.

[27] CJEU, 12 October 2004, ECLI:EU:C:2004:606, C-222/02 (*Peter Paul*), para. 40; CJEU, 16 February 2017, ECLI:EU:C:2017:128, C-219/15 (*Schmitt v. TÜV*), para. 55.

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out-of-court enforcement mechanisms as a substitute for enforcement by civil courts points in the same direction.[28]

Member States are generally required to provide for remedies that ensure an adequate level of investor protection, not the highest possible level.[29] EU law thus does not always require that a party is able to bring claims for damages for breach of Union law.[30] In the context of MiFID I and MiFID II, national legal systems might provide for a sufficient degree of investor protection by ensuring the proper functioning of both administrative enforcement by supervisory authorities, including the power to secure investor redress, and out-of-court enforcement through available alternative dispute resolution bodies as prescribed by the directives. At the same time, there can be no doubt that enforcement of the MiFID I and MiFID II conduct of business through civil liability can contribute to the effectiveness of these conduct of business rules.

2.2 Towards a Relationship of Complementarity

The previous analysis shows that it is unclear whether national civil courts are required to give effect to the MiFID I and MiFID II conduct of business rules through holding investment firms liable to compensate clients for losses caused by breach of these rules. There are good reasons why civil courts should, nevertheless, have regard to the conduct of business rules as implemented in national financial supervision legislation when establishing whether conditions of liability are met in an individual case. First of all, EU law relies on national legal systems for its enforcement. When certain goals, such as investor protection, are formulated at EU level, civil courts can be expected, in so far as possible, to contribute to achieving these goals.[31] The importance of investor protection in this context is illustrated by the fact that it constitutes a self-standing regulatory objective in MiFID I and MiFID II. The post-crisis reforms have intensified the focus on (retail) investor protection.[32] Second, it may be appropriate for civil courts to avoid too much divergence between national private law and financial supervision legislation, given their respon-

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[28] MiFID I, art. 53; MiFID II, art. 7(5).

[29] F. Cafaggi & P. Iamiceli, 'The Principles of Effectiveness, Proportionality, and Dissuasiveness in the Enforcement of EU Consumer Law' (2017) ERPL 575, 578.

[30] In more detail, see C. Sieburgh, 'EU Law and Non-Contractual Liability of the Union, Member States and Individuals' in A. Hartkamp et al. (eds), *The Influence of EU Law on National Private Law* (Kluwer 2014).

[31] Compare TEU, art. 4(3). Also on the role of private law remedies in the light of the effectiveness of EU law, see C. Sieburgh, 'A Method to Substantively Guide the Involvement of EU Law in Private Law Matters' (2013) ERPL 1165, at 1186.

[32] N. Moloney, 'EU Financial Market Governance and the Retail Investor: Reflections at an Inflection Point' (2018) YEL 251.

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sibility to safeguard legal certainty and the coherence of the national legal system.[33] Finally, civil courts could also benefit from the regulatory expertise incorporated into the MiFID I and MiFID II conduct of business rules regime, including the European Securities and Markets Authority's (ESMA) soft law, when deciding individual cases.

The practical result could be the adoption by civil courts of a complementarity model of the relationship between the MiFID I and MiFID II conduct of business rules and private law. While building on the complementarity model developed by Cherednychenko,[34] the model advanced in this chapter does not exclusively focus on the relationship between regulatory conduct of business rules and traditional private law duties of care, but also extends the argument to the interaction between EU investor protection regulation and private law concepts governing civil liability to pay damages. In addition to (breach) of a duty of care, this wider category of private law rules on civil liability consists of, for example, (proof of a) causal link, attributability of damage, the requirement of relativity (or proximity) and limitation (or prescription) that determine whether and, if so, to what extent an investment firm can be required to pay damages under national private law. This complementarity model implies that courts should consider the conduct of business rules, and the underlying investor protection objective, when establishing, for instance, the standard of care in private law or when determining whether to presume the existence of a causal link to alleviate potential evidential difficulties. Under this approach, private law concepts act as a mediator to the effect of the MiFID I and MiFID II conduct of business rules in national private law. As will be shown below, such an effect may help aggrieved investors to overcome potential obstacles to redress in national private law.

3 CIVIL LIABILITY FOR BREACH OF CONDUCT OF BUSINESS RULES UNDER NATIONAL PRIVATE LAW

3.1 The Road to Redress

As mentioned above, it is up to Member States to provide for the legal techniques to ensure the effectiveness of the MiFID I and MiFID II conduct of business rules. Private enforcement mechanisms through the civil liability

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[33] Similarly: C. Sieburgh, 'Legitimiteit van de confrontatie van Europees recht en burgerlijk recht van nationale origine' in W. Voermans et al. (eds), *Controverses rondom legaliteit en legitimatie* (Preadviezen NJV) (Kluwer 2011) 232.

[34] Cherednychenko (n. 6).

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of investment firms can enhance the effectiveness of such rules. This section focuses on how civil courts in the Netherlands, Germany and the UK approach the interaction between the MiFID I and MiFID II conduct of business rules and civil liability. In particular, this section is concerned with the extent to which investors can rely on such rules, and the underlying investor protection aim, in national private law. There are signs that civil courts in these legal systems tend to conceive EU investor protection regulation and traditional private law duties of care as complementary, albeit to a varying degree. At the same time, it remains difficult for investors to successfully invoke the conduct of business rules when claiming damages in practice. From a comparative perspective, the available enforcement avenues can be divided into two distinct categories: liability for breach of an unwritten duty of care and liability for breach of a statutory rule requiring certain conduct.[35]

3.2 Indirect Effect on an Unwritten Duty of Care

Civil liability for breach of an unwritten duty of care offers a gateway to a more 'indirect' effect of the MiFID I and MiFID II conduct of business rules. The indirect effect stems from the influence of the conduct of business rules on the normative content of the investment firms' duty of care under private law. Investors may invoke these regulatory rules to substantiate that a particular firm has acted in breach of a traditional private law duty of care. The case law in the Netherlands, England & Wales, and Germany shows that civil courts tend to acknowledge that while conduct of business rules can influence the private law duty of care, they do not exhaust its scope. This points to the adoption of the complementarity model of the relationship between the two in national law.

In the Netherlands, the interaction between the regulatory conduct of business rules for financial firms contained in the Dutch financial supervision framework and their private law duty of care was considered by the Hoge Raad (Dutch Supreme Court) in its seminal securities leasing judgments.[36] The defendant banks submitted that because they had complied with the applicable regulatory duties, they had discharged their duty of care in private law. The Hoge Raad rejected this line of reasoning and followed the opinion provided by Deputy Procurator General De Vries Lentsch-Kostense. She considered that Dutch law is characterised by a double system of duties of care and that

[35] In more detail, see M. Wallinga, 'Why MiFID & MiFID II Do (Not) Matter to Private Law' (2019) ERPL 1.

[36] HR 5 June 2009, ECLI:NL:HR:2009:BH2815 (*Dexia v De Treek*); HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob Bank v Bolle*); HR 5 June 2009, ECLI:NL:HR:2009:BH2822 (*Stichting GeSp v Aegon Bank*).

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while regulatory rules can influence the private law duty of care, they do not determine its scope.[37] The Hoge Raad has confirmed this stance in its more recent case law on the liability of banks providing credit.[38] Importantly, conduct of business rules may thus have an impact on the firms' duty of care by influencing general private law clauses which supplement the contract between the parties. Particularly interesting in this context is the special duty of care of financial firms which requires them as highly professional parties to protect their non-professional clients against themselves.[39] Investors tend to base their claims for damages against financial firms on the breach of this duty of care, which may constitute not only breach of contract, but also an unlawful act in tort.

English courts approach the relationship between financial conduct regulation and the duty of care in common law in a similar way, at least in theory. However, the potential influence of MiFID I and MiFID II conduct of business rules on the liability of investment firms under English law differs greatly in practice.[40] English law does not recognise an overarching duty of good faith in negotiations and performance of contracts. As such, investors are unable to have recourse to such a principle. Yet English law has developed piecemeal solutions that mitigate the absence of a principle of good faith. In the absence of an express term providing for the manner in which the firm is to conduct its business, it will generally be under an implied duty to exercise reasonable care and skill in rendering the investment service due under the contract as is the case with professional or otherwise skilled parties.[41] Tort law can impose an

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[37] Conclusion of the Deputy Procurator General C.L. de Vries Lentsch-Kostense for HR 5 June 2009, ECLI:NL:HR:2009:BH2815, no. 3.21.

[38] HR 14 December 2018, ECLI:NL:HR:2018:2298, para. 3.4.2; HR 16 June 2017, ECLI:NL:HR:2017:1107, para. 4.2.5.

[39] HR 23 May 1997, ECLI:NL:HR:1997:AG7238 (*Rabobank v Everaars*), para. 3.3.

[40] English law is understood as the legal system of England and Wales. It is important to note that the overall importance of enforcement in common law by investors is limited due to the Financial Ombudsman Service (FOS) resolving a significant number of investment disputes outside common law. Both retail clients and SMEs might still prefer to bring an action for damages in common law when they are dissatisfied with the determination by the FOS or when losses exceed the FOS' compensation limit (£160,000 before and £350,000 from 1 April 2019, DISP 3.7.4.).

[41] R. Cranston, *Principles of Banking Law* (OUP 2018) 271; J. Powell & R. Stewart (eds), *Jackson & Powell on Professional Liability* (Sweet & Maxwell 2017) no. 15.022, who also point out that the duty when dealing with non-professional clients is implied at common law under the Consumer Rights Act 2015, s. 49 and the Supply of Goods and Services Act, s. 13.

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identical duty when providing investment services such as investment advice.[42] The easiest route for an investor to argue that a firm owes a duty of care in negligence appears to be the assumption of responsibility test.[43] A firm can be assumed to owe its client a duty of care in negligence when the firm, which holds itself out as possessing specific skill and/or knowledge in the field of investments, accepts the client's request for advice and he relies on the firm's recommendation about appropriate transactions.[44]

English courts generally embrace the principle that conduct of business rules contained in the financial supervision framework inform the duty to exercise reasonable care and skill. The relationship between conduct regulation and common law duties of care was considered in *Gorham & Others v British Telecommunications Limited plc*.[45] The Court of Appeal rejected the pension provider's view that the applicable regulatory rules determined the scope of the common law duty of care and that because it had not breached any of these rules, there could be no liability. The decision underlines the freedom of civil courts to decide on the standard of behaviour required from financial firms in common law.[46] The Court also acknowledged, however, that 'considerable weight' should be attached to the content of regulatory requirements when determining such a standard. This has been confirmed in subsequent case law.[47] While many of the relevant cases revolve around advisory relationships, the influence of the conduct of business rules may potentially extend to other

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42 *O'Hare v Coutts & Co.* [2016] EWHC 2224 (QB), at [199] and [207]; *Rubenstein v HSBC Bank* [2011] EWHC 2304, at [87]; [2012] EWCA Civ 1184, at [46].

43 G. McMeel & J. Virgo, *McMeel and Virgo on Financial Advice and Financial Products* (OUP 2014), no. 26.32. The test was formulated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and clarified in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

44 English courts have in recent interest rate swap cases applied a restrictive approach to the existence of an advisory relationship in the absence of a contractual agreement. The mere provision of recommendations can be insufficient for the existence of an advisory relationship, while payment of separate fees for services provided and discussions about the appropriate course for the client offer evidence in favour, see including further references *London Executive Aviation v RBS* [2018] EWHC 74 (Ch); *Marz Ltd v Bank of Scotland Plc* [2017] EWHC 3618 (Ch).

45 [2000] EWCA Civ 234.

46 Also in this regard: *Green & Rowley v RBS* [2013] EWCA Civ 1197.

47 *O'Hare v Coutts & Co* [2016] EWHC 2224 (QB); *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 QB; *Loosemore v Financial Concepts (a firm)* [2001] Lloyd's Rep PN 235; *Seymour v Caroline Ockwell & Co* [2005] EWHC 1137 (QB); *Shore v Sedgwick* [2007] 2509 (QB).

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relationships where the conduct of a regulated party is governed by a financial supervision regime.[48]

At the same time, the doctrine of contractual estoppel has proved a challenge for investors when claiming damages from financial firms. The latter have regularly deployed contractual estoppel as a successful defence in disputes with sophisticated entities in relation to investments in complex financial products to hedge risks or to make speculative investments.[49] Moreover, this doctrine has also been invoked in disputes with smaller corporate and retail clients.[50] Under the doctrine of contractual estoppel, parties can contractually agree on the basis on which they enter into a relationship, whereby they are barred from denying the existence of that state of affairs.[51] In reliance on this doctrine, firms may contractually protect themselves against investor claims by using no responsibility or non-reliance clauses or clauses that disclaim that any investment service has been given. In such cases, the doctrine of contractual estoppel can preclude a duty to exercise reasonable care and skill that otherwise, on the actual facts, would have arisen.[52] The reluctance of English courts to override contractual arrangements can thus lead to instances where, though a firm provides an investment service, the client is excluded from claiming damages caused by breach of a duty in relation to that service.

More recent case law, however, suggests that the attitude of English courts to contractual estoppel might be changing.[53] The Court of Appeal decision in *First Tower Trustees v CDS* shows that non-reliance clauses are subject to the Unfair Contract Terms Act 1977 under which such clauses have no effect unless they satisfy the requirement of reasonableness.[54] Further, the decision in Parmar *and another* v Barclays Bank Plc confirmed what many suspected,

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[48] This is due to the fact that in English law investors are thought to be entitled to expect that the firm they are in a regulated relationship with will comply with the applicable conduct of business rules, see *O'Hare v Coutts & Co* [2016] EWHC at [207]; *Crestsign v NatWest & RBS* [2014] EWHC 3043 (Ch), at [127]; *Green & Rowley v RBS* [2014] EWHC 3043 (Ch), at [18]; *Loosemore v Financial Concepts (a firm)* [2001] Lloyd's Rep PN 235, at 241–242.

[49] For an overview, see J. Braithwaite, '*Springwell*-watch: New Insights Into the Nature of Contractual Estoppel' (2017) LSE WP; G. McMeel, 'The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy' in A. Dyson et al. (eds), *Defences in Contract* (Hart 2017) 240.

[50] *Crestsign* [2015] EWCA 986; *Thornbridge* [2015] EWHC 3430.

[51] *Raiffeisen* [2010] EWHC 1392 (Comm), at [250]; *Thornbridge*, at [111].

[52] *Crestsign* [2014] EWHC 3043 (Ch), at [111]; *Springwell* [2008] EWHC 1186, at [482], [556].

[53] S. Muth & L. Maynard, 'Time Up for Basis Clauses?' (2018) JIFBL 535; G. McMeel, '"The Enforcement of Basic Norms of Commerce and of Fair and Honest Dealing": Holding Banks to Higher Standards (Part Two)' (2018) JIFBL 294.

[54] [2018] EWCA Civ 1396, at [66]–[67], [99].

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that COBS 2.1.2R contained in the financial supervision framework prevents firms providing advice from relying on disclaimers or statements that the firm is not to be considered as an adviser with the effect of precluding regulatory duties which would otherwise have arisen.[55] These authorities suggest that the restrictive impact of contractual estoppel on the level of protection investors are able to derive from common law is diminishing.

Turning to the case law of the German Supreme Court (*Bundesgerichtshof* (BGH)), the following observations can be made. The BGH allows for a certain influence of conduct of business rules of EU origin on unwritten duties of care.[56] Liability for breach of an unwritten duty of care is mainly restricted to liability in contract under German law. Earlier case law of the BGH suggested that the conduct of business rules contained in the financial supervision framework could have an indirect or radiating effect (*Ausstrahlungswirkung*) on pre-contractual and contractual duties.[57] Under this doctrine, conduct of business rules were to be taken into account when determining the existence and scope of specific duties of care that can be derived from general private law clauses.[58] In its later case law, however, the BGH has taken a dismissive stance against the *Ausstrahlungswirkung* of conduct of business rules on contractual liability.[59] At present, therefore, a concretising, binding effect of the regulatory conduct of business rules on the standard of care in contract has not been recognised in German law.[60] This implies that the conduct of business rules do not provide the basis for an independent claim for damages in contract.

At the same time, the BGH has left the door ajar for the interaction between conduct of business rules and private law duties of care. According to the BGH, the supervisory principle, under which accepting inducements from third parties is allowed only when they are disclosed to the investors, gives rise

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55 [2018] EWHC 1027 (Ch).

56 The way in which investors can rely on the rules contained in financial supervision legislation relates, to a large extent, to their nature. A detailed analysis of this issue goes beyond the scope of this chapter.

57 BGH 8 May 2001, *XI ZR* 192/00, *NJW* 2002, 62; BGH 5 October 1999, *XI ZR* 296/98, no. 32, *NJW* 2000, 359; BGH 19 December 2006, *XI ZR* 56/05, no. 18, *NJW* 2007, 1876.

58 In general, see Inigo Koller, '§ 63' in H.-D. Assmann & U. Schneider (eds), *Wertpapierhandelsgesetz Kommentar* (Dr. Otto Schmidt 2018), no. 9; G. Spindler, 'Grundlagen' in K. Langenbucher et al. (eds), *Bankrechts-Kommentar* (C.H. Beck 2016) no. 28.

59 BGH 3 June 2014, *XI ZR* 147/12, no. 35, *NJW* 2014, 2947; BGH 17 September 2013, *XI ZR* 332/12, *WM* 2013, 1983; BGH 27 September 2011, *XI ZR* 178/10, *NJW-RR* 2012, 43.

60 Spindler (n. 58), no. 28b; P. Buck-Heeb, 'Anlageberatung nach der MiFID II' (2014) ZBB 221, 223.

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to a general, almost exhaustive legal principle (*eines allgemeinen – nunmehr nahezu flächendeckenden – Rechtsprinzip*) which should be considered when determining what obligations the financial firm owes to its client.[61]This reasoning may allow investors to invoke the conduct of business rules when claiming damages under private law. In particular, investors could substantiate the claim that investment firms generally act in accordance with applicable conduct of business rules and that civil courts should, therefore, look at these rules when determining the existence and content of contractual duties of care.

3.3 Direct Effect on Liability for Breach of a Statutory Duty

The second avenue of enforcement of the conduct of business rules provides a gateway to a more 'direct' effect of these rules in private law. The direct effect is grounded in a category of tort which establishes liability for breach of statutory rules. The direct effect presents a more straightforward way of claiming damages for a breach of the MiFID I and MiFID II conduct of business rules as transposed in national financial supervision legislation as it does not depend on the existence of a duty of care implied in contract or tort. Although legal systems generally contain mechanisms that establish liability for breach of a statutory duty in either a civil code or financial supervision legislation, investors are faced with several challenges when claiming damages.

In Dutch law, MiFID I and MiFID II conduct of business rules may be directly invoked by investors on the basis of the general tort category of breach of a statutory duty.[62] Direct effect of the conduct of business rules on liability in Dutch law can also result from the transposition of the Unfair Commercial Practice Directive as a *species* of tort. This directive establishes a link between the information required from investment firms by MiFID I and MiFID II by designating that information as material for the purposes of establishing a misleading omission.[63] A firm's breach of the MiFID I and MiFID II information disclosure duty as transposed into financial supervision legislation will give rise to an unfair commercial practice and consequently constitute a tort for which retail investors can claim damages.[64] The relativity requirement can prove challenging for investors to rely on the direct effect of conduct of business rules in private law.[65] Under this requirement, breach of a conduct of

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[61] BGH 3 June 2014, *XI ZR* 147/12, no. 37.

[62] At. 6:162(2) BW.

[63] UCP Directive, Art. 7(5); UCP Directive, recital 15.

[64] Section 6.3.3.A of the BW. While a link with the suitability rule is absent, investors might also be able to rely on the UCP framework to bring a damages claim for breach of this rule, see Wallinga (n. 3), §6.3.4.

[65] Art. 6:163 BW.

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business rule may only lead to the investment firm's civil liability if the rule in question aims at protecting the claimant's interests against the damage at issue and the way it has arisen. The fact that a conduct of business rule requires certain behaviour towards an investor does not automatically mean that the rule is designed to protect that investor from the losses claimed.[66] It remains to be seen whether courts will allow investors to more easily satisfy this requirement, given that MiFID I and MiFID II aim to protect investors.

A similar requirement of relativity presents a challenge for investors in German law to directly invoke the MiFID and MiFID II conduct of business rules transposed in financial supervision legislation on the basis of non-contractual liability (§823 II BGB (*Bürgerliches Gesetzbuch* – German Civil Code)). Whether conduct of business rules qualify as statutory protective rules (*Schutzgesetze*) for the purposes of § 823 II BGB is the subject of intense, ongoing debate. Legal scholarship generally accepts that conduct of business rules are designed to protect individual interests of investors.[67] The BGH also recognises that this is the case.[68] It is striking, therefore, that the BGH has refused to allow investors to directly invoke the conduct of business rules when claiming damages.[69] The Eleventh Panel of the BGH, responsible for private law matters concerning banking and capital markets law, has adopted its restrictive stance in relation to a regulatory rule that prohibited management of financial institutions from advising unsuitable investment transactions.[70] The Sixth Panel of the BGH, responsible for tort law matters, confirmed this approach in the *Phoenix* decision.[71] In so doing, the BGH demonstrates its reluctance to allow investors to benefit from the direct effect of conduct of business rules on civil liability rules under § 823 II BGB.

In English law, the UK financial supervision framework provides a private cause of action for breach of conduct of business rules contained in the FCA's Handbook.[72] This statutory remedy renders breach of financial conduct regulation actionable in the tort of breach of statutory duty. The remedy has played a role in resolving investor disputes with regard to the mis-selling of home income plans and personal pension plans and it is now routinely relied

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66 HR 4 December 2009, ECLI:NL:HR:2009:BJ7320 (*Nabbe v Staalbankiers*), para. 3.7.

67 See Koller (n 64) no. 2 & 12; Andreas Fuchs in Andreas Fuchs (ed.), *Wertpapierhandelsgesetz Kommentar* (C.H. Beck Verlag 2016) no. 101.

68 BGH 17 September 2013, *XI ZR* 332/12, no. 23, *WM* 2013, 1983; BGH 19 February 2008, *XI ZR* 170/07, no. 17, *NJW* 2008, 1734.

69 In more detail about the *BGH*'s reasoning, see Wallinga (n. 3), §6.2.2.

70 BGH 19 February 2008, *XI ZR* 170/07, *NJW* 2008, 1734.

71 BGH 22 June 2010, *VI ZR* 212/09, *NJW* 2010, 3651 (*Phoenix*).

72 FSMA 2000, s. 138D(2), as amended by FSA 2012, formerly s. 150.

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on in actions for damages in addition to the usual grounds at common law.[73] The issue of information disclosure is illustrative of the benefits in terms of investor protection of the direct effect of the conduct of business rules on liability resulting from the statutory remedy. While *O'Hare v Coutts & Co* might have signified a departure from the *caveat emptor* approach to the provision of financial services,[74] it remains to be seen whether common law will accept the existence of a general duty of investment firms to ensure that investors understand both the advice provided and the risks related to recommended transactions.[75] The statutory remedy for breach of the conduct of business rules, however, allows investors to rely on regulatory information disclosure duties directly. At the same time, access to this statutory remedy is restricted to private persons, which includes retail investors, but excludes businesses.[76] The remedy is therefore unavailable to small and medium-sized enterprises.[77] Furthermore, the ability for aggrieved investors to claim damages based on the statutory remedy may also be limited by the doctrine of contractual estoppel discussed above.

4 CAUSATION

4.1 Factual and Normative Causation

The issue of causation is one of the greatest challenges aggrieved investors face when claiming damages from financial firms. Establishing a causal link can prove difficult due to the fact that determining whether a particular action or event is the cause of a specific harmful result often involves a great deal of uncertainty. This is particularly true for the investment firm–client relationship where the investor's decision forms an essential link between a firm's breach of its duty and the losses suffered. In such relationships, speculative purposes and loss aversion can influence the decision-making process, and changing market circumstances can affect the investment's performance, making it difficult to exactly determine how the causal chain runs.

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[73] Powell & Stewart (n. 41) no. 14.082; McMeel & Virgo (n. 43), no. 4.20.

[74] [2016] EWHC 2224 (QB); [2017] 314 EWHC (QB); *Crestsign v NatWest & RBS* [2014] EWHC 3043.

[75] Especially considering *Alliance Group Ltd v RBS Plc* [2018] EWCA Civ 355 reaffirmed the notion of *caveat emptor* at least in non-advised sales of investments products.

[76] Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, regulation 3; *Titan Steel Wheels Ltd v RBS Plc* [2010] EWHC 211 (Comm), at [44] et seq.

[77] See on what he calls the mismatch between financial supervision legislation and the MiFID I and MiFID II definition of retail investors: McMeel (n. 49).

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Many legal systems have adopted a two-step approach to causation distinguishing between factual and legal causation. The first step of factual causation establishes whether a particular conduct is the actual cause of harm. For this factual inquiry, the *condicio sine qua non* test is generally applied. Whether a *condicio sine qua non* relationship (hereafter: 'csqn relationship') exists between conduct and harm depends on the hypothetical situation in which the conduct is eliminated. If a client would have made another investment decision and the (same) losses would not have occurred in the absence of the financial firm's breach of duty, the firm's conduct can be regarded a *condicio qua non* of the harmful result.

In order to limit the far-reaching and, at times, unreasonable result that can follow from the csqn test, the first step of factual causation is complemented by a normative assessment of factual causes of the harmful result. This second step of legal (or normative) causation can involve an evaluation of a wide range of possible factors, such as reasonableness of compensation, remoteness and proximity, foreseeability and probability of harm, degree of fault, nature of liability, and the protective scope of a violated standard.[78]

4.2 Tools to Alleviate Difficulties in Proving the *Condicio Sine Qua Non* Relationship

When faced with a claim for damages, firms often raise the argument that if they had, for example, adequately informed or advised the client, he or she would have executed the same transaction. Investors can experience considerable difficulties in discharging the burden to prove the existence of the csqn relationship. As MiFID I and MiFID II do not contain any rules on the burden of proof in case of breach of the conduct of business rules, it depends on national private laws whether and, if so, how evidential difficulties can be alleviated. Civil courts in some legal systems have met these evidential needs by applying specific procedural instruments.

For instance, the BGH has reversed the burden of proof in financial litigation by adopting a presumption in relation to breach of contractual and pre-contractual information disclosure and advisory duties (*Vermutung aufklärungs- und beratungsrichtigen Verhaltens*).[79] If it can be established that

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[78] C. van Dam, *European Tort Law* (OUP 2013) 308–309; J. Kleinschmidt, 'Causation' in J. Basedow et al. (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012) 159; J. Spier & O. Haazen, 'Comparative Conclusions on Causation' in J. Spier (ed.), *Unification of Tort Law: Causation* (Kluwer Law International 1998) 134.

[79] BGH 8 April 2014, *XI ZR* 341/12, no. 20; BGH 16 November 1993, *XI ZR* 214/92, *NJW* 1994, 514.

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a financial firm has breached an information disclosure or advisory duty, the existence of a factual causal relationship between the firm's harmful conduct and the investor's decision to execute a transaction is presumed.[80] It is then for the firm to prove that the investor would still have made the same decision if he was adequately informed or advised. As the bar is set particularly high, firms are rarely able to adduce sufficient evidence in order to rebut the presumption.[81] The justification for application of the presumption is generally found in the protective purpose of the information disclosure or advisory duty in question,[82] which allows policy considerations formulated at both national and EU level, such as investor protection pursued by MiFID I and MiFID II, to be taken into account.

In a similar vein, to aid investors in overcoming evidential difficulties, the Dutch Hoge Raad has applied a presumption of the existence of the csqn relationship on a case-by-case basis. In *Dexia v De Treek*, it held that if at the time the parties entered into a contract regarding the purchase of a financial instrument the financial position of an investor is such that performance of the contract imposes an unacceptable financial burden on him, the existence of a csqn relationship between the bank's conduct and the investor's decision to execute the transaction can generally be presumed.[83] This reasoning was subsequently applied in the *WorldOnline* decision relating to prospectus liability.[84] The presumption requires a financial firm to adequately demonstrate that had it exercised the required standard of care, the investor would have made the same investment decision. Application of the presumption is, however, not standard practice in Dutch financial litigation.

In contrast, in English law, proving the csqn relationship appears to be less difficult for investors because of the required standard of proof. The burden of proof with regard to factual causation requires the claimant to establish that the losses suffered would not have arisen but for the breach of duty by the defendant. In the context of the investment advisory relationship this implies that investors will have to establish that they have relied on the information

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[80] BVerfG 8 December 2012, *1 BvR* 2514/11, no. 20; BGH 22 March 2010, *II ZR* 66/08, no. 23; BGH 12 May 2009, *XI ZR* 586/07, no. 22; BGH 16 November 1993, *XI ZR* 214/92, *NJW* 1994, 513–514.

[81] Spindler (n. 58), no. 209.

[82] C.-W. Canaris, 'Die Vermutung "aufklärungsrichtigen Verhaltens" und ihre Grundlagen' in F. Häuser et al. (eds), *Festschrift für Walther Hadding* (De Gruyter 2004) 4; H. Stoll, 'Die Beweislastverteilung bei positiven Vertragsverletzungen' in J. Esser & H. Thieme (eds), *Festschrift für Fritz von Hippel* (J.C.B. Mohr (Paul Siebeck) 1967) 553, 559.

[83] *Dexia v De Treek*, para. 5.5.2.

[84] HR 27 November 2009, ECLI:NL:HR:2009:BH2162 (*WorldOnline*), para. 4.11.2.

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or advice provided by the firm and, consequently, that they would not have executed the transaction in question had the firm not disclosed inadequate information or made an unsuitable recommendation.[85] The significance of this burden for the investor is minimised by the requisite standard of proof being on the balance of probabilities.[86] This standard requires that the trial judge is persuaded, on the evidence provided, that it is more likely than not that the conduct of the firm gave rise to the investor's decision to execute the transaction and the investment losses claimed.[87] This does not mean that the investor is required to establish that his statement of factual causation is more probable than that of the firm.[88] Furthermore, where an investor does experience evidential difficulties that are caused by the firm's breach of duty, courts are said to consider the investor's evidence benevolently and that of the firm critically.[89] Even in the absence of the effect of MiFID I and MiFID II, therefore, proof of factual causation in the context of claims for compensation of investment losses does not appear to raise an insurmountable evidential hurdle in English law.

5 TIME FOR A EUROPEAN PRINCIPLE OF CIVIL LIABILITY?

The foregoing investigation demonstrates that from an EU law perspective it remains unclear whether national civil courts are required to give effect to the MiFID I and MiFID II conduct of business regime by holding investment firms liable to compensate clients for losses caused by breach of these rules. Several reasons were identified, however, why civil courts may still be expected to have regard to these rules when determining whether conditions for civil liability in national private law are met. Although it is apparent that MiFID I and MiFID II are not designed to harmonise private law rules on civil liability, the investors' ability to secure redress on the basis of national private law can offer an important instrument for EU investor protection regulation to attain its policy goals.[90] In particular, the complementary relationship between

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85 *Zaki & Ors v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14, at [103] et seq.

86 R. Glover, *Murphy on Evidence* (OUP 2017) 91, 92, 96; A. Burrows, *Remedies for Torts and Breach of Contract* (OUP 2004) 53, 72, 73.

87 *In re B (Children)* [2008] UKHL 35, at [13], [62] et seq.

88 Glover (n. 86) 91–92.

89 C. Walton et al. (eds), *Charlesworth & Percy on Negligence* (Sweet & Maxwell 2014) no. 5.04.

90 Similarly: M. Andenas & F. Della Negra, 'Between Contract Law and Financial Regulation: Towards the Europeanisation of General Contract Law' (2017) EBLR 499.

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the MiFID I and MiFID II conduct of business rules and civil liability could strengthen the effectiveness of these rules.

There are signs that national civil courts tend to adopt the complementarity model of the relationship between the MiFID I and MiFID II conduct of business rules and traditional private law duties of care, albeit to a varying degree. The case law of the Dutch, English and German civil courts shows that they generally dismiss the idea that financial conduct regulation exhausts the private law standard of care owed by investment firms towards clients. Civil courts in these systems, however, do recognise that conduct of business rules can influence the normative content of private law duties of care. This allows investors to invoke these rules and to benefit from their detailed prescription as to what behaviour is required from firms. Another, more direct, gateway to the effect of the conduct of business rules in private law is liability for breach of a statutory duty in Dutch and English law. National civil liability regimes are thus actively engaging with MiFID I and MiFID II conduct of business rules, accommodating such rules and the underlying investor protection aim within their domain, with the hybridisation of individual remedies as a result.

At the same time, the analysis reveals differences in the extent to which investors harmed by breach of the conduct of business rules are actually able to successfully claim damages in national private law. Investors continue to face challenges in demonstrating the breach of private law standards, satisfying the relativity requirement and proving factual causation. Particular mention should be made of the doctrine of contractual estoppel in English law, which may preclude investors from relying on duties of care against investment firms at common law, and the German Supreme Court's denial of the possibility for investors to bring damages claims for breach of the conduct of business rules on the basis of non-contractual liability (§ 823 II BGB). While the complementarity model of the interaction between EU investor protection regulation and private law concepts governing civil liability could, in theory, help investors to overcome such challenges,[91] it remains to be seen to what extent this will be the case in practice.

The question which arises in this context is whether the EU investor protection regulation should include the principle of civil liability in order to encourage and facilitate its private enforcement by aggrieved investors. The principle of subsidiarity, under which EU regulation can only be adopted when and insofar as policy goals cannot be more efficiently realised at the Member State level, dictates that the EU legislator should exercise restraint in pursuing harmonisation of civil liability rules. Such harmonisation can be justified if there is an enforcement deficit in national legal systems which jeopardises the

[91] In more detail, see Wallinga (n. 3), Part III.

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realisation of certain policy objectives. Greater clarity at EU level about the possibility to hold investment firms liable under private law could ultimately contribute to investor protection and thus stimulate cross-border activity in investment services. In more concrete terms, an express private cause of action for breach of conduct of business rules of European origin could ensure that investors across the EU may obtain compensation for losses resulting from breach of the conduct of business rules, regardless of their national private law's approach to this issue. Obliging Member States to make such a cause of action available to investors through EU legislation could preclude financial firms from relying on the doctrine of contractual estoppel against investors, dictate the access of small and medium-sized enterprises to the statutory remedy under English law and require the BGH not to block recourse to non-contractual liability under § 823 II BGB, especially when investors cannot rely on the duties of care in contract. Furthermore, the principle of civil liability in EU investor protection could require a reversal of the burden to prove a causal link between the breach and the damage in favour of investors or lowering the standard of proof concerning such a link, if otherwise the protection which the remedy aims to realise would become illusory.

Different regulatory options can be considered to embed a principle of civil liability in the revised MiFID II or a newly adopted MiFID III, varying from an autonomous EU regime for private enforcement and remedies to establishing a minimum level of protection in national private law. In this context, it is important to obtain information on whether attempts to include civil liability in other areas of EU financial regulation, such as the prospectus and credit rating regime, have resulted in strengthening investor protection. Attention has to be paid not only to how the established policy goals can be achieved, but also to possible negative side-effects that should be avoided. In particular, full harmonisation of civil liability rules might result in unjustified restrictions on the ability of civil courts to realise justice in individual disputes and prevent learning from diversity. That investors should be able to obtain compensation on the basis of private law does not necessarily mean, therefore, that conditions of civil liability should be exhaustively harmonised at EU level. There are good reasons to leave intact a margin of discretion for national civil liability regimes to shape these conditions, provided that an adequate level of protection is ensured.

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