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INVESTOR AND CONSUMER PROTECTION: POINTS OF CONVERGENCE AND DIVERGENCE

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Table of Contents

List of Abbreviations 5

INTRODUCTION 6

CHAPTER I: THE PROTECTIVE REGIME OF INVESTOR & CONSUMER 7

1. Investor-protection Regime 7

1.1 The Roots of the Protective Regime 7

2. Consumer - Protection Regime 10

2.1 Primary – Secondary Law 10

3. Regime Comparison 12

4. The Rationale for Investor Protective Regulation - The legal affinity of investor protection with the principle of consumer protection 13

4.1 The "ratio" of the investor protective regulatory framework 13

4.2 The legal affinity of investor protection with the principle of consumer protection 15

CHAPTER II: NOTIONS OF INVESTOR-CONSUMER & INVESTMENT PRODUCTS-CONSUMER GOODS: DIVERGENCES/ CONVERGENCES 17

1. Investor 17

1.1 The notion of investor 17

1.2 Investor/Client Classification under MiFID I - II 17

1.3 Protective Regime according to investors' classification 18

2. Consumer 19

2.1 The notion of consumer 19

2.2 Distinction of the two notions – point of convergence: Retail Investor 21

3. Investment Products 24

4. Consumer Goods 25

5. Divergences 26

CHAPTER III: CONSUMERIZATION OF THE INVESTOR – POINTS OF CONVERGENCE 27

1. Horizontal Consumer Protection of the Retail Investor 27

1.1 2002 Distance Marketing of Financial Services Directive 27

1.2 Unfair Commercial Practices Directive 28

1.3 Unfair Contract Terms Directive 30

1.4 E-commerce Directive 31

1.5 Consumers' Right Directive (Art.3 par.3d exemption of financial services) 31

1.6 Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers 32

1.7 Depositor Guarantee Schemes and Investor Compensation Schemes 33

CHAPTER IV: LIABILITY REGIME 36

1. Consumers' Liability Regime 36
2. Investors' Liability Regime 36
2.1 Relationship between Investor Protective Legislation and Private Law 36
2.2 Civil Liability 38
2.3 Contractual Liability 39
2.4 Non-contractual liability 39
3. Professional civil liability - The liability of suppliers of services 40
3.1 Proposal for a Council Directive COM (90)482 40
3.2 Liability under Article 8 of Law 2251/1994 v Contractual – Non contractual Liability 43
CHAPTER V: JURISPRUDENCE OF THE CJEU* *44
1. Investor as consumer under the jurisprudence of the CJEU 44
1.1 Shearson Lehman Hutton Inc. v Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH (TVB) 45
1.2 Alpine Investments BV vs Minister van Financien 46
2. Recent Jurisprudence 48
2.1 Jana Petruchová v FIBO Group Holdings Limited 48
2.2 AU v Reliantco Investments LTD & Reliantco Investments LTD Limassol Sucursala Bucureşti 50
CONCLUSION* *53
BIBLIOGRAPHY* *55
1. Foreign 55
2. Greek 56

List of Abbreviations

CISs	Collective Investment Schemes
CESR	Committee of European Securities Regulation
CSMAD	Criminal Sanctions for Market Abuse Directive (2014/57/EU)
MAR	Market Abuse Regulation (596/2014)
DGSD	Deposit Guarantee Schemes Directive (94/19/EC)
DGSD (Recast)	Deposit Guarantee Schemes Directive (Recast) (2014/49/EU)
ESC	European Securities Committee
ESMA	European Securities and Markets Authority
FSAP	Financial Services Action Plan
ICSD	Investor Compensation Schemes Directive (97/9/EC)
IMD	Insurance Mediation Directive (2002/92/EC)
ISD	Investment Services Directive (93/22/EEC)
KID	Key Information Document (for PRIIPs)
MiFID I	Markets in Financial Instruments Directive (2004/39/EC)
MiFID II	Markets in Financial Instruments Directive (2014/65/EU)
MiFIR	Markets in Financial Instruments Regulation (EU) No. 600/2014
PRIIPs	Packaged Retail Insurance-Based Products
PRIPs	Packaged Retail Investment Products
TEC	Treaty establishing the European Community
TEE	Treaty on the European Union
TEEC	Treaty establishing the European Economic Community
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive (2005/29/EC)
UCTD	Unfair Contract Terms Directive (93/13/EC)
UCITS	Undertakings for Collective Investment in Transferable Securities

INTRODUCTION

The present dissertation has as its primary scope to set out the European Investor Protective framework under the light of the European Consumer Protection law. A comparative analysis will be sought in the following lines in order for the convergences and divergences of the two regimes to be highlighted.

Investor and Consumer constitute the two poles of the financial market, the mainspring of the European Economy. Their protection emerges as a *leitmotiv* for the smooth operation and the evolution not only of the economic field but the social/political frame as well. Therefore, a constantly growing regulatory system has been developed around those two notions trying to cover their needs and/ or demands.

The European regulatory framework consists of a wide variety of legislation aiming to the protection of investors and consumers. While some of those pieces of legislation are specific-oriented to either the former or the latter, there are others that seem to provide a more generic scope of application. In other words, albeit that even from the characterization of a person as an investor or consumer it is understandable that they are distinctive terms, there is a glimmer of possibility the second overlapping sometimes the first one. And here is where the major query arises: Can an investor, despite the existing divergences, be considered as a consumer? Are there any points of convergence?

The recent financial crisis as well as the downward trends and pressures on the capital market exposed a number of key weaknesses in the global regulatory system, which has set the stage for significant losses for investors. This prolonged crisis in the capital market sector among the ever growing involvement of individuals/ legal entities in financial activities and the respective development of investment services have led the investors in a search of alternative ways in order for them to be reimbursed in case of potential losses. In this respect, the question of whether or not investors should be classified as consumers is not insignificant. Adversely, it is of primary importance as, under certain circumstances, it may extend the possibilities for investors' protection beyond the limits of the specific provisions of capital market law by falling under the protective scope of consumer law as well.

1. Investor-protection Regime

1.1 The Roots of the Protective Regime

The EU's regulatory orientation towards investor protection constitutes a quite recent phenomenon having an evolving route among the years[1]. Historically, the development of European capital market law can be divided into **five main stages**[2].

The **first** stage commences in the mid-1960s with the Segré Report[3] focusing on the liberalization of capital transfers on the one hand and the harmonization of Member States' rules on the other[4]. However, the 1966 Segré Report did not touch the sensitive part of the investor protection regime in detail[5]. The first significant hint in regulating the relationship between the investment firm and the investor came up a little afterwards with the 1977 Code of Conduct[6]. The paper highlighted the connection between the objectives of Article 2 of the Treaty of Rome[7] and the Community's activities, for the achievement of which sufficient capital and the establishment of a common market were essential[8]. The disparities of the rules governing securities markets were confining the investment. Therefore, investor protection emerged as an instrument for reducing these fragmentations and encouraging market interpenetration among the creation of a unified capital market[9]. The Principles included in the Code of Conduct were designed to *"establish standards of ethical behavior on a Community-wide basis, so as to promote the effective functioning of securities markets"*[10].

The **second** stage starts in 1985 with the presentation by the European Commission of the White Paper on the Internal Market[11]. The adoption of European rules at this stage was initially based on the threefold principle of (a) mutual recognition, (b) minimum harmonization and (c) control by the Member State of origin[12]. In the wake of the White Paper, another regulatory framework emerged in order to embrace market intermediaries and Collective Investment Schemes (CISs) as well as investor markets[13]. The now-repealed 1985 UCITS Directive[14] and the 1993

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[1] Moloney, *"EU Securities and Financial Markets Regulation",* 2014, p.782.
[2] *Ibid*., p.8 et seq.; Veil, *"European Capital Markets Law"*, 2017, p.3 et seq.
[3] Report by a Group of Experts appointed by the ECC Commission, The Development of a European Capital Market (1966) (Segré Report).
[4] Vasilis D. Tountopoulos, *"Capital Market Law"*, 2nd Edition, 2021, p.14-18.
[5] Moloney, 2014, p.782.
[6] 77/534/EEC: Commission Recommendation of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities OJ L 212, 20.8.1977.
[7] Treaty establishing the European Economic Community (EEC Treaty)[7], which was signed on 25 March 1957 in Rome. Today Treaty on Functioning of the European Union (TFEU). Article 2 EC now refers to the "harmonious, balanced and sustainable development of economic activities".
[8] Moloney, *"EC Securities Regulation"*, 2008, p.566.
[9] *Ibid.*, p.567.
[10] Code of Conduct 1977, Fundamental Objective paragraph.
[11] Completing the Internal Market: White Paper from the Commission to the European Council (MILAN, 28-29 JUNE 1985), COM/85/0310.
[12] Tountopoulos, 2021, p.14-18.
[13] Moloney, 2014, p.782.
[14] Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

Investment Services Directive (ISD)[15] among the 1997 Investor Compensation Schemes Directive (ICSD)[16] were measures of some relevance to retail market protection without, however, having investor protection as their primary objective. Specifically the ISD, the most important legislative initiative of that period[17], was a Directive focused on the investment firm and investment services pass-porting, while UCITS regime was designed to facilitate cross-border marketing and ICSD to ease the regulatory costs of investment firms' cross-border activity[18]. Market-integration and liberalization was their primary goal while investor-protective rules concerning advertising and conduct of business received scant attention.

The **third** stage of the investor's legislative route follows in 1999 with the adoption by the European Commission of a Communication in the form of a White Paper on the Financial Services Action Plan (FSAP) [19]. The purpose of this action was to list the legislative initiatives to be taken by the European institutions until 2004 in order to strengthen European integration[20]. In this context, on 17.7.2000 the Council of Finance Ministers of the Member States set up a Committee of Wise Men, chaired by Alexandre Lamfalussy, to make proposals on the reform of European supervision. The Committee drew up a report proposing a new process of European rule-making involving the supervisory authorities (the Lamfalussy process)[21]. The report aimed at: a) speeding up the legislative process, b) making it more flexible, c) democratizing it through the participation of stakeholders and d) making it more transparent[22]. In March 2001 the European Council adopted the above report. Despite initial objections, the European Parliament approved the procedure for adopting European rules. The Committees prescribed, European Securities Committee (ESC) and Committee of European Securities Regulators (CESR), were already established in July 2001.

During the FSAP the EU investor agenda was further embraced with another two Directives, namely the 2003 Prospectus Directive[23] enhancing the confidence of "small investors" in financial markets and the Insurance Mediation Directive (IMD)[24] addressing distribution risks regarding the sales of insurance-based investment products[25]. However, the most radical reforms

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[15] Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.
[16] Directive 97/9/EC of 3 March 1997 on investor-compensation schemes.
[17] Tountopoulos, 2021, p.14-18.
[18] Moloney, 2014, p.782.
[19] Commission Communication of 11 May 1999 entitled "Implementing the framework for financial markets: action plan".
[20] See Gortsos Ch., *"The Evolution of Financial Law, in Community and Commercial Law"*, 2007, p.296 et seq.
[21] See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15.2.2001. The Lamfalussy process for setting European rules was structured on four levels. At the first level, general rules were adopted (either in the form of a directive or a regulation). At the second level, the implementing measures for the first level of rules were adopted. This level provided for the action of committees (ESC, CESR), in which representatives of the regulatory authorities of the Member States also participated. These Committees assisted the European Commission in its work of adopting implementing measures. Subsequently, and at the third level, the Committees have been involved in refining the rules at the first and second level by issuing directives and recommendations, with the ultimate aim of harmonizing the application of these rules. Finally, the fourth stage concerned the implementation and enforcement of the provisions.
[22] Schmolke, Der Lamfalussy-Prozess im Europäischen Kapitalmarktrecht-eine Zwischenbilanz NZG 2005, p.912, 916.
[23] Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.
[24] Directive 2002/92/EC of 9 December 2002 on insurance mediation repealed by Directive (EU) 2016/97 of 20 January 2016 on insurance distribution.
[25] Moloney, 2014, p.783.

to the investor protection regime occurred under the so called MiFID I[26]. The objective of MiFID I was expressly investor protection while simultaneously addressed new conduct of business regime, conflict of interest management, best execution and order execution.

The Lamfalussy II process applies at the **fourth** stage of the development of European capital market law. This stage starts in 2009 with the de Larosière report and ends in 2015. It covers the period time after the financial crisis where the crystallization of its risks[27] caused a wave of crisis-era regulatory reform focusing mostly on the stability of the financial system[28]. The first not so successful attempt was composed by the 2009 PRIPs Communication and a proposal for reform of the ICSD. However, the most significant reforms on the market regulation adopting a renewed focus on investor protection at this stage came little afterwards and were: a) the rules on financial instrument markets (MiFID II/MiFIR) and b) the rules on insider dealing and market manipulation (MAR/CSMAD). In particular, the 2014 MiFID II[29]/ MiFIR[30] regime among IMD II reforms has tightened the distribution regulation while disclosure obligations have been enriched not only under the MiFID II but also under the 2010 Prospectus Directive and the cross-sector PRIPs reforms[31]. Under MiFID II/MiFIR product intervention has also been integrated constituting a strong instrument into EU's toolbox. The re-entry of ESMA in the regulatory spotlight in the context of rule-making and the attempt of constructing a unified rulebook and adopting a supervisory convergence on investor protection field has given a new impetus to investor law and policy[32].

Finally, the **fifth** stage of the development of European capital market law commences in 2015 with the adoption of an action plan for the creation of a Capital Markets Union[33]. The purpose of this plan is: a) to mobilize capital in Europe; b) to channel it to all businesses, including SMEs, and to infrastructure projects that need this capital to expand and create jobs; and c) to create a truly single capital market in the EU where investors have the possibility of investing capital across national borders while enterprises have the possibility of raising capital from a variety of sources and regardless of where they are located[34].

Furthermore, it is worth mentioning that the European Commission has already adopted on 24.9.2020 the new Capital Markets Union Action Plan[35]. The key objectives of the new Action

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[26] Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC.

[27] See Moloney, 2014, p.787: At the time the financial crisis was consolidated, the world of investments was affected in all its aspects, from equities, bond investments and CISs to households and individual savers. Although not targeting investors' protection from market risk, the EU market regulation proved weak as regards to distribution and disclosure obligations as well as the persistence of mis-selling. In particular the mis-selling of structured products confirmed the failure of the investor market regulation during the crisis. Investors' appetite for structured, capital-protected, products was increased in response to market volatility and low interest rates. And while the capital protection to these products seemed to be sufficient, the liquidity risks among the difficult market conditions led to investor losses.

[28] *Ibid.*

[29] Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[30] Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

[31] Moloney, 2014, p.789.

[32] *Ibid.*

[33] COM (2015) 468 final.

[34] Tountopoulos, 2021, p.14-18.

[35] COM (2020) 590 final.

Plan are: a) to support a green, digital and resilient recovery; b) to establish EU as a safe haven for private savings and investment; and c) to integrate national capital markets into a truly single market[36].

2. *Consumer - Protection Regime*

2.1 Primary – Secondary Law

The need for protecting "consumer" emerged for the first time in the context of the Treaty establishing the European Economic Community (EEC Treaty). Its scope was the establishment of a common market without national borders, where trade could be conducted on a level playing field and a cross-border basis[37]. Prerequisite for the creation of a "common market" as such, was the free movement of goods, people, services and capital. The aim of constructing a single economic area with free competition gradually led to the creation of a new –for then- branch of law regulating the legal position of consumers and seeking to protect their economic interests as well as their health and safety[38]. A new necessity, the need to establish a high level of consumer protection, began to develop as a principle which was quickly introduced into primary EU law.

Efforts in this respect started in 1975. The Council, based on Article 2 of EEC Treaty, adopted its First special Program for consumer protection and information policy in 1975[39], in which the fundamental consumer rights were defined[40]. In May 1981 the draft of a Second Program followed complementing the first one[41]. Some years after, in 1993, the EEC Treaty was amended by the Maastricht Treaty[42] with which the consumer policy was introduced as an independent policy of the Community among a series of obligations for its realization. For the first time it was defined in the text of the Treaty that the activities of the Community shall include among others, for the achievement of its goals, a contribution to the attainment of a high level of health protection and a contribution to the strengthening of consumer protection[43].

Furthermore, convinced that consumer protection policy should be strengthened, the authors of the new Treaty proceed to the addition of a new Chapter XI entitled "Consumer Protection", which included a single article, namely Article 129A. The Article was then renumbered to 153 TEC by the Amsterdam Treaty[44]. In particular, par. 3 of the Article states that the Community adopts measures aiming first to the completion of the internal market and second to ensure a high level of consumer protection[45]. For the latter case the principle of subsidiarity[46] applies

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[36] Tountopoulos, 2021, p.14-18.
[37] Alexandridou Eliza, *"Consumer Protection Law"*, 2nd Edition, 2015, p.7.
[38] *Ibid.*
[39] Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C-092, 25 April 1975.
[40] The five fundamental consumer rights adopted were: i) the right to protection of health and safety; ii) the right to protection of economic interests; iii) the right to claim for damages; iv) the right to education and v) the right to legal representation (or the right otherwise to be heard).
[41] For more details see Delouka-Igglesi, *"Consumer Protection Law"*, 2014, p.10.
[42] With the Maastricht Treaty the European Economic Community was renamed to European Community.
[43] Article 3 of TEE points (o) and (s)
[44] The Treaty was signed in 1997 and took force from May 1999.
[45] *Ibid.*, Article 153 par. 3.
[46] For more details see Alexandridou, *"The Maastricht Treaty and the protection of consumer rights (A first approach of principle of subsidiarity)*, Armenopoulos 1993, p.701 et seq.

according to Article 5 par.1 TEC[47]. The principle of proportionality applies as well, requesting the content and form of Union action not to exceed what is necessary to achieve the objectives of the Treaties[48]. Important for the consumer protection is also the principle of minimum protection established by Article 153 par. 5[49] TEC through which EU law provides a common basic level of protection to all consumers residing in the EU.

Finally the Treaty of Lisbon, namely the Treaty on the Functioning of the European Union (TFEU), known also as Reform Treaty, signed at 13 December 2007 as well as the consolidated version of the Treaty on the European Union (TEE) which followed, did not bring substantial reforms in the field of consumer protection. Article 153 was renumerated to 169 TFEU while its par. 2 was reformed to Article 12 TFEU[50]. Article 169 supplements Article 114 of the TFEU, which indicates that–in its proposals concerning health, safety, environmental and consumer protection – the Commission will take as a base a high level of protection. Reference to consumer protection is made also in Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) confirming the importance of consumer protection by stating that Union policies shall ensure a high level of consumer protection.

In a nutshell the legal basis for the protection of consumers as regards primary law is found in Articles 4(2)(f)[51], 12, 114(3) and 169 of TFEU and Article 38 of the CFREU. Nevertheless, all these Treaties have further served as a basis for an ever growing corpus of directives and regulations in the area of consumer protection[52]. Therefore, taken into account that, in line with the principles of subsidiarity and proportionality the European Union's intervention must be qualified as necessary in order to provide adequate and equivalent levels of consumer protection, the particular legal instrument predominantly used by the EU in field of consumer protection has been the directive[53].

Among the various directives covering consumer protection issues, there are some measures of more general scope and application[54], such as Directive 93/13/EEC on unfair terms in consumer contracts, Directive 2006/114/EC concerning misleading and comparative advertising, Directive 2000/31/EC on electronic commerce and Directive 2006/123/EC on services in the internal market. While there are others specifically oriented and tailored-made for the needs of consumers[55] such as 85/374/EEC[56] –now repealed by 2011/83/EU Directive on consumer rights-

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[47] Alexandridou, 2015, p.9 - Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[48] Article 5 par.3 TEC.

[49] Article 153 par.5 TEC states that: *“Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them”.*

[50] Article 12 TFEU clarifies that consumer protection requirements must be taken into account in defining and implementing other Union policies and activities.

[51] Articles 4(2)(f) states that: *“Shared competence between the Union and the Member States applies in the following principal areas: ... (f) consumer protection”*

[52] European Parliamentary Research Service (EPRS), Author: Jana Valant Members' Research Service, *“Consumer protection in the EU Policy overview”*, September 2015 — PE 565.904

[53] *Ibid.*, See also Alexandridou, 2015, p.12 et seq.

[54] *Ibid.*

[55] Alexandridou, 2015, p.12 et seq.

[56] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

the General Product Safety Directive (2001/95/EC)[57], Directive (EU) 2019/770 among Directive (EU) 2019/771 on certain aspects concerning contracts for the supply of digital content and digital services and sale of goods respectively, Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements relating to residential immovable property.

3. Regime Comparison

It is apparent that both regulatory frameworks are mainly based to Directives for enhancing the protection of their subjects. As regards capital market law, already since the beginning of 2000, directives which do not allow the national legislator to deviate from their content when harmonizing national law by adopting stricter national rules[58] are preferred. These directives are described in the literature as of maximum or a high level of harmonization[59]. The adoption of full harmonization directives is directly linked to the creation of a single market[60]. Furthermore, in recent years, regulations have been introduced that contain features of both maximum and minimum harmonization. These are hybrid arrangements known as: a) limited maximum harmonization or b) limited minimum harmonization[61].

Adversely, the large number of directives issued regulating the field of consumer protection results to the "consumer *acquis"* remaining complex and sometimes inconsistent, especially in the case of the same directive being transposed into national law differently, but also because of differences existing between various directives[62]. The greater part of EU consumer law remains of a minimum harmonization level, constituting another factor that contributes to the fragmentation of consumer law. Likewise to the investor field, there is also the category of limited maximum harmonization directives, such as the Consumer Right Directive[63], which means that full harmonization is imposed on Member States' legislators, while allowing them some derogation so that on certain issues they can maintain or adopt more favorable rules for consumers in their territory.

In a nutshell, the notion of consumer and the need of its protection as a scope are solidly grounded –specifically on TFEU and CFREU-, while the notion of investor has been developed a little afterwards. Both the former and the latter constitute two different legislative frameworks regulating and formulating a protective field being addressed to different subjects, namely the consumer and the investor respectively, fact that justifies the differences and similarities found between the two regimes.

[57] Directive 2001/95/EC of 3 December 2001 on general product safety.
[58] Tountopoulos, 2021, p.27-31. See also Article 3 of Directive 2004/109.
[59] E.g. Regulation 2017/1129 and MiFID II.
[60] *Ibid.*, Preamble of the Directive.
[61] *Ibid.*, 55, Tountopoulos, 2021, p.27-31;e.g. Articles 3 par. 1 and 3 par. 1 of Directive 2004/109.
[62] Alexandridou, 2015, p.13.
[63] See also Eleftheriadis and Giovannopoulos in Alexandrirou, 2021, p.170 et seq.

4. *The Rationale for Investor Protective Regulation - The legal affinity of investor protection with the principle of consumer protection*

4.1 The "ratio" of the investor protective regulatory framework

The Rationale behind the cultivation of a protective regulatory framework for the investor, having an active role in different aspects of the economic, social, political life, it is not one-sided. Capital market law starts from the assumption that the public interest does not allow for complete and absolute self-regulation of markets[64]. Legislative intervention is necessary to ensure both market efficiency and investor protection. These objectives are explicitly set out in most pieces of capital market law and are interlinked, as the protection of the capital market is for the benefit of investors and *vice versa*[65]. In other words, there can be no efficient market without investor protection, and investor protection is a basic precondition for the efficient functioning of the market[66]. It is no coincidence that investor and market protection are described as two sides of the same coin[67]. Moreover, the wording of the European regulations does not allow a distinction to be made between investor protection and market efficiency. It is therefore obvious that it is particularly difficult to distinguish between these objectives, although it is often stated in the literature that the main aim of capital market law is to ensure the efficiency of its market[68].

Nowadays, the principle of efficiency of the capital market finds its keystone into the investor protective regulation, promoting the creation of a single European capital market and a single market for investment services[69]. On the same grounds, the modern legislator comprehends all kinds of legislative measures as instruments to protect the investor not only as an end in himself, but as a means for reaching a specific outcome[70]. The investor is afforded legal protection in order for the proper functioning of the capital market to be achieved and thus the corresponding benefits to be maximized for the sake of the wholeness. An efficiently functioning capital market enhances the competitiveness of the national economy and serves the public interest. Capital market efficiency is understood under three facets: a) allocative efficiency, b) institutional efficiency and c) operational efficiency[71].

The efficient functioning of the capital market is therefore in any event the ultimate economic and political objective[72], which is served, inter alia, by providing adequate legal protection for the main "feeder" of capital market services, namely the recipient of investment services. This functional-oriented approach of the rules of law, in particular their legislative conception and possibly their interpretation on the basis of criteria which, more or less, derive from the needs

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[64] For more details see Gelter in "*Global securities litigation and enforcemen"t*, 2019, p.3, 7.
[65] Tountopoulos, 2021, p.6.
[66] *Ibid.*
[67] Liappis, in *"Consumer Protection Law II"*, 2008, p.1251 et seq.; Tountopoulos, *Anlegerschutz bei unterlassenem Pflichtangebot nach europäischem Kapitalmarktrecht, WM* 2014, p.337, p.339.
[68] Oulds, in Kümpel et al., Bank- und Kapitalmarktrecht, 2019, 1424; Lenenbach, Kapitalmarkt und Börsenrecht, 2002, 1.38; Seiler/Geier, in Schimansky et al., Bankrechts - Handbuch, 2017, Vor § 104, αρ. 72.
[69] Karagkounidis, "*Protection of the Investor"*, 2007, p.232.
[70] See A.Kazako, "*Civil law, market economy and consumer protection"* (1987), p. 28-29
[71] See Karagkounidis, p.222 et seq.; Tellis, EpiskED 2009, p.273, 283 et seq.; Tsibris, "*The public offering of securities*", 1994, p.33; Tsimbanouli, *'The capital market and its legislative framework"*, 2001, p.1 et seq. For more details see also Tountopoulos, 2021, p.7 et seq.
[72] See Liakopoulos, *"Economic freedom subject of protection in competition law*", 1981,p. 49.

and feasibilities that lie primarily in the spheres of economy and politics, is not unprecedented[73]. On the contrary, it constitutes a common place founded often in the legal science and always creating a field of intense scientific debates[74].

However, the investor, except for being a "feeder" of capital market which requests for a well-protected, satisfied "supplier" in order to function properly, it constitutes also an individual "player" in the field of transactions acting in an exquisitely "inhospitable", complex and dangerous trading environment[75]. The second objective of investor regulation, namely the protection of investors, is divided into two categories: the "hyperatomic - collective protection" (i.e. protection of the investing public) on the one hand, and the "individual protection" (i.e. protection of individual interests of individual investors) on the other hand[76].

As per the first one it is unquestionable that markets cannot exist, even function effectively, if the investing public as a whole does not trust their reliability, stability and integrity. The protection of the investing public is perceived as a functional counterpart of market efficiency. A typical example where the protection of the investing public intertwines with market efficiency is the provisions on the flow of information in the market[77]. Of course, it is not always clear in which manner the investing public is defined and protected. In particular, while certain directives and regulations seem to accept that investors are capable of evaluating existing data and making rational decisions, other directives refer to consumers and retail investors, implying that these investors are more vulnerable and not always able to properly understand the content of the information received[78].

The second, namely the protection of the investor as an individual, finds its grounds in certain provisions of capital market law designed to protect the individual interests of investors while recognizing an individual right to compensation for injured investors. The example of the provisions on Prospectus liability is typical. The relevant provisions expressly establish an individual right for investors to claim compensation for the damage suffered thus creating a favorable regime for their benefit[79]. However, other provisions of capital market law expressly state that their sole purpose is to protect the efficiency of the market. Which provisions are intended to protect market efficiency and which are intended to protect investors is not known *a priori*[80]. Therefore, it is necessary to interpret the relevant provisions in each specific case *("ad hoc/ in concreto")*[81].

[73] See Dellio, *Protection I*, p.132 et seq.
[74] Karagkounidis, 2007, p.243
[75] It has the meaning of the secondary capital market environment, which is a necessary precondition for the functioning of the primary capital market; See Avgitidis, *"Liability of the contractor"*, 2005, p.136. For the distinction between primary and secondary capital market see *Ibid.,* Chapter I.
[76]Tountopoulos, 2021, p.10.
[77] *Ibid.*
[78] Veil, "*European Capital Markets Law"*, 2017, p.26.
[79] Tountopoulos, 2021, p.11.
[80] Particularly for this issue see the analysis of Georgakopoulos, *"The purposes of stock exchange policy, in Stock Exchange - Topical Critical Analyses"*, 2002, p.56.
[81] See also Avgitidis, *"Capital Market Law"*, 2019, p.19 et seq.; A. Georgiadis in Georgiadis/Stathopoulos, Article 914, no. 50 et seq. Georgiadis, *"Brief Interpretation of the Civil Code"*, 2010, Article 914, no. 10 et seq.

Recent European developments, however, take the debate on the protective nature of capital market law regulations to a completely different level[82]. The focus of the debate is no longer on the question of whether EU capital market law rules recognize rights to compensation for investors, but whether the recognition of private rights is necessary to ensure the effectiveness of EU regulation[83]. Of particular importance in this respect is the case law of the CJEU, according to which the recognition of private enforcement contributes to the effective application of EU competition rules[84] and, more generally, to the effective application of regulatory provisions[85]. At the same time, it is also important to mention that EU legislation explicitly recognizes that investors have both the status of client and consumer setting as its purpose the protection of investors[86]. **This constitutes a first hint that an affinity exists between the structure and ratio of the investor and consumer regime.**

4.2 The legal affinity of investor protection with the principle of consumer protection

In the field of capital markets, the principle of the autonomy of private will is predominant, which is a preliminary criterion for the attribution of the risks to which the investor is exposed[87]. The application of this principle means that the investor must assume all the investment risks associated with voluntary participation in the capital market mechanism[88]. However, this point covers only the one aspect of the issue.

It is an unquestionable fact that the investor in this rather complicated capital regime is found to be in a weaker position than the professional market actors. In particular, their relationship is characterized by severe information and expertise asymmetries to the detriment of the investor[89], mainly due to its limited competence regarding complex investments, leading to related risks and costs[90] and inevitably to market failures. Lack of contractual experience as well as bargaining power constitutes also elements that place the investor at an even greater disadvantage. These features are further exacerbated by the agency relationship which characterizes investor engagement with the markets[91] and by the behavioral risks to which investors are exposed. More specific, regulatory intervention has been argued to be imperative as evidenced from behavioral finance of the investor acting as irrational and of poor-decision making[92]. Investors are vulnerable to significant decision-making weaknesses and subject to sustained and predictable biases, including over-confidence and susceptibility to herding behavior, which damage optimum decision-making[93]. **All these features shape an abstract model of the 'investor',**

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[82] Tountopoulos, *"Market Abuse and Private Enforcement",* European Company and Financial Law Review, 2014, Vol. 11., p.297 et seq.
[83] *Ibid.,* 297, 315 et seq.
[84] CJEU, 20.9.2001, C-453/99, Courage Ltd, rec. 24, 26, 36; CJEU, 13.7.2006, C-295/04-C-298/04, Manfredi, rec. 59-61; CJEU, 14.6.2011, C-360/09, Pfleiderer, rec. 28; CJEU, C-199/11, Otis, rec. 41, 42.
[85] CJEU, 17.9.2002, C-253/00, Muñoz, ECLI:EU:C:2002:497
[86] See, indicatively Article 1 of Regulation 1095/2010 and recital 2 of Regulation 236/2012.
[87] Karagkounidis, 2007, p.252.
[88] *Ibid.*
[89] Moloney, 2014, p.770.
[90] See Howells, G, *"The Potential and Limits of Consumer Empowerment by Information"*, 2005 and Garten, H, *"The Consumerization of Financial Regulation"*, 1999.
[91] Moloney, 2014, p.770. Given in particular heavy reliance on investment advisers and similar distribution channels (see Choi, S, *"A framework for the Regulation of Securities Market Intermediaries"*, 2004).
[92] Moloney, 2008, p.538
[93] Shleifer, A, *"Inefficient Markets. An introduction to Behavior Finance"*, 2000; see Chater N., Huck S., Inderst R., *"Consumer Decision Making in Retail Investment Services: A Behavioral Economics Perspective"*, 2010.

specifically the small and medium-sized investor, which resembles greatly to the abstract model of the "consumer"[94].

As regards the consumer, he is faced with a wide variety of goods, disoriented, unable to properly evaluate and choose the best quality and cost-effective product he needs. Furthermore, consumers' actions are not always a result of a free, unconditional choice as they are subject to constraints arising from mass production, standard contract clauses even some manifestations of monopoly[95]. The typical profile of a consumer, when compared to its contractor (producer/supplier/service provider), focuses on his status as an "amateur" while consisting of features such as lack of information and expertise regarding both the characteristics of the products/services and the way "market" operates, negotiation imbalance, vulnerability to biases etc. It is therefore logical that the central policy demands in consumer protection law are: i) to mitigate the existing asymmetry in information between supplier and consumer and ii) to restore the consumer's bargaining power[96].

Therefore, it is make clear that **both** the former and the latter are at a distinct disadvantage vis-à-vis undertakings offering products and/or services on the market, and their legal self-determination is systematically challenged by a multitude of situations, which constitute factors that significantly jeopardize their property interests and form a strong reason to doubt their confidence concerning the integrity of the market mechanism[97]. Moreover, in **both** cases, it is not only the individual consumer/ investor who is threatened with losses and damage, but also the market/securities market mechanism itself[98].

These common features of the two notions formulate the ties establishing the legal affinity between investor and consumer protection. The investor –particularly the small and medium-sized- like any consumer, constitutes a non-professional operating in the relevant capital market[99]. Therefore, even if he may not be considered to fall within the *"strict sensu"* notion of consumer[100], he is nevertheless in a similar position to the latter, giving us a first hint for the possibility of the general provisions of consumer protection law to be applied in the field of investments[101].

The rationale behind the structure and development of the investor's legal framework, bearing in mind the legal affinity existing with consumer legislative, has lead inevitably to the integration of the principle of consumer protection for safeguarding and shielding the weaker part against the superior, well-informed and connoisseur contractor. Thus, the "investor-driven" regulatory approach, mostly associated with discretionary activities, *"caveat emptor",* personal responsibility, disclosure and market-based mechanisms for protection, including hedging and diversification tools[102], has been gradually affected by a "consumer-based" approach[103] resulting

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[94] Karagkounidis, 2007, p.252.
[95] Vasile Dinu, *"The Need for Consumers' Protection",* January 2010.
[96] See in detail Livada, *"The concept of the protected consumer under Community law"*, Dikaio Etaireion & Epiheiriseon, Vol. 11/2005, p. 1139-1140.
[97] Karagkounidis, 2007, p.253
[98] *Ibid.*
[99] Vasileios Christianos, *"The protection of the investor as consumer in Community law: from the prohibition of insider dealing to the prohibition of market manipulation"*, Elliniki Dikaiosini, Volume 6/2002.
[100] *Ibid.*
[101] See Liakopoulo, *"The Principles and prospects of financial law"*, Dikaio Epixeiriseon & Etairion, 2000.
[102] Moloney, 2014, p.773.

to a more interventionist regulation, especially regarding product testing and privilege investor protection. **This weakness position of the investor and consumer against their contractor constitutes a point of convergence between the two notions as well as a common *ratio* behind the respective investor and consumer regulatory frameworks, the latter of which has, as it seems, significantly affected the former.**

CHAPTER II: NOTIONS OF INVESTOR-CONSUMER & INVESTMENT PRODUCTS-CONSUMER GOODS: DIVERGENCES/ CONVERGENCES

1. Investor

1.1 The notion of investor

The notion of investor does not have a single and stable conceptual and normative content in Community law. In the context of Directive 97/9/EC [104], the term is broadly defined in Article 1 (5) as *"any person who has entrusted money or instruments to an investment firm in connection with investment business"*. MiFID I and II, from the other side, use the term "client" instead of "investor" whom define as *"any natural or legal person to whom an investment firm provides investment or ancillary services listed in Annex I (Sections A and B) of the Directive"*[105]. On the basis of the references made in the preamble of MiFID II[106], it is obvious that the term "investor" is used as an alternative of the "client" of the investment firm[107]. As an "ideotype" for the interpretation of the provisions aiming to the protection of the investor, the type of an active investor-client, i.e. a client who seeks and process information relevant to his investment opportunities, as well as proceeds to investment decisions on the basis of that information, is chosen[108]. Furthermore, secondary European law has adopted some categories of the investing public, without, however, defining those categories in such a sufficient and precise way in order to make them useful. Indicatively, the term "retail investor" is used in the text of certain Community Directives[109] albeit not specifying its conceptual. Most important and useful seems, however, the classification of investors under MiFID I – II.

1.2 Investor/Client Classification under MiFID I - II

The classification regime includes: i) a "three-tier" categorization with regard to investment services of receiving, transmitting and executing orders on behalf of clients and dealing on own account, namely retail clients, professional clients and eligible counterparties (i.e. financial

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[103] *Ibid.*, A "consumer-based" approach suggests an acknowledgement that the investment products in question are essential to daily life, that consumption is a consequence of government withdrawal from welfare, and that protection of the consumer with respect to potential losses and risks is warranted.

[104] Directive 97/9/EC of 3 March 1997 on investor-compensation schemes.

[105] MiFID II, Article 4 (1), point (9).

[106] *Ibid.,* Recitals: 5, 51, 87, 89 and 144 in the Preamble of the Directive.

[107] Gortsos, C.V., 2018, *"(A): Stricto Sensu Investor Protection Under the MiFID II: A Systematic Overview of Articles 24-30".*

[108] Avgitidis, 2005, p.319-320.

[109] See Art. 20 par. 1 (g) of Directive 2004/39/EC; Preamble rec. 43 of Directive 2003/6/EC and Preamble, rec. 5, 22 of Directive 2006/73/EC.

institutions) and ii) a “two-tier” categorization, namely retail and professional clients[110], concerning the other investment services[111].

In particular, a “retail” investor” is defined in MiFID II in a deductive way to mean clients who are not professional ones[112]. Professional clients, from the other side, are defined in Annex II of the MiFID II as clients who possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that they incur. Professionals are further classified into two sub-categories: professionals as such[113] and those treated as professionals upon request[114]. The latter case includes non-professional clients to whom the retail-client regime applies as the default regime, treatment which they can alter by requesting the application of the professional clients' status[115]. Respectively, professionals can level up their protection regime to a non-professional status[116]. Retail clients deserve the highest level of investor protection while professional ones enjoy a limited degree of protection.

1.3 Protective Regime according to investors' classification

The distinction between different categories of investors, mainly private and/or professional, does not serve some abstract need of categorization, but is inextricably linked to the finding that the need of protecting investors, as subjects enjoying protection under capital market law, is not equally acute for all “types” of investors[117]. Therefore, as regards professional investors, because their expertise, experience and negotiating power in the field of investment are presumed, they do not come close to the standards of the inexperienced and weak investor deserving protection, thus the inclusion of persons in this category entails their exclusion from the protective scope of certain provisions.

The quite innovative and distinctive client classification scheme, firstly introduced by MiFID I, constituted the basis around which the calibration of the application of the conduct-of-business regime was structured[118]. The application of authorization and operational rules remained irrelevant to client types, thus creating a regulatory segmentation serving the creation of a tailored-made regulation, particularly for the unsophisticated investors[119]. The full range of conduct-of-business regime was applied to services provided to retail clients, among which disclosure obligations, suitability assessment and best execution were designed only for retail clients. Services provided to professional clients were also subject to the conduct-of-business requirements, having, however, many of the extensive administrative rules been disapplied[120]. As

[110] Similar in the content of the distinction between "professional" and "private" clients should also be considered the distinction under the Directives 2004/109/EC (Preamble, rec. 12, 25 and 36) and 2003/6/EC (Preamble, rec. 25) as well as the distinction between qualified and non-qualified investors in the context of Directive 2017/1129 /EC on the prospectus.
[111] Gortsos, C.V., 2018.
[112] MiFID II, Article 4 (1), (11).
[113] *Ibid*., Annex II sect. I.
[114] *Ibid*., Annex II sect. II.
[115] See Moloney, 2014, p.353-354.
[116] *Ibid*., Annex II sect. I (4).
[117] Avgitidis, 2005, p.337.
[118] Moloney, 2014, p.352.
[119] *Ibid.*
[120] *Ibid.*

per the eligible counterparties, those were totally exempted from this protective regime specifically regarding the order execution[121], leaving aside the other investment services.

MiFID II has not materially disturbed the MiFID I classification system[122]. More specific, the conduct regulation under MiFID II is applicable to all professional clients, while the new administrative rulebook is expressly oriented to retail clients[123]. Eligible counterparties continue to be exempted from the most significant part of the conduct regime having at the same time the possibility to be subjected upon request to the full range of the protective conduct rules, under quite strict requirements though[124]. As regards to the case where investment firms are authorized to execute orders on behalf of clients and/or to deal on own account, to receive and transmit orders, the dis-application of the conduct-of-business regime remains enabling them to bring about or enter into transactions with eligible counterparties, without being obliged to comply with the obligations under Article 24 (with the exception of par. 4 and 5), Article 25, (with the exception of par. 6), Article 27 and Article 28(1). However, investment firms in their relationship with eligible counterparties must act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business[125].

Furthermore, MiFID II has extended the non-exhaustive list of non-professional clients also to include local public authorities and municipalities[126]. It is worth mentioning here that professional investors remain recipients of protective rules, even of a lower intensity, in recognition of the fact that information asymmetry affects not only private individuals but also professional investors, both equally threatening the market mechanism with distortions[127]. **This extension of the protective scope of some provisions to professional investors constitutes a divergence compared to consumer law where professional recipients of goods or services are completely excluded from protection in common consumer transactions**[128]

2. Consumer

2.1 The notion of consumer

Defining consumer is one of the main legislative problems of consumer protection law because of the wide range of persons who may, where appropriate, be recipients of goods or services[129]. Sociological research has shown that there are different types of consumer, i.e. the consumer who needs full protection, the passive consumer, the informed consumer or, on the contrary, the over-informed consumer[130]. In other words, the case is not the protection of the same group of persons but the protection of a variety of needs arising from different situations[131]. Articles 4, 12

[121] MiFID I, Article 24.
[122] The Commission described the classification system as providing adequate and satisfactory degree of flexibility: 2010 MiFID I Review Consultation, n 112, 61.
[123] Moloney, 2014*,* p.354.
[124] *Ibid.,* p.353.
[125] *Ibid.*
[126] MiFID II, Annex II sect. II (1). See Gortsos, C.V., 2018.
[127] Karagkounidis, 2007, p.240.
[128] See Dellios, "*Protection I"*, p. 27 et seq.
[129] Livada, DEE, Vol. 11/2005.
[130] Christianos, *"Community law on consumer protection"*,1997, p. 42.
[131] Dellios, 2005, p.71 et seq.

and 169 TFEU refer to consumer protection as one of the EU's actions without attributing specific characteristics to it. Therefore, definitions of this concept are given on a case-by-case basis, in view of secondary law[132].

In particular, Directives aiming at protecting the life and health of consumers, such as Directive 92/59/EC on general product safety[133], define the concept of the consumer in a very broad way in order to include in their scope of protection any natural person exposed to risks arising from the use of products and services[134]. Furthermore, Directive 85/374/EEC on liability for defective products provides that, in case of material damage only, liability exists where the products are of "*a type ordinary intended for private use or consumption and were used by the injured person for his own private use or consumption"*[135].

On the contrary, where Community measures are aimed at safeguarding the mainly economic interests of the consumer, the scope of protection is limited by the use of criteria which have as their common denominator the strengthening of the position of the party having reduced bargaining and economic power, which can easily be exploited by its counterparty[136]. The subjective scope of protection is usually determined on the basis of the use of the product or service to satisfy needs unrelated to the professional activity. Indeed, Directives 2011/83/EU[137], 2008/48EC[138], 93/13/EC[139] and Directive 1999/44/EC[140] on certain aspects of the sale of consumer goods and associated guarantees consider as "consumers" only natural persons pursuing purposes unrelated to their professional activity.

A definition of the notion of the consumer is also found in Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia) and in Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I). In Art. 1 of the first and Art. 1 of the latter Regulation, the consumer is defined, in a similar way, as *"a person who concludes contracts for purposes other than his professional activity"*.

From the multiple definitions spread throughout the EU legislation, a tendency for the scope of protection to be limited only to personal or household consumption by natural persons and always outside the scope of their professional activities can be easily discerned. In particular, according to the *Cape and Idealservice*[141] judgment, *"from the letter of Article 2 of the Council*

[132] With the Green Paper on the Review of the Consumer Acquis {2007/2010(INI)}, the Union took the first steps towards complementing the vertical approach to consumer protection, i.e. the regulation of protection by sectors, with a horizontal approach, proposing the integration of the concept of consumer. It considers that the horizontal instrument should be applied as widely as possible to all consumer contracts, whether for national or cross-border transactions, in order to avoid introducing a further element of complexity by imposing different legal arrangements on consumers depending on the nature of the transaction.

[133] The underlying Directive has been replaced by Directive 2001/95/EC of 3 December 2001 on general product safety, which also does not contain a limitation of the concept of consumer.

[134] Karakostas Ioannis, *"The recipient of banking services as a consumer"*, Chronika Idiotikou Dikaiou, Volume 2003, p.97.

[135] Article 9 of Directive 85/374/EEC

[136] Karakostas, Chronika Idiotikou Dikaiou, Vol.2003, p.97.

[137] Article 2 (1) of Directive 2011/83/EU.

[138] Article 3 (a) of Directive 2008/48EC.

[139] Article 2 (b) of Directive 93/13/EC.

[140] Article 1 (2) (a) of Directive 1999/44/EC. But according to Article 23 of Directive (EU) 2019/771, *"Directive 1999/44/EC is repealed with effect from 1 January 2022"*.

[141] C-541/99.

Directive 93/13/EEC clearly follows that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision[142]*"*. In that judgment the Court of Justice did not interpret the concept of consumer in the light of the particularities or the ratio of the European Directive, but only on the basis of the letter of that provision. The narrow interpretation of the concept of consumer, adopted by the CJEU in that case *"shall reasonably apply to all directives in which the grammatical wording of the definition of consumer is the same"*[143].

The divergence compared to the notion of investor, which includes a category of professional investors as well as enables also legal persons to be attributed the characterization of an investor, is obvious here. Indeed, it should be pointed out that the extension of the protection also to legal persons may be to the detriment of those who really need it and who are mainly natural persons presumed to be in a disadvantaged position in relation to their counterpart, whereas, on the contrary, "the distinction made by means of European law between natural and legal persons (even if exaggerated) is clear, providing certainty and focusing correctly on those cases which serve the core of consumer law"[144].

However, it should be pointed out that according to the CJEU and relevant jurisprudence, the concept of consumer cannot be defined on the basis of a predetermined subjective situation: the same person may be a consumer in one situation and a professional in another. It is therefore not the personal circumstances of the subject that are decisive, but his position in the context of a certain contract in relation to the purpose and terms of that contract[145]. Therefore, not every weaker contracting party is protected, but only those who conclude the contract at issue outside the context of their professional relations. In order to establish whether the above condition is met, it is not important the party's subjective situation, e.g. whether the profession he declares as his profession is unrelated to the specific contract, but whether he can be considered objectively as a professional in the context of the specific transaction[146].

2.2 Distinction of the two notions – point of convergence: Retail Investor

The concepts of the "investor" and "consumer" derive from the field of economics[147]. While the former accumulates capital by investing in the means of production in order to make money - namely through the intermediary of the capital market, finances (from his savings or from anywhere else) loss-making undertakings, thus participating directly or indirectly in them with the aim of making a profit, which consists either in receiving a certain income or in capturing any surplus value from the sale of the investment instruments at a price higher than the market price-, the latter disposes capital for the immediate satisfaction of his needs[148]. Thus, in some way, "investment" as a notion appears to be the inverse of "consumption"[149]. The two concepts seem like two parallel lines which do not intersect. They seem hostile, especially since the investor, at first sight, can hardly be considered worthy of protection since he is voluntarily exposed to risks in the context of his rightful self-determination, while the consumer is treated in

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[142] *Ibid*., Rec. 16.
[143] Livada, DEE 2005, p 1144. See also Kotsiris, *"The concept of consumer",* DEE 2005, p. 1128.
[144] *Ibid*., p.1145.
[145] See Case C-269/95, Rec. 15-17.
[146] Karakostas, Chronika Idiotikou Dikaiou, Vol.2003, p.97.
[147] Christianos, Elliniki Dikaiosini, Vol. 6/2002.
[148] *Ibid*.
[149] J. CALAIS-AULOY and F. STEINMETZ, *"Droit de la Consommation 1996"*, ed. Dalloz, no. 11.

a "class" view of consumer protection law as the socially "weak", who struggles to meet his living needs and is therefore protectable[150]. As a result, the question that arises from the outset is whether and under which circumstances the investor can be treated at the same time as a "consumer" of investment services enjoying the protective regime of consumer protection law. In other words, can these two concepts be reconciled, and if yes what is their **point of convergence**?

Both primary and secondary community law leave the delimitation of the relationship between the two concepts unresolved, while both the case law of the CJEU and theory have not yet adopted a definitive, coherent stance on the matter. However, the answer to the above question is not as difficult as it may seem at first sight[151].

The recognition of the investor as an independent empirical and legal type (Typus), distinguished from the common shareholder, who puts his corporate interests ahead of his personal interests, and the common consumer, arises mainly from[152]:

a) the recognition by the legal order of its critical economic role as a provider of funds to deficit economic units; and
b) the attribution to him, subjecting to certain conditions, of all those features and predicaments[153] which mobilize the "protection net" for the consumer, especially in cases where he does not act as a professional with special knowledge and experience, but as a small investor who places his savings in financial products in order to increase them[154].

It has indeed been argued, though in general terms, that the purchase of financial products on the stock exchange or by banking institutions, provided it is not of an ordinary and speculative nature, constitutes an act of consumption[155]. Of course, the nature of financial transactions is extremely complex and opaque, resulting to the hard core provisions of consumer law to be totally inadequate to cover the specific risks, the sophisticated knowledge and information deficits inherent in the investor more than any other consumer recipient of services[156]. Therefore, the development of a specific investor protection regime appears necessary while not counteracting the parallel application of general consumer law, especially in the areas of misleading advertising, which cover any misleading communication aimed at promoting products/services or unfair practices and terms in contracts with investor-consumers[157].

Therefore, taking into account the definitions of "consumer" as mentioned above, it is accepted that an investor, provided that is a natural person and carries out transactions outside the framework of his profession while not having the necessary experience and knowledge vis-à-vis

[150] Georgios Triantafyllakis, *"The protection of the investor as a consumer against market abuse (manipulation)"*, DEE, Vol. 4/2008.
[151] Christianos, Elliniki Dikaiosini, Volume 6/2002.
[152] Karagkounidis, 2007, p.270 et seq.
[153] Especially in recent years, empirical research in cognitive psychology has revealed (see Amos Tversky, "*The psychology of risk in Share (ed.), Quantifying the Market risk (1990")*, pp. 73 et seq.) that non-professional investors make far from rational decisions. Their choices are often dominated by illusions, nervousness, obsessions and other imponderable emotional factors. In other words, they are subject to severe cognitive limitations, so that they are often led to misuse financial instruments, characteristics that fit the profile of the consumer.
[154] Georgios Triandafyllakis, DEE, Vol. 4/2008.
[155] Christianos, Elliniki Dikaiosini, Vol. 6/2002.
[156] Triandafyllakis, DEE, Vol. 4/2008.
[157] *Ibid.*

the investment firm enabling him to take investment decisions with due assessment, may also be treated as a consumer. In that case, the investor has the same typological characteristics as the consumer, namely the absence of the capacity for legal self-determination and for adequate self-protection and autonomous assessment of the investment risk because of the information asymmetry to which he is subject[158].

It is clear from the European texts that the legislator's consistent view is the consideration of investors as consumers, subjecting to protection[159]. In particular, as per the correspondence of the notion of "consumer" with the categorization of investor/ clients into private and professional under MiFID I - II, it follows that the typical, for the case of the consumer, unfavorable bargaining position will in principle apply in the case of the retail client/ investor **–point of convergence-**, as to whom it is typologically presumed (*e contrario* by Art. 1 para. 12 and Annex II of Directive) that he lacks the necessary experience and knowledge of investment transactions[160]. In contrast, in the case of the professional client/ investor, the Community legislature is motivated by the belief that such traders have, in the first instance, the necessary knowledge and experience to assess the risks inherent in their investment decisions. Consequently, their bargaining position is not equivalent to that of a private investor and they are not in principle subject to the concept of consumer[161].

An exception to the above constitutes the case where the retail investor meets the criteria of Annex II Section II of MiFID and applies to the investment firm to be treated as a professional client. In that regard, it must be accepted that, if the private investor succeeds in obtaining the status of professional client, he is presumed to have the necessary expertise in investment transactions and, consequently, does not possess the typical characteristics of a consumer. Similarly, if professional clients specifically request to be included in the level of protection of retail investors in accordance with Annex I of the Directive, it can be concluded that in this case the clients do not have the necessary expertise and can therefore be considered to be in the typical position of a consumer[162].

It is noteworthy in this respect that the criteria adopted for investors' classification are similar to those which have been standardized in the case law of consumer protection law[163]. In both cases, the cognitive link and the element of familiarity of the classified

[158] *Ibid.*
[159] Perrakis in *"Consumer Protection Law"* (Ed. Alexandridou) 2008, p. 63.
[160] **The possibility of including retail clients in the concept of consumer is also demonstrated in view of Article 28 of Directive 2006/73/EC "implementing Directive 2004/39/EC as regards organizational requirements and operating conditions for investment firms and the definitions applicable for the purposes of that Directive". This Article specifies issues relating to the categorization of clients of investment firms (Article 19(3) of Directive 2004/39/EC) in relation to Directive 2002/65/EC. In particular, that provision states in paragraph 5(b) that, in any event, where Article 3 par. 3of Directive 2002/65/EC does not otherwise apply, the investment firm shall comply with the requirements of that Article in relation to an existing or potential retail client as if that client was a "consumer" and the investment firm was a "supplier" within the meaning of that Directive. Although the provision refers only to the provision of investment services at a distance, it is nevertheless clear from its content that, according to the Community legislature, an individual client (existing or potential) of an investment firm may be covered by the concept of consumer.**
[161] In the same conclusion: Karakostas, 2004, p.295 et seq; Avgitidis, 2005, p.315 et seq; *Ibid.,"The recipient of investment services as a consumer",* Episkopisi Emporikou Dikaiou 2001, p.297 et seq; Papastergiopoulou, Chronika Idiotikou Dikaiou 2003, p.310 et seq.
[162] Karagkounidis, 2007, p.264-267.
[163] *Ibid.*, p.273.

person (as a consumer/retail investor or professional trader/investor) with the subject-matter in question are favored. The convergence of the features justifying the protection of both investor and consumer is more than apparent. However, what is certain is that the systematic involvement of an investor in the capital market is not a sufficient condition to shift him from the category of private individual and its potential characterization as a consumer to the category of professional[164].

Other criteria that have been proposed from the theory and jurisprudence and which may or may not advocate, in a consistent and complementary manner, in attributing or not the consumer status to a particular recipient of investment services are[165], apart from the professional status of the investor (in accordance with the categorization under MiFID I/II), the purpose of his investment activity (speculative or otherwise)[166], his investment experience[167] and knowledge of the market, the degree of initiative and self-direction[168], the type and amount of transactions carried out and risks assumed[169], the intensity of his trading activity, etc.

3. Investment Products

Investors have in principle access to a large variety of investment products which are regulated according to their complexity and degree of risk[170]. MiFID II regime covers specific "investment services and activities" as regards to a wide range of simple and complex "financial instruments". Financial instruments are specified in Section C of Annex I[171]. In the context of transferable securities referred in the Annex, structured products are included coming within their scope[172]. Furthermore, various kinds of derivatives, among commodity derivatives, fall also under the coverage of the Directive. MiFID's II scope is not restrained only to these investment products, but it includes structured deposits[173], namely deposit-based investments resulting to the consequent removal of regulatory arbitrage risks. Although having a quite broad scope of application, MiFID II leaves outside of its regulatory range the insurance-based investments which are addressed specifically by the respective Insurance Distribution Directive 2016/97[174] having, albeit, the latter being affected by the former.

Furthermore, a tailor-made for retail investors regulation[175] exists for the so called Packaged Retail and Insurance - based Investment Products (PRIIPs). In particular, the first (PRIP) has the meaning of *"an investment, ... where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail*

[164] Triandafyllakis, DEE, Vol. 4/2008.
[165] Karagkounidis, 2007, p.257.
[166] Avgitidis, 2005, p.331-2.
[167] *Ibid*, p.332.
[168] Dellis, DEE, Vol. 2002, p.1090.
[169] *Ibid*, p.1148.
[170] Distribution systems of retail investment products across the European Union, Final report, 2018.
[171] *Ibid.*, Article 4 (1), point (15).
[172] Moloney, 2014, p.799.
[173] *Ibid.*, Article 4 (1), point (43)
[174] See Recital 10 in the Preamble of the Directive.
[175] Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.

investor[176]", while the latter means "*an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations*[177]".

The complicated structure of investment products as well as the high level of risk they entail is taken under consideration by the European legislature. More specific, MiFID II introduces a single set of rules of conduct for investment firms. The obligation to execute investment orders on terms most favorable to the client, in a timely and prompt manner, based on the principle of time priority, the general observance of honest, fair and professional conduct aimed at serving the interests of investors as effectively as possible, among the obligation to provide the necessary information in order for the clients to make informed and correct investment decisions are some provisions focusing on enhancing the protective shield of the investors[178].

In the same line moves the PRIIPs Regulation. Its scope constitutes the creation of a fully harmonized level of protection particularly for retail investors through the establishment of uniform rules on the format and content of the key information document (KID)[179]. KID has been designed to be a highly standardized document which supports comprehensibility, but also compatibility across a range of products[180]. The key information document should be drawn up in a standardized format which allows retail investors to compare different PRIIPs, since consumer behavior and capabilities are such that the format, presentation and content of information must be carefully calibrated to maximize their understanding.

4. Consumer Goods

On the contrary to investment products which are characterized from their intangible and risky nature, their complexity and difficulty to control, consumer goods are mainly movable items, easily to manage and directly consumable. "Goods" are defined in the CRD[181] as *"any tangible movable items ... where water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity"* while the General Product Safety Directive[182] distinguishes between safe products and dangerous ones[183] and the Product Liability Directive refers to defective products[184]. Furthermore, Directives 2019/771 and 2019/771 –attempts of consumer law to keep up with the technological advances and developments- introduce the notion of "goods with digital elements" defining them as *"tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions"*[185]. **In this kind of products there is an act of consumption missing from financial instruments which are not used for consumption**

[176] *Ibid*., Article 4 par. 1.
[177] *Ibid*., Article 4 par. 2. For more see I. K. Rokas, *"Insurance mediation"*, 2019, p. 183.
[178] Articles 24-30 of MiFID II, See also Gortsos, 2018.
[179] *Ibid*., Article 1.
[180] Moloney, 2014, p.823.
[181] Article 2 (3) of Directive 2011/83/EU.
[182] Directive 2001/95/EC of 3 December 2001.
[183] *Ibid*., Article 2 (b) (c).
[184] Article 6 of Directive 85/374/EEC
[185] Articles 2 (5) and 2 (3) of the Directives respectively.

purposes but for the purpose of speculation[186]. Investment products are not end products but generators of future benefit.

Alike to the protective provisions in the field of investment products, consumer legislation in not limited only to the determination of general safety, conformity and information requirements regarding the characteristics of the goods, the trader's data, the terms of the contracts etc. on the part of the producer/ supplier[187]. Consumer Directives establish also strong rights in the arsenal of the consumer such as the right of withdrawal and the right of repair or replacement of the goods when they do not meet the subjective and/ or objective requirements for conformity[188]. Even when the exercise of the latter rights is not possible or unable to bring the desire result a right of reduction of the price or termination of the contract is provided.

5. Divergences

The **divergences** between the two notions of "investment" and "consumer" products are obvious as regards both their nature/characteristics and the respective rights provided to their subjects. "Consumer good" constitutes a generic term widely defined while "financial instruments" are specifically delimited. Each and every one of us is a consumer, a notion interconnected with our everyday life even our survival. **Adversely,** the term of investor is suited to persons with special features limiting its "cycle" to a certain number of parties. **Thus, we could say that consumer law provides a different kind of protection compared to investment law, each of them purporting the protection of their subject by offering a wide variety of rights or imposing among others disclosure obligations, assessment of suitability and appropriateness duty etc.**

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[186] Christianos, Elliniki Dikaiosini, Vol. 6/2002.
[187] Article 5 of Safety Product Directive & Articles 5,6,7, of CRD.
[188] Articles 13 et seq. of Directives 2019/771 and 2019/770.

1. Horizontal Consumer Protection of the Retail Investor

Despite the individual terminological and conceptual differences that may exist, the concept of investor – being a recipient of investment services - constitutes, in principle at least, a more specific manifestation of the concept of consumer, as the latter is pictured in modern community law[189]. Therefore, since the investor consists of a concept falling not only in the field of investments but in the consumer field too, there is in principle no legal obstacle to him enjoying the protection of the Consumer Law[190], **provided that he fulfills the requirements of the notion of the "consumer", namely being a natural person and acting for purposes which are outside his trade, business or profession.** Even the MiFID II Directive itself refers to and points out the need for taking measures to strengthen the protection of clients as consumers. In particular, the Directive sets out as such measures those ensuring that *"to further protect consumers, investment firms do not remunerate or assess the performance of their own staff in a way that conflicts with the firm's duty to act in the best interests of their clients, for example through remuneration, sales targets or otherwise which provide an incentive for recommending or selling a particular financial instrument when another product may better meet the client's needs"*[191]. Thus, it is understood that the general consumer-protection measures are applied to investment-services providers while the investor/investment firm relationship is supervised via a number of horizontal consumer-protection directives which impact on the firm's behavior in its relation with investors[192] thus **constituting the main point of convergence.**

1.1 2002 Distance Marketing of Financial Services Directive

The 2002 Distance Marketing of Financial Services Directive constituted the first major step in European legislation addressing the distribution process and the management of marketing risks. Albeit being surpassed initially by MiFID I and then MiFID II, the Directive continues to represent a quite useful, "key" measure[193] enhancing the investor protection regime, especially for products and services falling out of the scope of MiFID II as a result of its exemption scheme[194]. It points out and deals with the risks posed to clients stemming out from the distance marketing of financial services.

More specific, the Directive applies to the "consumer" as defined in Art. 2 (d), namely to *"any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession"* in the context of financial services. The definition of "financial services" is also provided in Art. 2 (b), meaning *"any service of a banking, credit, insurance, personal pension, investment or payment nature"*. Therefore, it is made obvious –

[189] Christianos, Elliniki Dikaiosini, Vol. 6/2002.
[190] *Ibid*..; Regarding Greek Consumer Law see Georgios Dellios, *"Liability arising from investment advice - in particular the status of the investor as a consumer,* Contribution to the 1st Conference of the Society for the Study of Commercial and Economic Law (EMEOD) on "Economic Law in the era of crisis", which took place on 27-28 May 2016 in Sounio.
[191] Par. 77 in the Preamble of the Directive 2014/65/EU.
[192] Moloney, 2008, 515.
[193] Moloney, 2014, p.816.
[194] Article 2 of Directive 2014/65/EU

from these two definitions- that the notion of investor is implied and contained in the notion of "consumer" while the application scope of the Directive covers also the investment field by regulating aspects of the investment firm/ investor relationship.

In this context of distance contracts[195], clients are deprived of the ability to assess the product or service provided as well as the rights and obligations involved. Moreover, the lack of personal interaction -element that characterizes and dominates in the distance contracts- leads inevitably to clients' informational disadvantages and monitoring difficulties. Therefore, the Directive adopts measures strongly related to investor/client-facing disclosure requirements, namely information regarding the firm/supplier, the distance service, the contract, risk warnings and redress[196]. The firm/supplier shall communicate to the consumer all the contractual terms and conditions, the information and the required disclosure, on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer[197]. In other words, a prospectus regime is established constituting a protective shield for the consumers/investors, which although not officially a maximum harmonization regime, it imposes restrictions to the extent to which Member States can use prospectus requirements to address local retail market risks[198].

Apart from the disclosure requirements, the Directive addresses consumer rights which of course, once again, can be relevant and apply to retail investors. In particular, the 14-day withdrawal right provided under Articles 6 & 7 of the Directive favors for a more interventionist approach as regards to investor protection. The right of withdrawal is mandatory and taking into account the imperative nature of those provisions, "*consumers may not waive the rights conferred on them by this Directive*[199]*"*. However, this protection offered is of limited relevance because it may apply to contracts concerning advice or portfolio management services but it leaves out of its scope cases where the price of a product or service reflects market fluctuations which may occur within the withdrawal period[200]. Thus, the protective framework regarding investment services is constrained reducing to a great extent the applicability of the specific right of withdrawal to certain circumstances.

1.2 Unfair Commercial Practices Directive[201]

Retail investors fall also under the protective scope of the so called "horizontal consumer protection directives" which address marketing[202]. Outstanding position among those directives

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[195] Article 2 (a) of Directive 2002/65/EC: *"distance contract" means any contract concerning financial services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.*

[196] Article 3 of Directive 2002/65/EC.

[197] Article 5 (1) of Directive 2002/65/EC; Moloney, 2014, p.817.

[198] *Ibid*., p.790.

[199] Article 12 of Directive 2002/65/EC

[200] Moloney, 2014, p.819. In particular, services related to: foreign exchange, money market instruments, transferable securities, units in collective investment undertakings, financial-futures contracts, including equivalent cash-settled instruments, forward interest-rate agreements (FRAs), interest-rate, currency and equity swaps, options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates, Article 6 (2) (a) of Directive 2002/65/EC.

[201] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 ('Unfair Commercial Practices Directive').

[202] Moloney, 2014, p.817.

holds the 2005 Unfair Commercial Practices Directive (UCPD). The roots of this Directive are found in EU consumer law and policy[203] while itself constitutes an additional weapon to the arsenal created around the protection of retail investor.

The *"ratione personae"* of the Directive is the same as the 2002 Distance Marketing Directive, namely the consumer. The "consumer" is defined in Article 2 as *"any natural person who, in commercial practices is acting for purposes which are outside his trade, business, craft or profession"*. Contrary to investor legislation, such as MiFID II/ PRIIPs which for the most part places the burden on firm compliance with the overarching requirement of communications to be "fair, clear and not misleading", the UCT Directive proceeds to the outright forbidden of certain marketing types[204]. The *"ratione material"*, from the other side, of the Directive includes "unfair business-to-consumer commercial practices" before, during and after a commercial transaction in relation to a product[205]. The generic and wide definitions of the notions "business-to-consumer commercial practices" and "products"[206] enable investment services to fall under the Directive's scope thus providing investor with another protective regime.

However, it should be noted that commercial practices not directly related to influencing consumers' transactional decisions in relation to products, such as corporate promotional literature and annual reports, are excluded.[207] The risks arising out from misleading marketing of financial products are defined in Recital 10, which highlights the Directive's importance for complex products with a high level of risk to consumers, and particularly financial services products, where a trader seeks to create a false impression of the product's nature[208].

The relevance in the lines of the Directive with the investor protection context is found in Article 7 (1) when stated that *"commercial practice shall be regarded as misleading if, .., it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise"*. Information to be regarded as material is listed in Article 7 (4) while including MiFID's and PRIIPs Regulation's disclosure requirements under Art. 7(5)[209]. Therefore, this provision among the prohibition of the related commercial practice of marketing communication and the prospect of enforcement action, dovetails with MiFID II's imposition of positive disclosure requirements on the investment firm[210].

Moreover, the connection between those directives is established under the determination of the way this material information are presented. More specific, Article 7 (2) of UCTD states that *"a practice is misleading where a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner material information or fails to identify the commercial intent of the commercial practice and where, in either case, this causes or is likely to cause the average*

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[203] Commission, Green Paper on EU Consumer Protection (2001) (COM (2001) 531) 11-15.
[204] Moloney, 2014, p.817.
[205] Article 3 (1) of Directive 2005/29/EC.
[206] Article 2 (c) and (d) respectively of Directive 2005/29/EC.
[207] Rec. 7 of the Preamble of Directive 2005/29/EC.
[208] Ibid., p.818.
[209] Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, COM(2016) 320 final}, p.17.
[210] Moloney, 2014, p.818.

consumer to take a transactional decision that he would not have taken otherwise", while Article 24 (3) of MiFID II provides for *"all information ... addressed by the investment firm to clients or potential clients to be fair, clear and not misleading"* and Article 6 (1) of PRIIPs Regulation for *"the key information document shall ... be accurate, fair, clear and not misleading"*. Thisdisclosure requirements' regime chimes well with each other while imposing discipline on UCITS product providers with respect to UCITS marketing[211].

UCPD enhances further the "misleading" and "aggressive" regime by providing a "black list" (Annex I) of commercial practices which *"per se"* are considered to be unfair. Specifically, practices of particular importance to the retail investors include falsely claiming i) to be a signatory to a code of conduct ii) that a code of conduct has an endorsement from a public or other body iii) that a trader or a product has been approved, endorsed or authorized by a public or private body as well as stating or otherwise creating the impression that a product can legally be sold when it cannot[212].

1.3 Unfair Contract Terms Directive[213]

The horizontal marketing and contracting protections provided by the Unfair Contract Terms Directive (UCTD), which apply generally to consumer transactions, can also find breeding ground to the investment field and in particular to the investment firm/ investor relationship[214]. More specific, Article 2 (b) defines consumer as *"any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession"*. Once again the definition of the consumer is broad enough in order for the retail investor to be included. As a result, terms found in an investment services contract can be subject to the so called three-stage control adopted by the Directive, namely an audit in order to find out whether these terms are in accordance with the principles of: i) clarity, namely the integration of the terms in the investment services contract; ii) transparency, having the meaning of the interpretation of the terms; and iii) fairness, serving the avoidance of unfair terms into the contracts.

Non-compliance with those principals can lead either to an interpretation in *dubio contra stipulatorem* or even to the non - binding effect of those terms (the nonbinding result is not absolute but relative in favour of the consumer). The "Unfairness test" is based on the General Clause of Article 3 par. 1 and on the List-Annex of the Directive which contains "only" an indicative and non-exhaustive list of the terms which may be regarded as unfair. The non-exhaustive character of the Annex and the minimum harmonization principle under Article 8 UCTD mean that national law may extend the list or use formulations leading to stricter standards. Therefore, a Member State may incorporate the list as a "black list" rendering the terms per se unfair without needing to be assessed under the national provisions transposing Article 3(1).

[211] *Ibid.*, p.819.
[212] *Ibid.* and Annex I of UCTD, Points 1, 3, 4 and 9 respectively.
[213] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[214] Avgitidis, in Alexandridou, *"Consumer Protection Law"*, 2018, p.885.

However, in Point 2 (c) of the Annex it is stated that *"Subparagraphs (g), (j) and (1)*[215]*, -which represent terms that may be regarded as unfair- do not apply to transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control"*. Thus, the scope of application of the Directive is limited as regards to the investment sector[216].

1.4 E-commerce Directive

Ancillary protection provisions for the investor are also available under the 2000 E-commerce Directive as regards to online services particularly through the establishment of disclosure requirements. Although not addressing investment services in general[217], the Directive adopts a limited harmonization with respect to marketing and disclosure requirements, which may be useful in the investment firm/investor relationship. Article 5 (1) requires that in addition to any other information requirements applicable under community law, the service provider must provide the recipient and the competent authorities with certain basic information including among others, importantly for investment service, '*where the activity is subject to an authorization scheme, the particulars of the relevant supervisory authority"*[218].

Furthermore, it is noteworthy that unlike other consumer-oriented directives, most of the provisions of the E-commerce Directive do not apply only to consumers but generally to recipients of online services who are defined as *"any natural or legal person who for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible"*[219]. Therefore, its application scope is broadened and goes beyond the tight limits of the person acting outside his or her trade, business or profession. The Directive provides also marketing transparency rules by subjecting online commercial communications into clarity requirements[220]. Finally, it introduces contractual requirements and imposes rules on the conclusion of contracts by electronic means in order to ensure that these contracts would be electronically workable[221].

1.5 Consumers' Right Directive (Art.3 par.3d exemption of financial services)

The Consumers' Right Directive (CRD) aims at contributing, through the achievement of a high level of consumer protection, to the proper functioning of the Business-to-Consumer (B2C) internal market. It applies to any contract concluded between a trader and a consumer having a dual objective of reducing business reluctance to trade cross-border and enhancing consumer confidence in cross-border shopping.

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[215] The terms referred are: (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so; (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

[216] Christianos, Elliniki Dikaiosini, Vol. 6/2002.

[217] References to the investment field are made in Rec. 27 and Article 3 (4) of Directive 2000/31/EC.

[218] Article 5 (1) (e) of Directive 2000/31/EC.

[219] Article 2 (d) of Directive 2000/31/EC.

[220] Article 6 of Directive 2000/31/EC; Moloney, 2014, p.817.

[221] Articles 9-11 of Directive 2000/31/EC.

While using the same definition of the consumer as provided under other directives[222], which normally leaves room for the concept of the investor to penetrate, the CRD excludes many sectors from its scope among them the financial services {Art 3(3) (d)}. The financial services sector does not fall under the CRD, since there are specific rules governing consumer financial services, namely Directive 2002/65/EC concerning the distance marketing of consumer financial services[223], which is applicable to investors. Therefore, it could be stated that CRD is specifically oriented to *"stricto sensu consumers"* without permitting even the retail investor to enjoy the protective regime provided.

1.6 Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers[224]

Among the various directives that can be recruit for the retail investor, when treated as a consumer, as an additional weapon against the investment firm is the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. The aim of the Directive is to improve consumers' access to justice and to provide them with appropriate safeguards in order to avoid abusive litigation, while its purpose includes the contribution, through the achievement of a high level of consumer protection, to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States[225].

The Directive effectively introduces a right of collective redress across the EU. It requires member states to put in place procedures by which "qualified entities"[226] will be able to bring representative actions to seek injunctions, damages and other redress on behalf of a group of consumers who have been harmed by a trader who has allegedly infringed EU law[227]. However, this representative action appears to have a limited scope. In particular the infringement for which representative proceedings may be brought must relate to a limited set of European directives and regulations on consumer protection, set out in Annex I to the Directive, among which MiFID II, PRIIPs Regulation, UCITS Directive, Prospectus Regulation are included[228]. Therefore, once again investors are subjected under the application of a consumer-oriented directive highlighting the common features and conditions under which those two notions, "investor" and "consumer" are treated.

It is worth mentioning here, however, that as is currently the case, the "closed list" approach completely excludes direct investors into capital markets (securities holders) since neither of the acts enumerated thereof concern this category of consumers. While for indirect investors - in deposits, investment funds, insurance policyholders – there is already a set of financial

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[222] Article 2 (1) of Directive 2011/83/EC.

[223] However, it is important to note that the CRD applies when financial services are incorporated within a sales or service contract i.e. through ancillary contracts (even though they would still be subject to the sector-specific legislation applicable to financial services mentioned above).

[224] Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[225] Article 1 (1) of Directive 2020//1828/EU

[226] A qualified entity can be any organization or public body representing consumers' interests226 while to be designated as such it must comply with criteria relating to independence, transparency, be non-profit making and have a legitimate interest in consumer protection; Article 3 (4) of Directive 2020//1828/EU.

[227] EPRS: Briefing, January 2020: Representative actions to protect the collective interests of consumers: A new deal for consumers.

[228] *Ibid.,* Point (48) (50) (60) in Annex I.

safeguards (Solvency II, the Capital Requirements Directive and Regulation, National Deposit Guarantee Schemes), there are no comparable for direct investors, such as shareholders and bondholders. Excluding shareholders from the scope of this Directive means that small individual investors suffering damage by the same issuer will not be able to join their claims together into one single action in all Member States and, by that, they would be unjustifiably worse off that users of other (financial) services or goods. Therefore, the Market Abuse Directive (MAD)[229] and the Market Abuse Regulation (MAR)[230] remain the only pieces of EU legislation that provide sanctions for breaches of obligations of issuers towards securities holder.

Qualified entities are able to apply for two types of measures through their representative action: a) injunctive relief[231], which may consist of provisional or definitive measures to cease an infringement, as well as an order for the trader to publish the decision finding an infringement; and b) other redress[232], including compensation, repair, replacement, price reduction, contract termination or reimbursement, but not punitive damages.

Undoubtedly, the Directive by including under its scope investor tailored directives and giving them the opportunity to collectively claim their rights against the investment firms by raising a representative act under the "qualified-entity veil" constitutes an additional protective shield in their hands. It may also balance the deficiencies and the gaps in the protection regime that the other directives leave.[233]. However, key aspects of the new representative action regime are only harmonized to a rather limited extent or remain vague, leaving the Member States considerable leeway for transposition into national law[234]. Member states have to implement the Directive into national legislation until the end of 2022, with a further six months for the new processes to come into effect, meaning that widespread collective redress procedures should be available in 2023 at the latest. Therefore, it is the time that will eventually show the strengths and/ or the weaknesses of the Directive as well as its effectiveness on the consumer protection regime.

1.7 Depositor Guarantee Schemes and Investor Compensation Schemes

Compensation schemes constitute a significant part of the securities and markets regulation landscape acting as a last-resort measure for investors and an ex-post tool in the case investment firms fail to meet their obligations[235]. Most regulatory systems are structured in such a way aiming at shielding clients of intermediaries (i.e. financial institutions, banks) to whom they have entrusted their assets or funds in case a status of insolvency emerge[236]. The major role of the so called "deposit guarantee" systems has been highlighted mainly during the economic crisis by providing and enhancing the financial stability. Deposit protection has contributed also to the bank sector, especially in cases of bank resolution, by focusing in bank rescue mechanisms while reconsidering the extent of the depositors being subjected to "bail-in" obligations[237]. However, a

[229] Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).
[230] Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
[231] *Ibid*., Article 7.
[232] *Ibid.,* Article 8.
[233] *Ibid.*, Article 24.
[234] Beate Gsell, *"The new European Directive on representative actions for the protection of the collective interests of consumers – A huge, but blurry step forward"*, Common Market Law Review , 2021, p. 1365 – 1400.
[235] Moloney, 2014, p.835.
[236] *Ibid*., See in general, Moloney, 2015, *"Regulating the Retail Markets"* in FERRAN, E.
[237] *Ibid.*

distinction needs to be made here. Deposit protection and investor compensation are two notions fundamentally different with each other:

The first is a consumer-based oriented device contributing to financial stability by insuring against the risk of a run on a bank. The well-known asymmetry between liquid liabilities (customers can withdraw their deposits at short notice) and illiquid assets (loans make up the greater part of a credit institution's assets) renders credit institutions liable to mass withdrawals when a default on deposit repayments is suspected[238].

EU law regulated minimum protection guarantees to depositors only in 1994, by the introduction of the Deposit Guarantee Schemes Directive (DGSD)[239]. The *ratio* of the DGSD was to enable depositors to have access to funds as soon as a credit institution was unable to repay them[240], while in the case where deposits made by credit institutions on their own behalf and for their own account were not protected by the DGSD, it provided that national DGSs could take measures necessary for the rescue of a credit institution in difficulty[241].

As the global financial crisis had already escalated to a critical point, in mid-2010 the Commission submitted, among an array of other measures, a proposal for the amendment of the DGSD[242], which led to the adoption of the new DGSD (Recast) in April 2014[243]. The most significant provision of the Directive is Article 6 which provides a minimum amount of guarantee of the deposits stating that *"Member States shall ensure that the coverage level for the aggregate deposits of each depositor is EUR 100.000 in the event of deposits being unavailable".* The scope of this provision and mainly of the Directive is the protection of consumers/ retail depositors -retail investors, **typically**, are not included in its application scope- as well as the protection of the EU's troubled credit institutions from a situation of a run on retail deposits by establishing a harmonized deposit protection regime across Europe[244].

The second, namely the Investor Compensation Schemes Directive (ICSD), aims at protecting investors by providing compensation in the event of an investment firm being unable to meet its obligations towards them. The ICSD constitutes a minimum standards measure allowing the Member States to prescribe wider or higher coverage than the minimum requirements, while the provisions regarding the operation, structure and funding of compensation schemes are not harmonized[245].

According to Article 2 (1) *"Each Member State shall ensure that within its territory one or more investor-compensation schemes are introduced and officially recognized. ... no investment firm authorized in that Member State may carry on investment business unless it belongs to such a scheme."* Furthermore, Article 14 of MiFID II provides that *"The competent authority shall verify that any entity seeking authorization as an investment firm meets its obligations under Directive 97/9/EC at the time of authorization. The obligation laid down in the first paragraph*

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[238] *Ibid.*
[239] Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes.
[240] *Ibid.*, Rec. 9.
[241] *Ibid.*, 10th recital. However, the DGSD did not provide any directions as to how this option could be exercised by Member States.
[242] Constantinos Tokatlides, *"Retail Depositor and Retail Investor Protection under EU Law"*, 2017, p.121 et seq.
[243] Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes.
[244]Tokatlides, 2017, p.121 et seq.
[245] Moloney, 2014, p.837.

shall be met in relation to structured deposits where the structured deposit is issued by a credit institution which is a member of a deposit guarantee scheme recognized under Directive 2014/49/EU." From these provisions it is understood that investment firms must comply with ICSD prior to its authorization as well as that being a member of DGD scheme suffices when it is for structured deposits[246]. Therefore, a linkage between those three Directives appears setting an aligned regime regarding the various investment instruments and investment firms.

Contrary to the DGD, ICSD is oriented specifically to investors as the notion is broadly defined in Article 1 (5) as *"any person who has entrusted money or instruments to an investment firm in connection with investment business"* while providing a relevant exceptional regime for the so called "sophisticated investors"[247]. The retail dimension of ICSD is also imprinted in the minimum compensation requirement[248] that is established under Article 4 (1), namely a compensation of 20.000 per investor regarded to be *"sufficient to protect the interests of small investors"*[249].

Compensation provided from ICSD is available under two types of claims according to Article 2 (2). More specific, investors can seek for compensation where an investment firm appears unable to repay money owed to or belonging to investors and held on their behalf in connection with investment business or to return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business[250]. Compensation refers only in cases of a loss of money or instruments while the relevant claims typically arise if there is fraud or other administrative malpractice or when an investment firm is unable to fulfill its obligations as a result of operational errors[251]. The Directive, however, does not cover investment risk, such as when an investor has bought stocks which then fall in value.

The major gap in the Directive's regime emerges from the fact that deprives investors from the possibility to claim in respect of damages for negligence, breach of statutory or fiduciary duty, or other forms of civil liability. Moreover, claims regarding mis-selling, misleading advertising or conflict-of-interest breaches are also exempted. Indeed, the risk of loss as per the firm's inability to repay monies or return instruments is low[252]. The only result that a cause of action from the part of the investors may have is a claim over the assets of the bankrupt firm. And here is where resorting to the protective regime of the consumer protection legislation emerges as a solution that can fill, to an extent, the gap created.

Considering the protective regime under the ICSD, in conjunction also to the MiFID, the CJEU[253] noted that *"in view of the definitions of the concepts of 'deposit' and 'instrument' in DGSD and ICSD respectively, a single debt security may ... be encompassed by both those*

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[246] *Ibid.*, p.838.
[247] Annex I of the ICSD.
[248] Moloney, 2014, p.838.
[249] *Ibid.*, Rec. 11.
[250] Moloney, 2014, p.839.
[251] *Ibid.*
[252] 2005 Oxera Report, n. 401, p. 93-94.
[253] See ECJ decision of 25.06.2015 in Case C-671/13, "Indėlių ir investicijų draudimas" VĮ, Virgilijus Vidutis Nemaniūnas. The CJEU took in particular into account recital 9 to the Preamble of the ICSD, Articles 1 points 3 and 4, 2(2) and (3), 4(1) and (2) to the ICSD, Section C of Annex I to the MiFID, and Article 4(1) point 19 to the MiFID; *Ibid.*, paras 9–15.

concepts and therefore fall within the scope of both Directives"[254]. The recent CJEU jurisprudence in this field among the normative content of the new DGSD and the reasoning in the proposal for a recast of the ICSD reveal an approximation of the characteristics of the financials consumers that are perceived as retail depositors to those that are perceived as retail investors, in particular in the event of financial institution's failure[255].

CHAPTER IV: LIABILITY REGIME

1. Consumers' Liability Regime

An essential component of every legislative regime established for providing and enhancing protection is the grant of subjective claims to the individual who encounters difficulties when attempting to realize his interests and pursuits on the market. As already mentioned, consumers directives recognize plenty of individual rights to their subjects enabling them to defend their interests and satisfy their needs. Consumers can, thus, bring claims for protection directly – through the respective national laws implementing those Directives and the subsequent rights they provide- against those whose conduct constitutes a manifestation of power and interference with their rights (e.g. producers, service providers, suppliers etc). Most significant, apart from those already mentioned, is the provision of a strict objective liability regime for producers in case of defective products[256] as well as the minimum 2-year legal guarantee regime which allows consumer to ask the seller to repair or exchange the good, or if this proves impossible, the reimbursement of the sums paid[257]. **Unfortunately, no similar conditions exist under the regulatory framework applied in the investment landscape, feature that constitutes one of the main points of divergence between consumer and investment legal regime**.

2. Investors' Liability Regime

2.1 Relationship between Investor Protective Legislation and Private Law

The rules of capital market law do not provide investors with the right to raise individual claims for protection against investment firms that infringe those rules. This is because the system of ethical rules applied to investment service providers is dominated by the concern of developing the capital market as an institution and enhancing its efficiency. This concern is of such a nature that goes beyond the interests and protection needs of individual investors, to the benefit of an overarching public purpose. Therefore, the Member States, through the competent supervisory authorities, remain the main "guarantor" of investment firm's compliance with the business rules

[254] *Ibid.*, para. 43.
[255] Tokatlides, 2017, p.117 et seq.
[256] Article 1 of Directive 85/374/ECC; For more see Giorgio Risso, *"Product liability and protection of EU consumers: is it time for a serious reassessment?",* Journal of Private International Law (2019).
[257] Articles 10 and 11 of Directives 2019/771 & 2019/770 respectively; For more see Dirk Staudenmayer, *"The Directive on the Sale of Consumer Goods and Associated Guarantees — A Milestone in the European Consumer and Private Law"*, European Review of Private Law Vol. 8, Issue 4 (2000), p. 547 – 564.

by implementing not only administrative but also criminal sanctions**. Especially the latter constitutes a provision not found in consumer law[258].**

In this regulatory scheme, it seems, at first sight, that investors cannot individually and directly claim compensation invoking the provisions of the aforementioned directives since there is no relevant reference in their context. As a result, the recourse to private law appears the only solution. In other words, it is the relationship, under EU law, between the rules of conduct and private law norms which can determine whether firms can be held liable, on the basis of national private law, to compensate retail investors in case of investment losses[259]. This relationship is essential when determining how judicial enforcement of the regulatory conduct of business rules through private law means can contribute to retail investor protection at the national level[260].

It is well known that there is a tension between EU investor protection regulation and private law. MiFID II, PRIIPs Regulation, UCITS Directive have accommodated within their ambit conduct of business rules, disclosure obligations for firms when providing investment services to investors. However, many of the duties that shape this relationship have also been formulated by civil courts in the context of adjudicating individual disputes between investment services providers and their clients[261]. For example, the MiFID II information disclosure duty and the suitability rule overlap with duties of care in private law developed by civil courts in national legal systems across the EU[262]. By being incorporated in MiFID II, these duties that are similar to the duties of care, traditionally being part of the domain of private law, are subjected to a regime of public supervision and administrative enforcement[263].

As per the nature of the MiFID II Conduct of Business Rules and KID, it has been supported that they can be translated into contract-related standards of financial supervision illustrating their potential relevance to national private law[264]. At the same time, the fact that these rules can be cast as supervision standards to be enforced by supervisory authorities through the legal means available within administrative law makes it difficult to grasp what their effect is in national private law, in particular contract and tort law[265].

Furthermore, as regards the kind of relationship between the MiFID II Conduct of Business Rules, the obligation of drawing up the KID and private law duties of care, it has been argued that the complementarity model is preferred[266]. More specific, this model presupposes the autonomy of private law from regulatory one by building around them mutual influence and constructive dialogue while composing a two-tier framework[267]. The complementarity model,

[258] See Article 70 MiFID and 22 PRIIPs Regulation.
[259] Marnix Wallinga, *"EU Investor Protection Regulation and Liability for Investment Losses: A Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law"*, p.71.
[260]*Ibid.*
[261]*Ibid.*
[262]*Ibid.,* See also Cherednychenko, 2010, The regulation of retail investment services in the EU: towards the improvement of investor rights? JCP(4):403–424; See decision Woods v Martins Bank Ltd [1958] 1 W.L.R. 1018. It provides an example where liability was based on failure by an adviser to cater the recommended investment to the characteristics of the investor.
[263]*Ibid .,*2015, "Contract governance in the EU: conceptualising the relationship between investor protection regulation and private law", pp. 504 et seq.
[264] Marnix Wallinga, p.106.
[265]*Ibid.,* p.74.
[266] *Ibid*, p.75 et seq.
[267] Cherednychenko, 2015, p.513.

however, does not require that private law duties of care strictly follow the regulatory conduct of business rules. Under this model, civil courts remain free to impose diverging private law standards of care, while being urged to give consideration to the EU investor protection regulation when determining the duties of care in individual cases[268].

2.2 Civil Liability

The initial consultation document regarding the review of MiFID I contained a proposal for including a principle of civil liability of investment firms in MiFID II. According to the Commission, the introduction of a principle of civil liability was vital in realizing an equal level of investor protection across the EU[269]. This proposal was, however, rejected. By suggesting such a principle and by considering that MiFID does not deal with the conditions for liability of firms to pay damages, the Commission recognizes that the private law norms determining whether an investment firm is liable in private law fall outside MiFID's harmonization scope[270].

"Genil v. Bankinter"[271] is the first case in which the CJEU shed light on its position on the relationship between EU investor protection regulation and private law. The case refers to a swap agreement between Genil 48 SL and Bankinter S.A., which was meant to protect Genil against the risk of fluctuating interest rates. Genil sought to render the agreement void "*ab initio*" arguing a failure by Bankinter to acquire information regarding Genil's client profile so as to administer the suitability or the lighter appropriateness assessment. The referring court determined that Bankinter failed to carry out the assessment required under the suitability and appropriateness rule[272]. The question posed to the CJEU was what the contractual consequences are when a firm acts in breach of the aforementioned conduct of business rules[273]. The CJEU held: *"57. It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that Directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness[274]. 58. The answer to the second and third questions is therefore that it is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness.*

[268] Marnix Wallinga, p.75.
[269] Commission, Public Consultation. Review of the Markets in Financial Instruments (MiFID), Brussels: 8 December 2010, p.63.
[270] Marnix Wallinga, p.81.
[271] Judgment of the Court (Fourth Chamber), 30 May 2013 Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA, Case C-604/11
[272] *Ibid.*, paras. 16 and 17.
[273] *Ibid.*, para. 56. For the remaining prejudicial questions referred to the CJEU, see paras. 22, 35 et seq. and 49 et seq.
[274] See, to that effect, Case C-591/10 Littlewoods Retail and Others [2012] ECR I-0000, paragraph 27 and the case-law cited.

Taken into account the aforementioned, it is made clear that provisions contained in this kind of legislative measure, as MiFID II, cannot directly be invoked and enforced by a private party in a legal dispute with another party before a national court, and thus cannot substitute national law by creating obligations in the national legal order that do not already exist[275]. This is not of a meaning that directives cannot have effect on the position of private parties or in private law relationships. In addition to potentially giving rise to state liability towards private parties for breach of European law, directives can exclude inconsistent national rules that apply in the relationship between private parties (the "exclusionary effect" or "incidental effect")[276] and can affect private law relationships through the duty imposed on national courts to interpret national law, as much as possible, in accordance with the wording and purpose of European law ("consistent interpretation")[277], as well as through the translation of their content into general principles of European law[278].

2.3 Contractual Liability

This ground of liability is considered due to the fact that the provision of investment services by a firm to a retail investor is generally based on a contract between those two. Considering the aforementioned regarding the relationship between obligations arising out of European investment legislations and private law, civil courts can enforce the regulatory conduct of business rules by giving consideration to these rules when establishing the required standard of care in contract law. In line with the complementarity model, the unwritten private law duties of care enshrined in domestic contract laws serve as gateways to the effect of the regulatory conduct of business rules on contractual liability of firms to pay damages[279]. Accordingly, a failure by an investment firm to comply with the MiFID II information disclosure duty or suitability rule or the draft and content of KID can give rise to non-performance on the basis of a breach of a private law duty of care, thus entitling retail investors to compensation for suffered investment losses[280]. This shows that general contract law, in particular contractual liability, can serve as a valuable tool contributing to retail investor protection by being able to accommodate the conduct of business rules that prescribe in a detailed and specific way which behavior is required from firms when providing investment advice[281].

2.4 Non-contractual liability

Non-contractual liability provides a surplus, generally more neglected avenue for judicial enforcement of these regulatory conduct-of-business rules than contractual liability. The main advantage of non-contractual liability is that it can contain a gateway to not only the more "indirect" effect of the rules on the liability of firms that also exists in contract law, but also to a more "direct" effect[282]. Indirect effect derives from the influence that the conduct of business rules have on the normative content of the investment firms' unwritten duty of care. On the

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[275] Marnix Wallinga, p.95.

[276] CJEU 26 September 2000, ECLI:EU:C:2000:496, C-443/98 (Unilever Italia), para. 50 et seq.; CJEU 30 April 1996, ECLI:EU:C:1996:172, C-194/94 (CIA Security), para. 48 and 55. See also: CJEU 7 January 2004, ECLI:EU:C:2004:12, C-201/01 (Wells), para. 57 et seq.

[277] CJEU 10 April 1984, ECLI:EU:C:1984:153, C-14/83 (Von Colson), para. 26; confirmed in a relationship between private parties in CJEU 13 November 1990, ECLI:EU:C:1990:395, C-106/89 (Marleasing).

[278] Marnix Wallinga, p.95.

[279] *Ibid.*, p.261.

[280] *Ibid.*

[281] *Ibid.*

[282] *Ibid.*, p.331.

contrary, direct effect can found “fertile ground” in a tort that connects non-contractual liability to a breach of a statutory duty. The implementation of the KID, the MiFID II disclosure and suitability obligations in a statute in the legal systems, activates the legal mechanism to allow retail investors to directly invoking these rules transposed into financial supervision legislation in order to bring a claim for damages. This more direct manner of judicial enforcement of the regulatory conduct of business can enhance retail investor’s protection due to the fact that it does not depend on a duty of care implied in the contract or a general duty to act constituting the gateway to the effect of the regulatory conduct of business rules on liability, as is the case with indirect effect[283].

While these two kinds of liability grounded on private law are sometimes regarded as each other’s traditional counterpart, they are not subject to a mutual exclusion in the Member States. An infringement of a rule of conduct can, therefore, give rise to concurrent claims for damages in contractual and non-contractual liability. *In more concrete terms, the existence of a contractual investment advisory relationship, which can open up the way for a retail investor to claim damages in contract, does not prevent the investor from bringing a claim for damages on the basis of non-contractual liability[284]. If their substantive conditions are satisfied, on the specific facts of the case, both contractual and non-contractual liability can enable retail investors to bring up an action for damages in national private law. The retail investor has the right to choose the basis for liability that seems most beneficial taken into account the circumstances of the case. The investor cannot, however, recover double compensation of the same loss[285].*

3. Professional civil liability - The liability of suppliers of services

3.1 Proposal for a Council Directive COM (90)482[286]

Starting from the notion of "professional liability", we could say that there is no such difficulty lying in the formulation of a definition. It means the responsibility of the person who breaches the obligations arising out from the exercise of his professional activity[287]. The question, however, and the difficulty is found elsewhere, particularly in whether this notion itself constitutes a single and independent subject in the general context of civil liability, with what content and meaning.

The analysis of the concept of professional liability in European law has led to an equation of it with liability deriving from the provision of services, conducting in an independent manner in the context of a professional activity[288]. Therefore, it is argued that not only the so called “liberal” professions, as they were formerly known (lawyers, doctors, architects), are covered by

[283] *Ibid.*, p.332.
[284] *Ibid.*, p.186.
[285] *Ibid.*
[286] Proposal for a Council Directive COM (90)482– FINAL – SYN 308, Official Journal of the European Communities C 12, 18.1.1991, p 8. (abandoned and not invoked to date).
[287] Contribution by Aik. Fountedaki at a conference organized by the Association of Civil Lawyers on 10.5.2003 in Agrinio in cooperation with the Bar Association of the city.
[288] *Ibid.*

this concept, but also other professions such as the provision of banking/ investment services[289]. Such a broad definition of the professional liability somehow undermines its unity, since even a superficial survey of the relevant legislation of the Member States reveals very significant differences in the regulation of the various professions. More specific, a fundamental difference lays in the nature and content of the professional's obligations. In some cases, the person providing a certain service has the obligation simply to comply with specific standards of conduct governing his profession (*obligation de moyens*), while in other cases he must provide the recipient of the service with a certain result (*obligation de résultat*)[290]. The distinction is not a theoretical one, but of major importance in the field of liability.

In this context of the need to integrate the consumer protection regulations at European level, but also given that the Member States had only fragmentary national legislations and not a general regulation addressing the issue of professional civil liability, the Commission's proposal for a liability of the suppliers of services, which appeared at the end of 1990, clearly was a bold unifying initiative and essentially promoted a comprehensive approach to professional liability, which had not existed until then. In the Proposal, the notion of "service" was defined as *"any transaction carried out on a commercial basis or by way of a public service and in an independent manner, whether or not in return for payment, which does not have as its direct and exclusive object the manufacture of movable property or the transfer of rights in rem or intellectual property rights"*[291] while the notion of "supplier" as *"any natural or legal person governed by private or public law who, in the course of his professional activities or by way of a public service, provides a service"*[292].

As regards to the liability regime, the initial drafts of the Directive regulated the liability of the supplier of services, to a considerable extent, along the lines of the Community rules on the liability of the producer of defective products, establishing a strict objective liability regime for defective services, in the sense of a service that does not provide the reasonably expected safety. Generally, the Commission has from the outset treated its initiative on regulating the liability of the supplier of services as a necessary complement to the regulation of defective products, with a view to the overall protection of the consumer under the twofold approach of: defective product = producer's liability - defective service liability = service supplier's liability[293].

However the final draft of the Proposed Directive deviated from the model of strict liability of the producer of defective products, providing for the subjective liability of the supplier of services in combination with evidentiary facilities in favor of the consumer and the "presumption of fault" of the service provider. More specific, Article 1 (1) and (2) of the final draft stated that "*1. The supplier of a service shall be liable for damage to the health and physical integrity of persons or the physical integrity of movable or immovable property, including the persons or property which were the object of the service, caused by a fault committed by him in the performance of the service. 2. The burden of proving the absence of fault shall fall upon the*

[289] For details on the content and evolution of the concept of professional liability see Fountedaki, *"Civil Medical Liability. General Introduction, Doctrinal and Legal-Political Considerations, Fundamental Concepts"* (2003), 9 et seq.
[290] Fountedaki at a conference on 10.5.2003 in Agrinio. This is a distinction that dominates in French contract law.
[291] Article 2 of the Proposal for a Council Directive COM (90)482 – FINAL – SYN 308, Official Journal of the European Communities C 12, 18.1.1991, p 8.
[292] *Ibid.*, Article 3.
[293] Aik. Foundedaki in Alexandridou, "*Consumer Protection Law"*, 3rd Edition 2018, p.541.

supplier of the service". In essence, these provisions introduced an objective liability on the part of the supplier of the service with a reversal of the burden of proof.

However, the above proposal Directive of 1990 was abandoned by the Union institutions, especially because of the negative reactions it caused in the legal world of the Member States and in the professional classes and since then no attempt has ever been made at European level to the adoption of a similar regulation[294]. Therefore, investment firms, under EU law, cannot be held liable on an additional and separate basis of a "professional civil liability" regime, but only under relevant general principles of Civil Code or contract and tort law.

1. Article 8 of Greek Law no. 2251/1994 on Consumer Protection

Despite the aforementioned abandonment of the 1990 Proposal for a Directive, the Greek legislator, inspired by the latest text, has innovated by expressly providing in Article 8 of Law No. 2251/1994[295] the liability of the service provider and its "presumption of fault"[296]. Article 8 of Law 2251/1994 states that *"1. The supplier of services is liable for any pecuniary or non-pecuniary damage caused unlawfully and culpably by an act or omission in the course of their provision to the consumer. Service provider is any person who,* ***in the course of carrying on a professional activity****, provides a service in* ***an independent manner****." 2. A supply of services which has as its direct and exclusive object the manufacture of goods or the transfer of intellectual property rights or rights in rem is not a service within the meaning of this Article".* The question that immediately arises, when reading the aforementioned provision, is whether investment firms, mainly financial institutions/ banks, can be subject to its scope and be regarded as service suppliers.

Financial institutions/ banks provide undoubtedly **independent services**, as they retain full autonomy in the formulation and implementation of their activities[297], even if there is a contractual link or an assignment by its client, because the criterion for the application of Article 8 to the liability of the service provider is that it operates freely as regards the selection of means[298]. The customers merely join in this type of relationship without affecting their autonomy[299]. In addition, financial institutions/ banks act in the context of **their professional activity**, since they are engaged in business, bearing the relevant risks among the profits arising from their activity[300]. Therefore, at first sight, the conditions set out in Article 8 are met.

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[294] Delouka-Iglesi, "*Consumer Protection Law - European and Greek"*, 2014, p. 227 and Fountedaki in Alexandridou, 2018, p. 541.

[295] Article 8 was amended by article 10 of Law No. 3587/2007 mainly in order to clarify certain aspects of the issues, introducing a very important change, namely the explicit reference to the condition of unlawfulness and the presumption of its existence in the case of an improper provision of services. Law 2251/1994 was latest amended by Law No. 4512/2018 without, however, making any changes to the Article 8.

[296] Avgoutsianakis in Stathopoulos, Avgoutsianakis, Chioteli, Community Civil Law I, 1995, p. 157: *"During the procedure of drafting Law No. 2251/1994, it was considered that the Greek legislation should follow the Community orientation even if there is no relevant commitment".*

[297] Of course, it should be noted that there are different types of banking contracts (mandate, leasing, credit, investment, etc.) thus not all of these types of "services" are included in the meaning of Article 8 of Law No. 2251/1994. For example direct credit agreements do not constitute "services", on the contrary, indirect credit, i.e. credits, under which the bank undertakes vis-à-vis the creditor or a third party, an obligation to pay a sum of money in order to facilitate the creditor to obtain from the third party or another person the direct credit he needs, are contracts concerning the provision of services (Psichomanis, *"Banking Law"*, Vol. 2, 2010, Sixth Edition, p. 1).

[298] H. Tsene, "The non-contractual liability of banks for the provision of commercial banking services", Business and Corporate Law Studies Series, Nomiki Bibliothiki 2008, p.157.

[299] Psichomanis, 2010, p.2.

[300] Karakostas, p. 694.

Moreover, the financial institutions/ banks, due to their position (position of superiority, bargaining advantageous position, etc.), the nature of their services and the relationship of trust established with their client, have against the latter an increased level of duty of care and protection obligations. All the above elements result to advocate and at the same time require the inclusion of the financial institutions/ banks under the concept of the service provider according to Article 8. In particular, the characterization of a "Bank" as a service supplier has also been accepted and verified by both the theory[301] and relevant jurisprudence[302] which resulted to the following conclusion: "*In the concept of service suppliers within the meaning of the abovementioned provision shall also be included the banks, which are therefore charged towards the consumer public with commercial obligations of prudence and security, the breach of which constitutes, apart from breach of contract, a tort"*. Therefore, it is obvious that Article 8 of Law No. 2251/1994 applies to the investment field and the breach of specific obligations - such as the provision of information, advice and assessment of the interests of the client as a recipient of investment services- of the financial institutions/ banks can give rise to their liability vis-à-vis the customer/ retail investor, when both the condition of illegality and the condition of fault are met.

3.2 Liability under Article 8 of Law 2251/1994 v Contractual – Non contractual Liability

As regards the nature of the liability of the supplier of the investment services Article 8 par. 3 & 4 of Law No. 2251/1994 states that: *"3. The injured party must prove the damage and the causal link between the provision of the service and the damage. 4. The service provider bears the burden of proving the lack of illegality and fault."* These provisions establish a subjective liability or, if we could say so, an objective one with a reversal of the burden of proof regarding the features of illegality and fault[303]. A controversial issue that has been addressed several times in the theory is whether the provision of Article 8 of Law No. 2251/1994 constitutes an independent legal basis for liability[304] or it merely regulates, as a more specific provision, certain issues of the tort liability[305]. It should be stated that case law has consistently accepted the second view[306], while the first view has been more strongly supported in theory.

The benefit of the liability under Article 8 compared to tort liability is exactly the facilities in the proof procedure offered to the consumer. There is no need for the consumer of proving that the supplier of the service, for example the bank, acted in an illegal and culpable way. His only obligation is to prove the damage he suffered and its causal link with the service provided. On the contrary, if the consumer raises his claims under the provisions of tort law (i.e. 914 CC) then he will be burdened with the additional obligation to prove both the aforementioned elements in order for the liability of the supplier to be established.

Moreover, under the provisions of contractual liability (CC 336, 363, 342), a debtor's objective liability is established in which -when defective performance is the case - the burden of proof is reversed only as regards fault and not as regards the objective deficiency of the provider's

[301] See. Tsene, p. 155 et seq., Sp. Psychomanis, p.370 et seq., Rokas-Gortsos-Mikroulea-Livada, "Elements of Banking Law", Nomiki Vivilothiki, Athens 2016., p.469,. Karakostas, p.117 et seq.
[302] Cases 1028/2015, 2257/2014, 535/2012 of the Supreme Court of Greece.
[303] The Greek legislator preserved the liability regime as introduced in the final draft of the Proposal Directive.
[304] For more see Fountedaki in Alexandridou, 2018, p. 554.
[305] For more see Karakostas, 2016, p.320.
[306] Decisions under Nos. 1227/2007, 427/2015, 1693/2013 of the Supreme Court of Greece.

conduct. On the contrary, Article 8 rule reverses the burden of proof, as regards both illegality and fault, thus providing greater easiness of proof for the injured party/ consumer[307]. Furthermore, liability under Article 8 is distinguished from that of contractual liability mainly because in Article 8 the supplier is liable not only against his counterparty, but also against any third party who has suffered damage as a result of his services. Therefore, the application of this article does not require as a precondition the existence of contractual relationship between the service provider and the injured party, it is sufficient that the damage is causally linked to the provision of the service, irrespective of whether the provision of such services is covered by a prior contract between them[308].

All in all, Article 8 of Law No. 2251/1994 constitutes an additional protective shield for the investor against the improper behavior of the investment firm as it establishes another legal basis for a relevant claim to be raised. The EU law, despite the existence of attempts and conversations around this legal matter, has chosen to refrain from the adoption of a respective provision with regard to the liability of supplier of services. This kind of liability undoubtedly facilitates the investor in his attempt for raising and establishing his claims. However, it has been argued that the generalized reversal of the burden of proof established by Article 8 is problematic, sometimes even indecent for the service provider and perhaps distorts the content of his obligations, overriding the distinction between "*obligation de moyens"* and "*obligation de résultat*"[309].

CHAPTER V: JURISPRUDENCE OF THE CJEU

1. Investor as consumer under the jurisprudence of the CJEU

The analysis conducted so far has shown that despite the existing divergences, the notion of investor can be included in that of the consumer. In other words, the investor may fall, under certain circumstances, into the protective scope of the Consumer Protective legal framework enjoying the advantages and the favorable provisions governing consumers' relationships. Therefore, the coexistence and parallel application of both of these branches of law, Investor & Consumer Law, is feasible even necessary, one could say, for shaping a complete and high-standard protective frame around the various and complex activities the investor engages with. Given that there is no clear legal provision on the underlying issue, it is the CJEU's jurisprudence that gives insight in this rather complex scheme of dealing investor as a consumer. In particular, the CJEU has many times been called upon to answer crucial questions regarding controversial and complicated issues, mainly in the context of the application of the provisions of

[307] Fountedaki in Alexandridou, 2018, p. 557-558.
[308] Karakostas, 2016, p.320.
[309] Fountedaki at a conference on 10.5.2003 in Agrinio.

the Brussels Convention of 27 September 1968[310] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

1.1 Shearson Lehman Hutton Inc. v Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH (TVB[311])

The first noteworthy decision of the CJEU was the one handed down in the context of Shearson Lehman Hutton Inc. v Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH (TVB). In that case, the Court was called upon to answer the questions referred for a preliminary ruling by the Federal Court of Justice of Germany concerning whether the German company TVB, which exercised its right of contribution or recourse against the American company Hutton Inc. in its capacity as assignee of the claims of a client of the latter, could qualify as a consumer in order to benefit from the special rules governing jurisdiction laid down by the Convention with respect to consumer contracts[312].

The Court in its ruling stressed, once again, that *"the principle established by case law[313], according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This rule must apply, in particular, to the concept of 'consumer' within the meaning of Article 13 et seq. of the Convention, in so far as that concept is the principal factor in the determination of rules governing jurisdiction."[314]*.

Since Article 14 of the Brussels Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the consumer is domiciled, constitutes an exception to the general rule of jurisdiction of the courts of the defendant's domicile, its interpretation should not go beyond the cases provided for therein[315], as generally the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile[316]. Furthermore, the judgment acknowledged that the special system established by Articles 13 et seq. of the Brussels Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less

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[310] Already Regulation 1215 of 12 December 2012 (Brussels Ia). Despite the fact that these decisions were published at a time when the 1968 Brussels Convention was still in force, the almost identical wording of the consumer provisions, their unquestionable protective purpose and the recognition of the importance of the content of these decisions in theory and case-law make it necessary to examine them carefully.

[311] Judgment of the Court of 19 January 1993.

[312] The dispute arose as follows: A German judge instructed the brokerage firm Hutton Inc. (through its German-based subsidiary, which provided investment advice to clients of the parent company) to carry out forward transactions in foreign exchange, securities and commodities, entering into an order contract and paying substantial sums, which it subsequently lost in the course of those transactions. TVB, in its capacity as the assignee of the claims of the German judge-client of Hutton Inc., claimed reimbursement of the sums lost by its assignor, alleging unjust enrichment, as well as damages for breach of contract and tort, since Hutton Inc. had failed to inform the assignor of the risks associated with the forward transactions. TVB brought proceedings against Hutton before the national courts on the basis of a right conferred on it.

[313] See, in particular, the judgments in Case 150/77 Bertrand v Ott [1978] ECR 1431, paragraphs 14 to 16 and 19, and in Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, par. 10).

[314] Ground 13 of the Judgment of the Court.

[315] Ground 17 of the Judgment of the Court.

[316] See judgment in Case C-220/88 Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others [1990] ECR I-49, paragraphs 16 and 19.

experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled. Thus, the protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified[317].

On the basis of the aforementioned, the Court held that the provisions of the Brussels Convention did not apply due to the lack of consumer status characterizing the applicant (namely the German company TVB), who was a debt-collector acting in the course of its professional activity. Indeed, as the Advocate General pointed out in his submissions[318], *the Brussels Convention protects the consumer "expressis verbis" only in as much as he personally is the plaintiff or defendant in proceedings. That protection does not extend to proceedings to which he is not a party.* In the underlying case, therefore, it was the assignee the one deriving from a consumer contract and not the consumer himself who sued the defendant company.

It should nevertheless be borne in mind that the judgment did not rule out the possibility that the assignor of the claims at issue, i.e. a German judge, who entrusted a professional intermediary with the execution of forward transactions in foreign currency, securities and commodities by concluding a contract with him, could be classified as a consumer. Moreover, the classification of brokerage contracts for the execution of forward transactions as consumer contracts, although not expressly included as an answer to the question referred for a preliminary ruling, was taken for granted in the reasoning of the judgment[319].

In a nutshell, in Shearson Lehman Hutton v TVB, the Court of Justice has clarified the field of application "*ratione personae"* of Art. 13 of the Brussels Convention holding that the special rules of jurisdiction on consumer contracts (Section IV of the Brussels Convention) are not applicable to a plaintiff who acts in pursuance of his trade or profession and therefore is not a consumer party to one of the consumer contracts mentioned in Art. 13, par. 1.

1.2 Alpine Investments BV vs Minister van Financien[320]

The path of the convergence of the notions of consumer and investor seems to have been consolidated, at a jurisprudence level, with the judgment of the CJEU concerning Alpine Investments BV v Minister van Financien. The case arose on the strength of some questions posed on the CJEU by the Dutch Administrative Court of Commerce and Industry as regards to the possible infringement of Art 59 TEEC (later Art 49 TEC and now Art 56 TFEU) through the prohibition -by virtue of a ministerial decision- of cold calling. In particular, the prohibition concerned the cold calling practice used during the provision of services to prospective customers established in one State when being offered by a person established in another State[321]. In essence, the applicant company claimed that the ministerial decision prohibited

[317] Ground 18 and 19 of the Judgment of the Court.
[318] Ground 26 of the Proposals of the Advocate General Darmon.
[319] Avgitidis , 2015, p.872.
[320] Judgment of the Court of 10 May 1995.
[321] The dispute in this case arose as follows: Alpine Investments BV, a Dutch company, provided financial services, specializing in forward commodity contracts, offering three types of services (portfolio management, investment

companies established in Netherlands from approaching customers established in other Member States.

In its judgment, the Court of Justice clarified that Article 59 of the TEEC covers services which the provider offers via telephone to potential recipients established in other Member States by providing them without moving from the Member State in which he is established[322]. Alongside, it was held that *such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services*[323]. The answer, besides, could not be differentiated so that the cold calling practice would fall outside the scope of Article 59 of the TEEC, depending on whether the relevant restrictions are imposed by the State in which the provider of services is established or by the State in which the potential clients - recipients of the commercial communication domicile[324].

Finally, the Court stressed out that Article 59 of the TEEC does not preclude a national regulatory legislation from prohibiting the practice of cold calling where imperative reasons of public interest so require. Moreover, as the Dutch Government argued and the Court from its side upheld it, "*financial markets play an important role in the financing of economic operators and, given the speculative nature and the complexity of commodities futures contracts, the smooth operation of financial markets is largely contingent on the confidence they inspire to investors".* Therefore, although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does nonetheless have a direct effect on the good reputation of Netherlands financial services.

The CJEU, thus, concluded that protecting consumers and maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services[325]. Besides, in the Court's view, the restriction at issue was not contrary to the principle of proportionality, since, according to the settled case-law *requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective*[326].

The most significant feature arising from this case, however, is that both the Advocate General's proposals and the final decision issued by the Court are inspired by a tendency to treat the interests of investors as genuine consumer interests. Indeed, while the questions referred for a preliminary ruling mainly concerned consumer protection, the operative part of the decision and

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advice and transmission of client orders) and addressing a wide range of clients in various European countries, without, however, having offices and branches outside the Netherlands. On 01-10-1991 the Minister of Finance decided to prohibit in general financial services intermediaries proposing investments in the over-the-counter commodities market, including Alpine Investments, from approaching potential customers by cold calling, both within the territory of the Netherlands and in the territory of other Member States. The intervening company lodged an objection against the Minister's decision, which was rejected, leading it to bring an action before the Administrative Court.

[322] Ground 22 of the Judgment of the Court and Grounds 25-28 of the Proposals of the Advocate General Jacobs.

[323] *Ibid*., Ground 27 of the Judgment and Grounds 43-62 of the Proposals.

[324] *Ibid.,* Ground 31 of the Judgment and Grounds 37 of the Proposals.

[325] *Ibid.,*Ground 40-44 of the Judgment and Grounds 689-78 and 85-87 of the Proposals.

[326]*Ibid.,* Ground 22 of the Judgment. See Case C-288/89 Collectieve Antennevoorziening Gouda and Others v Commissariat voor de Media [1991] ECR 1-4007, par. 15.

the corresponding arguments in the Advocate General's opinion stated that *"Art. 59 of the TEEC does not preclude the application of national legislation aimed at protecting investor confidence in the national financial products market ..."*. It is also noteworthy that the terms investor and consumer are used interchangeably in both judicial texts without any differentiation in the meaning and without any distinction as to the means of protection provided.

2. Recent Jurisprudence

However, "legislation" constitutes a living organism being in a status of constant flux and renewal while trying to be compatible with a rapidly evolving and changing world. It is of significant importance that very recently the jurisprudence has been enriched as regards the controversial issue of the point of convergence between the notions of investor and consumer thus "walking" in tandem with the evolution of the respective investor-protection regime. In particular, the CJEU, in some latest decisions, while dealing with the notion of consumer in the investment field, apart from the traditional now reference to the application of the provisions of the Brussels Convention, it has also reported and analyzed the relevant provisions of MiFID I.

2.1 Jana Petruchová v FIBO Group Holdings Limited[327]

The request for a preliminary ruling of this case concerned once again the interpretation of Article 17(1) of Brussels Ia. The request was made in the context of a dispute raised between Ms Jana Petruchová and FIBO Group Holdings Limited ('FIBO') concerning a request for payment of the difference between Ms Petruchová's profit and the profit she would have obtained if the order to purchase a currency, given by her, had been executed by FIBO without delay. In particular, the case concerned the nature of the investment activity of Ms Petruchová conducting through the FOREX system, namely its possible characterization as a "consumer activity" because any recognition of her as a consumer would trigger the enforcement of the favorable provisions of Section 4 of Chapter II of the Brussels Ia, thus declaring invalid the existing conferring jurisdiction agreement in favour of the Cypriot courts.

The national court, in this case, submitted a question referred for a preliminary ruling asking the CJEU to rule on the influence that i) the value of the transactions carried out; ii) the extent of the risk of financial loss associated with their conclusion; iii) any knowledge or experience of the alleged consumer in the field of financial instruments or iv) his/her active conduct in the context of such transactions, have on the classification of the contracts at issue as being outside the scope of his/her professional activity. It was also requested to clarify whether the interpretation of Article 17 § 1 should be aligned with that of other texts of EU law, such as Article 4(1) (12) of MiFID I.

To begin with, Brussels Ia defines in Article 17 § 1 the consumer as the person who enters into a contract whose purpose *"may be considered to be external to his professional activity"*. Defining

[327] Judgment of the Court (First Chamber) of 3 October 2019, Case C-208/18.

a party as a consumer is very critical because Art. 17 et seq. provide for a favorable regime. In particular they **(a) allow him to bring an action in the courts of his domicile (Article 18(1))**, **(b) render ineffective any interlocutory agreement concluded before the dispute arose (Article 19(1))**, which almost always establishes exclusive jurisdiction in favor of the courts of the country where the consumer's counterparty is domiciled or habitually resident.

As regards to the concept of the "consumer" used by Article 17, it has taken root, according to relevant jurisprudence, that is an autonomous concept, inherent to the Regulation and must be interpreted with reference to its system and objectives. Furthermore, it consists of a restrictive concept as it depends on the position of the person in a specific contract and on the nature and purpose of such contract: it is not a subjective quality of the person[328].

Furthermore, the CJEU has addressed the question of which contract to be considered as a "consumer contract" many times. Indicatively: i) Judgment ECJ 25 January 2018, C-498/16, Facebook, n. 30: *"the contract has been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use"*; ii) Judgment ECJ 14 February 2019, C-630/17, Milivojević, N. 88: *"contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption"*; It has also addressed specifically the question of whether contracts relating to the **provision of investment services** are consumer contracts even many years ago, but avoided taking a clear position on this issue in this phase[329].

Moreover, the following considerations must be taken into account while dealing with the court's preliminary questions[330]:

(a) almost always a contract relating to financial products and investment services is concluded by a natural person[331] for a purpose which **is not related to his professional activity**, without any additional conditions being required[332]. It cannot be excluded that the person in question may conclude the contract in the context of his own business activity (as is the case with internationally known investors)[333].

(b) the contract is always concluded with the expectation of pecuniary benefit (profit), and is therefore of a profit-making nature for both parties, regardless of the fact that as far as the consumer is concerned it is not related to his/her professional activity[334]. The link between the expected profit and the satisfaction of the consumer's own needs has been established as a criterion by the settled case-law of the CJEU**.** The satisfaction of those needs overshadows the pursuit of profit and it could be argued that it always directs the court's analysis towards

[328] *Ibid.*
[329] See above,C-89/91, Shearson Lehmann Hutton Inc. v TVB.
[330] Vasilakakis Evaggelos, *"The notion of consumer in contracts for the provision of investment services according to Aricle 17 of the Brussels Ia Regulation"*, Epitheorisi Politikis Dikonomias, 2020, p.307-320.
[331] As to the fact that it cannot also be concluded by a legal person, see par.71, of the case analyzed (Case C-208/18).
[332] *Ibid.*, Par. 54.
[333] *Ibid.*, This explains the distinction made by the judgment cited in par.55 between a consumer and a trader.
[334] *Ibid.*, par. 42.

quantitative criteria, namely whether the amount invested is proportionate to the consumption needs[335].

(c) to the relevant reflection, however, must be added the possibility that the expected profit, if achieved, might be channelled (even if the original plan had been different) partly or wholly into the professional activity of the alleged consumer instead of being used to meet consumer needs. This consideration is linked to the fact that a person's movable property must be treated as a single entity. The published judgment takes a clear position on the matter, accepting in paragraph 59 that, **the amount of the transactions at issue is not, in principle, of any relevance[336].**

Furthermore, the CJEU, with regard to the connection between MiFID I and the Brussels Ia, held that unlike a “consumer”, who is a natural person, a “retail client” may also be a legal person[337]. It also follows that the classification of “retail client” is not subject to the lack of commercial activity of the person concerned unlike the classification of “consumer”[338], while each of them pursue different objectives[339]. Consequently, although it cannot be excluded that a “retail client” may be classified as a “consumer” if it is a natural person acting outside any commercial activity, those two concepts, having regard to their existing divergences, do not fully overlap[340].

Finally, in the light of all the above considerations, the CJEU answering to the questions held that Article 17(1) of Brussels Ia must be interpreted as meaning that a natural person must be classified as a “consumer”' within the meaning of that provision **if the conclusion of that contract does not fall within the scope of that person’s professional activity**, which it is for the national court to ascertain. For the purpose of that classification, on the one hand, factors such as **the value of transactions, the extent of the risks of financial loss, any knowledge or expertise that person has in the field of financial instruments or his or her active conduct in the context of such transactions** are, as such, in principle **irrelevant**, and, on the other, the fact that **that person is a ‘retail client’ within the meaning of Article 4(1)(12) of Directive 2004/39 is**, as such, in principle **irrelevant**[341].

2.2 AU v Reliantco Investments LTD & Reliantco Investments LTD Limassol Sucursala Bucureşti[342]

In this case, the request for a preliminary ruling concerned specifically the interpretation of Article 4(1) of MiFID I among Article 7(2) and Article 17(1) (c) of Brussels Ia. The request has been made between AU, on the one hand, and Reliantco Investments LTD and Reliantco Investments LTD Limassol Sucursala Bucureşti, on the other, concerning limit orders

[335] Vasilakakis, Epitheorisi Politikis Dikonomias, 2020, p.307-320.

[336] In the present case, it appears that the alleged consumer plaintiff leveraged herself by means of a loan, by which she invested in 35 shares worth EUR 88 000 each. See also Judgment of the Court (Third Chamber) of 2 May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17, par. 42., in which the CJEU held that a person who has invested more than EUR 1,000,000 is a consumer (and therefore enjoys the protection of the corresponding provisions of the Lugano II Convention).

[337] *Ibid.*, par. 71.

[338] *Ibid.*, par. 73.

[339] *Ibid.*, par. 74. For more details see par. 75.

[340] *Ibid.*, par. 76.

[341] *Ibid.*, par. 79.

[342] Judgment of the Court (Fourth Chamber) of 2 April 2020, Case C-500/18.

speculating on a fall in the price of petrol, placed by AU on an online platform owned by the defendants, following which AU lost a certain sum of money.

In particular, the questions referred to the Court for a preliminary ruling were whether:

(1) when interpreting the concept of "retail client" in Article 4(1) point 12 of MiFID I, can or must the national court use the same interpretive criteria as those which define the concept of "consumer" within the meaning of Article 2(b) of Directive 93/13;

(2) under what conditions may a "retail client" claim consumer status in a dispute such as that in the main proceedings;

(3) do the facts that a "retail client" carries out a high volume of transactions within a relatively short period of time and that he invests very large sums of money in financial instruments such as those defined in Article 4(1) point 17 of Directive 2004/39, constitute relevant criteria for the purpose of assessing whether a "retail client" has consumer status under that directive;

(4) when attempting to establish its own jurisdiction, since it has the obligation to determine the impact of Article 17(1)(c) or Article 7(2) of Regulation No 1215/2012, whichever is applicable, can and/or must the national court take into consideration the legal basis relied on by the applicant (namely non-contractual liability alone) as a remedy for the conclusion of terms alleged to be unfair within the meaning of Directive 93/13, for which the substantive law applicable has been established pursuant to Regulation No 864/2007, or does the possible consumer status of the applicant make the substantive legal basis of his request irrelevant.

The Court examined together the first to third questions restating that the fact that a person is classified as a 'retail client', within the meaning of Article 4(1) point 12 of MiFID I, is, as such, in principle irrelevant for the purposes of classifying him or her as a 'consumer' within the meaning of Article 17(1) of Brussels Ia[343]. Also irrelevant is the issue whether the notion of 'retail client' must be interpreted in the light of the same criteria as those which are relevant for the interpretation of the notion of 'consumer', referred to in Article 2(b) of Directive 93/13[344]. Furthermore, the Court held once again that a natural person may be classified as a 'consumer' under Brussels Ia only if the conclusion of that contract does not fall within the scope of that person's professional activity, which it is for the national court to verify. For the purposes of that classification, factors such as the fact that that person carried out a high volume of transactions within a relatively short period or that he or she invested significant sums in those transactions are, as such, in principle irrelevant.

The fourth question addressed a rather interesting issue with regard to the interpretation of Article 17 of Brussels Ia as to the establishment of jurisdiction over a consumer claim against a professional in respect of the latter's non-contractual liability (*culpa in contrahendo*). The CJEU held that for the application of that provision, in addition to the other conditions[345], it is required that the contract has been concluded between the parties and the action is indissociably linked to that contract[346]. A direct consequence of this assumption is that, where no contract has been

[343] Judgment of 3 October 2019, Petruchová,C-208/18, par. 77.
[344] See C-208/18, Petruchová v. FIBO, par. 39.
[345] See C-208/18, Petruchová v. FIBO, par. 39.
[346] See Par. 63 of the case analyzed (Case C-500/18) & C-215/18, Králová v. Air Scandinavia, par. 56.

concluded between these parties, jurisdiction over a consumer claim against a professional cannot be established under the provisions of Chapter II, Section 4 of Brussels Ia, but the general provision of Article 7 thereof will apply, against which the provisions of Chapter II are "*lex specialis*"[347].

Even more crucial is the Court's further judgment as to the affiliation scheme of the claim for damages for misconduct during negotiations. Although the relevant judgment is not included in the operative part of the judgment analyzed herein, it follows directly from its reasoning that the consumer's action against the professional for the latter's liability for breach of pre-contractual obligations is considered to be indissociably linked to the contract concluded between the consumer and the professional, so that Chapter II, Section 4 of Brussels Ia applies for the purpose of establishing jurisdiction over that action[348].

In support of this assumption, the Court refers to Article 12(I) of Regulation No. 864/2007, which provides that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, must be the law which applies to the contract or which would have applied to that contract had it been entered into[349].

The only prerequisite for the above is the affirmation of an expectation of the conclusion of the contract, in view of the fact that jurisdiction will be judged on the basis of "the proposed contract the conclusion of which is envisaged"[350]. In other words, it is not necessary that the contract has been concluded, but it is sufficient that it is expected to be concluded. The decision does not, however, address the question of the decisive criterion for determining whether a contract is about to be concluded. Therefore, it is clear that this assumption of the Court refers to pre-contractual liability claims, i.e. those arising from the discussions preceding the conclusion of the contract, extending the protective shield of a "retail investor" -when a physical person- to the negotiation stage under the provisions of Brussels Ia.

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[347] See C-27/02, Engler v. Janus Versand Gmbh, paragraph 32 & Gabriel, C-96/00, paras 35, 36.
[348] Vathracokoilis Antonis, Lex&Forum, Vol. 1 (2021).
[349] Par. 71, of the case analyzed (Case C-500/18).
[350] *Ibid.*, par.72.

CONCLUSION

In conclusion, Investor and Consumer constitute two notions that appear to have both convergences and divergences. First of all, the *ratio* hidden behind their protective scope is the same, namely the protection of the weaker party in a relationship characterized by information asymmetry, lack of experience/ expertise and bargaining power. This status represents the principle of consumer law which is integrated in the investor regulatory framework. Furthermore, as regards to the classification of the investors under MiFID II, the same criteria used for the characterization of a person as a consumer are adopted. In particular, the criterion adopted in capital market law approximates in terms of its content to those criteria used in consumer protection law requiring a particular cognitive link and the element of familiarity of a particular person with the subject-matter of a particular investment service[351]. However, the main point of convergence between the two notions is found in the category of retail investors. Retail investors, provided that are natural persons, due to their lack of the professional feature, they can be included on the notion of consumer falling consequently under the protective scope of consumer law. Thus, many consumer directives may find application on the investor/ investment firm relationship.

Albeit, there are points of convergence among the two regimes, the divergences between the two notions are not of minor importance. The major difference is found on the definition of the terms. More specific, while the notion of consumer includes only natural persons, the term of investor is broader embracing legal persons as well. Moreover, professional investors constitute a specific category of investors while adversely a consumer cannot be someone who concludes contracts for purposes related to his professional activity. As regards to the instruments of each term, namely the investment products and consumer goods, divergences exist there too. The former are characterized by their complex, risky and immovable nature while the latter are in their majority simpler tangible, movable items. Furthermore, as per the protective regime, it is obvious that consumer law has in its arsenal more legislations than those offered in the investment field. However, it is worth mentioning here that professional investors enjoy an, even limited, level of protection while professional recipients of goods/ services in consumer law are totally excluded for any protective provision. Finally differences appear and in the respective rights that the protective legislation provides to their subjects. Consumers enjoy a wide range of rights such as right to repair, price reduction, withdrawal right while for investors the protection is left to Competent Authorities through the provision of administrative measures. Therefore, investors cannot raise their claims directly against investment firms -as such European right do not exist in order to be transposed to national legislation- but only through obligations arising out from general ethic codes/ principles, contract or tort law.

All in all, recourse to consumer protection provisions can solve several problems regarding the protection of the investing public. However, it has been observed that the current legislative framework for consumer protection does not provide sufficient coverage as the objectives served by consumer protection law and capital law are different. Indeed, capital market legislation covers broader needs. It aims to protect undertakings and free competition, to ensure the smooth functioning of the market and, more generally, to achieve macroeconomic consolidation. The

[351] Karagkounidis, 2007, p.273.

public nature of these regulations is therefore apparent, in contrast to the private law approach of consumer law. Moreover, capital market law contains a variety of technical regulations in order to cover new forms of transactions in the context of new technological advances, which show its special character. Lastly, in addition to the administrative provisions, law on the protection of the investing public also contains, unlike consumer law, mechanisms for criminal repression. Therefore, it is made obvious that Capital Market Law is an independent sector in need of and deserving a separate protective regime, strongly armored especially nowadays where technological developments in the economic field far surpass the legislation procedure.

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