Contractual Remedies for Banking Misconduct under European Regulatory Private Law

Fernando Zunzunegui*

Banking services; Banks; Breach of contract; Consumer protection; Damages; EU law; Misconduct; Spain; Termination; Void contracts

Abstract

This article deals with the responsibility for the provision of financial services, particularly investment services, from the perspective of European regulatory private law blurring the conventional dichotomy between public and private law. The contract between the provider and the customer is analysed. Finally, the article examines the remedies for breaches of contractual obligations, taking Spanish law as the main reference, to conclude that the predictability of the consequences of breaches in the provision of investment services is an essential element of legal certainty and that it is the judge who determines due diligence, in accordance with contract law, using the conduct of business rules as a guideline criterion. Case law is contributing to the creation of a financial services contract law that complements the general framework of obligations and contracts with financial market conduct rules. The complementary model of European regulatory private law that preserves the autonomy of contract law in the judicial enforcement of conduct of business rules applies.

Introduction

This article analyses the contractual remedies for breach of the conduct of business rules by banks and other financial service providers from the perspective of European regulatory private law,[1] blurring the conventional dichotomy between public and private law.[2] Doctrine has identified four models that conceptualise the relationship between the conduct of business rules and contract law, distinguishing between the separation, integration, substitution and complementary models.[3] Conduct of business rules usually have private law effects and in no Member State have conduct of business rules been transposed through contract law. This leads us to rule out the separation and integration models and focus our analysis on the substitution and complementary models. The question being debated is whether the contractual due diligence the bank must exercise is determined by the conduct of business rules as laid down in the substitution model or whether it is the judge who determines the due diligence in accordance with contract law, using the conduct of business rules as a mere guideline, as dictated by the complementary model.[4]

The relationship between public regulatory law and private contract law in various legal systems has already been analysed from this perspective.[5] Here we study how European regulatory private law operates in Spanish law, in order to fill this doctrinal gap.

The EU leaves to the Member States to determine the consequences of breaches in regulatory duties.[6] It does not determine the civil consequences of breaches,[7] except

* Professor of Financial Market Law, Carlos III University, Madrid, Spain. E-mail: fernando.zunzunegui@uc3m.es.

[1] A term coined by H.-W. Micklitz, "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation" (2009) 28(1) *Yearbook of European Law* 3–59, and developed, inter alia, by O.O. Cherednychenko, "Public Supervision over Private Relationships: Towards European Supervision Private Law?" (2014) 22(1) *European Review of Private Law* 37–67 and F. Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (Bloomsbury Publishing, 2019). The method we are going to use is what has been called "law in action" versus "law in books", at the intersection between financial regulation and contract law. See A. Perrone and S. Valente, "Against All Odds: Investor Protection in Italy and the Role of Courts" (2012) 13(1) *European Business Organization Law Review* 32.

[2] See, inter alia, H.-W. Micklitz, "The Public and the Private—European Regulatory Private Law and Financial Services" (2014) 10(4) *European Review of Contract Law* 475.

[3] See M.W. Wallinga, *EU investor protection regulation and private law: a comparative analysis of the interplay between MiFID & MiFID II and liability for investment losses* (Springer, 2020), p.74, citing O.O. Cherednychenko, "Contract governance in the EU: conceptualising the relationship between investor protection regulation and private law" (2015) 21(4) *European Law Journal* 500–520.

[4] In this complementary model, according to M. Andenas, "Foreword" in R. D'Ambrosio and S. Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, No.90 (October 2020), p.13: "The design of private law remedies for breaches of conduct of business rules remain crucially dependent on the interpretative approach of national courts."

[5] Wallinga, *EU investor protection regulation and private law: a comparative analysis of the interplay between MiFID & MiFID II and liability for investment losses* (2020), where he studies German, Dutch, and UK law from this perspective. In turn, F. Della Negra, "I rimedi per la violazione di regole di condotta MiFID II: una riflessione di diritto UE", *Banca borsa e titoli di crédito*, No.5, Pt I (2020), pp.700–729, looks at Italian law from the same perspective.

[6] As Della Negra states: "Where EU law was in silent on the remedial consequences of regulatory duties, the remedy should be based on national law", Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), p.19.

[7] MiFID "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" the directive, according to *Genil v Bankinter* (C-604/2011), initial, ECJ judgment (4th Chamber), 30 May 2013 at [57], applying MiFID I in doctrine also applicable to MiFID II.

for specific provisions on misrepresentation in the prospectus,[8] incorrect marketing of packaged products[9] and the civil liability of rating agencies[10] or depositaries.[11] However, before we deal with the remedies, it is useful to identify the sources of financial service contract law in order to better perceive its legal nature.[12] This is a sector with an abundance of rules from a plurality of sources.[13] It is a regulation characterised by technicality and complexity; a trend exacerbated by the development of financial technology (Fintech). The new Capital Markets Union Action Plan is underpinned by digitalisation alongside the promotion of sustainable finance and retirement savings.[14] Within this framework, the European Digital Finance Strategy overcomes sectoral differences based on the principle of "technological neutrality", according to which "same activity, same risks, same rules".[15] It proposes to regulate crypto-asset providers along the lines of the MiFID model,[16] a model also applied to the regulation of providers of crowdfunding services.[17] This regulation extends the perimeter of financial regulation to Fintech services, but still does not address the contractual remedy for breach of conduct of business rules. This is a weakness that calls into question the protection of savings and investment.[18] There is provision for a system of penalties, but there is no civil remedy to ensure the effectiveness of financial customer protection regulations, whether as a user of financial services or as a saver or investor.

The Markets in Financial Instruments Directive [2014] OJ L173/349 (MiFID II) does not regulate the contractual consequences of breaching conduct of business rules.[19] It leaves it to the Member States to decide on the contractual remedies to be applied in the event of breach of the obligations laid down in the Directive;[20] so that "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

[8] Article 11 on "Responsibility attaching to the prospectus" of Regulation 2017/1129, of 14 June 2017, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market. This liability rule is reproduced in art.38 of the TRLMV (recast text of the Securities Market Law approved by Royal Legislative Decree 4/2015, of 23 October) (formerly 28 LMV), used as the basis for Supreme Court Judgments 23 and 24/2016 of 3 February, Plenary Session, Pedro José Vela Torres and Rafael Saraza Jimena writing for the court, respectively, on the Bankia IPO, in actions for nullity due to defect of consent (*error vicio*) and not prospectus liability. Doctrine that excludes qualified investors from prospectus liability because they have "other means of obtaining information on the relevant economic data to make the decision", although this is pending preliminary rulings by the Supreme Court (Supreme Court Order of 10 December 2019). See A. Agüero Ortiz, "Responsabilidad por el contenido del folleto frente a inversores cualificados", *Diario La Ley*, No.9585 (2020), according to whom prospectus liability "is liability for quasi-objective negligence" with "a *iuris tantum* presumption of lack of due diligence by the liable parties"; D. Busch, "The influence of the EU prospectus rules on private law" (2020) *Capital Markets Law Journal* 1–28, highlighting the importance of referring questions to the CJEU for a preliminary ruling, as the Spanish Supreme Court did in the case of the *Bankia IPO* (Supreme Court Order of 10 December 2019).

[9] Article 11 of Regulation 1286/2014 of 26 November 2014, on key information documents for packaged retail and insurance-based investment products (PRIIPs), which delimits the civil liability of the producer against the retail investor's claim for damages for reliance on the key information document "in accordance with national law". This article "does not exclude further civil liability claims in accordance with national law".

[10] Article 35a on "Civil liability" of Regulation (EC) 1060/2009, of 16 September 2009, on credit rating agencies. See J.M. Busto Lago, "Materiales para la construcción de la responsabilidad civil de los terceros de confianza perspectiva desde la responsabilidad civil de auditores y de las agencias de 'rating' y la teoría de las 'flood' gates", *Anuario da Facultade de Dereito da Universidade da Coruña*, No.18 (2014), pp.58–64.

[11] See art.21.12 of Directive 2011/61 of 8 June 2011, on Alternative Investment Fund Managers.

[12] It is a sector in need of doctrinal development that integrates banking, the securities market and insurance from a multidisciplinary perspective, without separating institutions from contracts. As M. Andenas, "Foreword" in R. D'Ambrosio and S. Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, No.90 (October, 2020), p.10, points out: "EU law does not rely on domestic distinctions between public and private law". The main problems affect the various financial sectors, and the solutions share a common body. See V. Colaert, "Product Information for Banking, Investment and Insurance Products" in V. Colaert, D. Busch and T. Incalza (eds), *European Financial Regulation: Levelling the Cross-Sectoral Playing Field* (Hart Publishing, 2019), pp.303–316.

[13] In what has been called the "regulatory circle", a term coined by F. Bassan, *Potere dell'algoritmo e resistenza dei mercati in Italia. La sovranità perduta sui servizi* (Soveria Mannelli, Rubbettino, 2019), p.197, to refer to multilevel intervention by the European and national regulators, with coregulation and self-regulation of the market. "Liquid law" in continuous evolution, A. Antonucci, *I contratti di mercato finanziario* (Pacini Giuridica, 2018), pp.11–16.

[14] Commission Communication on "A Capital Markets Union for people and business: new action plan", COM(2020) 590 final, Brussels (24 September 2020).

[15] See Communication from the Commission on Digital Finance Strategy for the EU, COM(2020) 591 final, Brussels (24 September 2020).

[16] Proposal for a Regulation on Markets in Crypto-assets, COM(2020) 593 final, Brussels (24 September 2020), art.14 of which regulates the liability of issuers of crypto-assets for the information contained in the white paper advertising it, in terms similar to those of the prospectus. By "MiFID System" we mean Directive 2014/65 and Regulation EU 600/2014 on markets in financial instruments, and its developments.

[17] Regulation 2020/1503 of 7 October 2020, on European crowdfunding service providers for business, which mandates Member States to ensure that rules "on civil liability apply to natural and legal persons responsible for the information given in a key investment information sheet" (art.23.10).

[18] As opposed to consumer and competition law. Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), p.221, according to whom "retail clients should be allowed to enforce conduct of business rules in judicial or extra-judicial proceedings, via national private law".

[19] The consultation on its review did not consider regulating the contractual consequences. See *Public Consultation on the Review of the MiFID II/MiFIR regulatory framework*, 17 February 2020. It is considered to be extremely complex by F. Della Negra, "The civil effects of MiFID II between private law and regulation" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, No.90 (October, 2020), p.124, or undesirable because of its collateral effects, as stated by Wallinga: "full harmonization of civil liability rules might result in unjustified restrictions on the ability of civil courts to realise justice in individual disputes and prevent learning from diversity", M.W. Wallinga, "Chapter 10: MiFID I MiFID II and private law: towards a European principle of civil liability?" in O.O. Cherednychenko and M. Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar, 2020), p.241.

[20] "Member States shall ensure that mechanisms are in place to ensure that compensation may be paid, or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014" (art.69.2 final paragraph of MiFID II). "[I]t 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 art.19(4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness" (*Genil v Bankinter* (C-604/2011) EU:C:2013:344 at [58], applying MiFID I, in doctrine also applicable to MiFID II).

of equivalence and effectiveness".[21] It is left to Member States to set the sanctions provided that they are "effective, proportionate and dissuasive".[22]

The main purpose of European financial services regulation is to create an efficient and safe financial market, with harmonised prudential and conduct of business rules that guarantee freedom of establishment and freedom to provide services. There is increasing harmonisation of the legal framework modelled on the MiFID system.[23] This system governs investment services, but also inspires the regulation of payment services, offering of credit and insurance distribution.[24] Vertical regulatory silos have demonstrated their limitations.[25]

Under the MiFID system, the duty to disclose risks is supplemented by the prior assessment of the customer in order to provide services appropriate to the customer's profile. This suitability is reinforced when portfolio management or advice is involved. In addition, there is product governance regulating the design and distribution of financial products.[26] This ensures that the product meets the customer's needs throughout the entire product life cycle from production through distribution to marketing.[27] There is a double filter to prevent inappropriate supply of financial services. A first filter affects the design of the product by conditioning production to meet the needs of the customers for whom it is intended. A second filter makes the offer conditional on a prior evaluation of the customer in order to offer them products suitable to their profile or to recommend products suitable to their objectives and financial situation. This goes beyond the paradigm of information as the best way to protect the customer and ensure the smooth functioning of the market. It is a realistic and paternalistic approach in response to a market in which intermediaries have opportunistic behaviour that needs to be corrected,[28] and which protects customers from their own behaviour, which is not always rational.[29]

Within this regulatory framework, the principle of good faith stands out for its role in informing financial contracting,[30] which is outlined in the duty to "behave diligently and transparently in the interest of their customers".[31] A general duty of conduct that is specified for each investment service with the legal obligations that in some way make up the contents of the contract.[32] Spanish case law is based on the general principle that "every customer must be informed by the bank, prior to

[21] *Genil v Bankinter* (C-604/2011) EU:C:2013:344 at [57], which does not clarify which remedy meets these criteria. However, as Della Negra, points out, the remedy "must not be less favourable than those relating to similar actions of a domestic nature (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise the rights which are based upon or derived from EU law (principle of effectiveness)", Della Negra, "The civil effects of MiFID II between private law and regulation" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, No.90 (October, 2020), p.125. Cf. O.O. Cherednychenko, "Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services?" (2014) 10(4) *European Review of Contract Law* 488. In any event, the fundamental right to effective judicial protection applies. See Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), pp.19–22.

[22] Article 70.1 of MiFID II. Not to mention the power to issue fines to the investor to cover the damage caused by the infringing conduct, giving rise to a "hybrid enforcement mechanism", O.O. Cherednychenko, "Financial regulation and civil liability in European law: towards a more coordinated approach?" in Cherednychenko and Andenas (eds), *Financial Regulation and Civil Liability in European Law* (2020), p.4.

[23] See F. Annunziata, "MiFID II as a Template. Towards a General Charter for the Protection of Investors and Consumers of Financial Products and Services in EU Financial Law" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, No.90 (October 2020), pp.21–57; "leading to homogeneity and cross-sectoral harmonization by way of its centrifugal and centripetal force" (p.56); V. Colaert, "Product Information for Banking, Investment and Insurance Products" in Colaert, Busch and Incalza (eds), *European Financial Regulation: Levelling the Cross-Sectoral Playing Field* (Hart Publishing, 2019), pp.303–316, according to whom: "European legislator sees product information as one of the building blocks of protection of financial consumers and the information documents are here to stay" (p.304).

[24] Directive 2016/97 on insurance distribution (IDD) [2016] OJ L26/19, which transposes the MiFID framework into insurance with appropriate adaptations. With IDD, insurance is "financialised". It follows the path set out in para.87 of the preamble of MiFID II, according to which conduct of business rules for insurance-based investment products must "appropriately ensure a consistent regulatory approach concerning the distribution of different financial products which satisfy similar investor needs and therefore raise comparable investor protection challenges". IDD extends its scope to all types of insurance, with enhanced protection for insurance-based investment products. See, by the author, "La financiarización de la distribución de seguros" (2021) 185–186 *Revista española de seguros* 413–428. Concerning the nature of unit-linked insurance, see A.J. Tapia Hermida, "Noción del seguro de vida unit-linked", *Revista española de seguros: Publicación doctrinal de Derecho y Economía de los Seguros privados*, No.176 (2018), pp.477–506, who highlights its "specific regulatory problems" (p.483).

[25] As Annunziata states: "Sectoriality is a further element of complication, and inevitably produces fragmentation and lack of coordination", F. Annunziata, "MiFID II as a Template. Towards a General Charter for the Protection of Investors and Consumers of Financial Products and Services in EU Financial Law" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, No.90 (October 2020), pp.21–57; F. Bassan, *Potere dell'algoritmo e resistenza dei mercati in Italia. La sovranità perduta sui servizi* (Soveria Mannelli, Rubbettino, 2019), p.28.

[26] See A. Marcacci, "European Regulatory Private Law Going Global? The Case of Product Governance" (2017) 18 *European Business Organization Law Review* 305–332.

[27] According to Marcacci, product governance "not only internalises the very same duties flowing from the client-provider contractual relationship but moves the boundaries much further by regulating the entire 'value chain' process of the product, with the Compliance Function being in charge of directly overseeing the whole process", A. Marcacci, "European regulatory private law going global?: the case of product governance" (2017) 18(2) *European Business Organization Law Review* 305–332, 328.

[28] The authorities and the industry itself recognise that misconduct, as a pattern of behaviour, damages trust and makes the current banking model unsustainable. According to Margarita Delgado, Deputy Governor of the Bank of Spain: "the cost of litigation and its terrible effect on the reputation of the entire sector far outweigh any hypothetical benefits that individual institutions could have obtained through questionable practices", in the Opening Speech of the conference "Los consumidores ante el mercado hipotecario post-COVID" (18 November 2020), available at: *https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/IntervencionesPublicas/Subgobernador/Arc/Fic/delgado181120.pdf*.

[29] It is common to refer to the "investor" as the object of protection under securities market regulations. This is imprecise, as customers who are users of investment services are protected irrespective of whether or not they become an investor. In fact, it is a regulation that protects the investor's market, making use of the intermediary, see Della Negra, "I rimedi per la violazione di regole di condotta MiFID II: una riflessione di diritto UE", *Banca borsa e titoli di credito*, No.5, Pt I (2020), p.711, citing Maffeis, "La natura e la struttura dei contratti di investimento" (2009) 3 *Rivista di diritto privato* 81, according to whom "la banca è il titolare di un vero e propio ufficio di diritto privato", in D. Maffeis, "L'ufficio di diritto privato dell'intermediario e il contratto derivato over the counter come scommessa razionale" in D. Maffeis (Dir.), *Swap tra banche e clienti. I contratti e le condotte* (Giuffrè Editore, 2014), p.10.

[30] Good faith is a commercial principle set out in art.57 of the Commercial Code that also applies to financial service providers. From a European perspective: "Full harmonization, however, should not be extended to general clauses on fairness, good faith, and the like, in order to leave Member States the necessary margin of appreciation", Micklitz, "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation" (2009) 28(1) *Yearbook of European Law* 50.

[31] Article 208.1 of the TRLMV.

[32] Supreme Court Judgment 467/2015, of 21 July 2015, Ignacio Sancho Gargallo writing for the court, expresses this clearly in a case of advice on the acquisition of a structured bond issued by an Icelandic bank that was affected by the issuer's bankruptcy. According to this judgment, the rules on the mandate and sales commission are understood to be integrated into the sectoral regulations, which gives rise to a "high standard of good faith, prudence and information obligations on the part of investment firms with regard to their customers".

the execution of the contract, of the risks involved in the speculative transaction in question".[33] This principle responds to the requirements of good faith and is embodied in the obligations to know the customer and to provide information in a comprehensible manner.[34] In short, the investment firm is obliged to provide correct information about financial services and instruments "not only because it is a requirement arising from good faith in contracting, but also because it is imposed by the securities market regulations, which consider these points to be essential and that it is necessary for the investment firm to provide adequate information".[35]

According to art.202 of the recast text of the Securities Market Law (TRLMV), investment service providers must follow the conduct of business rules in Chapter I of Title VII of the TRLMV, the codes of conduct approved as part of their regulatory development, and the rules contained in their own internal conduct of business rules.[36] From a public law perspective, breach of these duties of conduct is an administrative offence.[37] In turn, in private law, according to art.259 of the Commercial Code,[38] such rules contribute to the contents of the contract.[39] In Spanish law there is an express connection between regulatory law and contract law, which is lacking in other legal systems.[40]

Conduct of business rules are "liability rules" that determine the service provider's due diligence.[41] However, there are no provisions concerning the contractual consequences of breaching them.[42] From a contractual point of view, their application requires the difficult task of formulating the rule inspired by those duties that apply,[43] or rather, identifying the specific obligation applicable to the factual situation. In some cases, the applicable rule expressly mentions good faith.[44] However, it is usual in the financial market for standardisation of institutions' conduct to arise from the conduct of business rules set out in the law and developed in detail in the regulations, with subsequent specification by the technical criteria of the financial authorities (soft law).[45] The judge hearing a dispute between a bank and a customer may find a regulatory development or a supervisory criterion that allows the judge to decide without having to resort

[33] Supreme Court Judgment, Chamber for Contentious Administrative Proceedings, 2185/2016 of 10 October, Diego Córdoba Castroverde writing for the court.
[34] According to Supreme Court Judgment 323/2015 of 30 June, Rafael Saraza Jimena writing for the court: "This generic duty to negotiate in good faith entails the more specific duty to assess the customer's knowledge and experience in financial matters, to specify what type of information must be provided in relation to the product in question, and, where appropriate, to make a judgement of convenience or suitability, and, having done so, to provide the customer with information about the fundamental aspects of the business, including the specific risks involved in the financial instrument to be contracted." Citing the previous Judgment 840/2013 of 20 January 2014, Plenary Session. Settled case law on swaps (see Supreme Court Judgment 405/2020 of 7 July, Francisco Javier Arroyo Fiestas writing for the court, citing 32 judgments that applied it).
[35] Supreme Court Judgment, Plenary Session, 460/2014 of 18 April, Rafael Saraza Jimena writing for the court.
[36] Similarly, credit or payment service providers must comply with the corresponding conduct of business rules. See arts 16–21 of Act 5/2019 of 15 March regulating credit agreements on immovable property (LCCI), arts 8–20 of Act 16/2011 of 24 June on consumer credit agreements (although these are not identified as conduct of business rules), and arts 28–33 of Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures. Insurance distributors must also comply with specific conduct of business rules. See arts 172–185 of Royal Decree-Law 3/2020 of 4 February 2016, which transposes Directive 2016/97 on insurance distribution.
[37] Cf. art.296 of the TRMLV 4/2015, poorly titled "infringements due to beach of internal organisational measures and prudential requirements", para.14 of which covers breaches of the conduct of business rules applicable to investment service providers.
[38] Commercial Code art.259: "Commission agents shall observe the provisions of the Laws and Regulations with respect to the negotiation entrusted to them and will be liable for the results of their infringement or omission."
[39] See Supreme Court Judgment of 11 July 1998. A.J. Tapia Hermida, "Las normas de actuación en el mercado de valores" in A. Alonso Ureba and J. Martínez Simancas (Dirs), *Instituciones del mercado financiero* (Madrid, La Ley), pp.2818–2819, who considers that the conduct of business rules constitute "the first external limit on autonomy of will", breach of which "gives rise to an obligation on the intermediary to compensate for the damages caused". Della Negra describes the conduct of business rules as "quasi-contractual rules to reduce information asymmetries" (Della Negra, "The civil effects of MiFID II between private law and regulation" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, No.90 (October 2020), pp.115–143, 121).
[40] See D. Busch, C. Van Dam and B. Van Der Wield, "Netherlands" in D. Busch and C. Van Dam (eds), *A Bank's Duty of Care* (Hart Publishing, 2017), pp.201–245.
[41] See G. Gaudiosi, "Il valore dell'informazione nella 'contrattazione tra ineguali' in materia di investimenti. Riflessioni sulla (presunzione del) nesso di causalità a margine della sentenza Cass. civ. n.7905/2020", *Rivista De Iustitia* (June 2020), p.21, available at: *http://archivio.deiustitia.it/cms/cms_files/20200811100615_rrqy.pdf*.
[42] Conversely, the Portuguese Securities Code devotes art.304-A to the civil liability of investment service providers: "Os intermediários financeiros são obrigados a indemnizar os danos causados a qualquer pessoa em consequência da violação dos deveres respeitantes à organização e ao exercício da sua actividade, que lhes sejam impostos por lei ou por regulamento emanado de autoridade pública". See G.A. Castilho Dos Santos, *A responsabilidade Civil do Intermediário Financeiro Perante o Cliente* (Almedina, 2008).
[43] See Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court: "In principle they are rules that mainly regulate public legal aspects related to the actions of companies operating in the securities market, but they have a direct impact on the private legal contents of the contract". Accordingly, they "integrate the compulsory content of so-called 'lex privata' or 'lex contractus', which arises when concluding, with their customers, the contracts for which they are intended. These are standards or models of contractual behaviour, imposed, by good faith, on the providers of such services and, ultimately, duties that the other contracting party may demand of them—art.1258 of the Civil Code and art.57 of the Commercial Code" (Supreme Court Judgment, Plenary Session, 243/2013 of 18 April, Jose Ramón Ferrandiz Gabriel writing for the court, reiterated in, among others, the Supreme Court Judgments of 626/2013 and 41/2014). In other words, they are rules that "shape, delimit and define the actions of these firms in the stages of forming, concluding and consummation of the legal business entered into with their customers and specify and define the contents, scope, breadth and extent of their contractual obligations" (Judgment of Madrid Provincial High Court, 25th Chamber, 643/2012 of 28 December, Ángel Luis Sobrino Blanco writing for the court).
[44] This is the case in art.11.2 of the TRLMV, which stipulates that acquisitions of book-entry securities acquired for consideration by a third party are irrevocable "unless at the time of acquisition they acted in bad faith or with wilful misconduct". Also, in the distance marketing of financial services, in which the service provider must follow "the principles of good faith in commercial relations" when providing information to the consumer (art.7.2 of Act 22/2007 of 11 July on distance marketing of financial services to consumers).
[45] ESMA is authorised to develop draft regulatory technical standards for approval by the European Commission which "shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based" (art.10 of Regulation 1095/2010 of 24 November 2010 establishing ESMA). In addition, in order to ensure the common, uniform and consistent application of Union law, ESMA may issue "guidelines and recommendations addressed to competent authorities or financial market participants" (art.16 of Regulation 1095/2010). Similar regulatory functions are performed by EBA (arts 10 and 16 of Regulation 1093/2010 of 24 November 2010 establishing EBA) and EIOPA (arts 10 and 16 of Regulation 1094/2010 of 24 November 2010 establishing EIOPA). In turn, the CNMV may draw up technical guidelines "which it considers appropriate for compliance with the applicable regulations" (art.21.3 of the TRLMV). The Bank of Spain is also authorised to draw up technical guidelines (art.54 of Act 10/2014 of 26 June on the regulation, supervision and solvency of credit institutions), as is the DGSFP (art.111.2 of Act 20/2015 of 14 July on the regulation, supervision and solvency of insurance and reinsurance institutions). These are national authorities that may endorse the guidelines approved by the European authorities. Soft law of EU origin which, according to the CJEU, must be taken into account by the national courts when interpreting European law, see Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), pp.84–86, citing extensive case law.

to the application of good faith as a general principle of law.[46] This leaves little room for good faith as a principle that defines conduct in the financial market, which contributes to legal certainty and the foreseeability of breaches.

In the absence of a legal standardisation of financial contracts, the rules governing obligations and contracts are applied,[47] clarified by the technical criteria of the financial supervisors.[48] The case law doctrine, which is based on the financial authorities' criteria, applies the complementary model of European regulatory private law. It is "quasi-normative case law" that fills the regulatory gaps.[49] Like pieces of a jigsaw, each judgment contributes to shaping this law.[50]

Spanish case law has been applying the scope of protection of the MiFID system to structured products,[51] unit-linked products,[52] and even the marketing of multicurrency mortgages, on the grounds that they include implicit derivatives.[53] The MiFID system lists the transferable securities and derivatives that are classified as "financial instruments", the vehicle through which investment services are provided. Structured deposits in which the yield is dependent on the performance of a financial product, also fall within its scope of protection.[54] In turn, with regard to insurance-based investment contracts known in the trade as unit-linked, MiFID II acknowledges that it is important that they "are subject to appropriate requirements". This is based on the need for horizontal investor protection irrespective of the product used to capture savings.[55]

However, the scope of those protected by the conduct of business rules is not harmonised. The legislation on consumer credit, payment services and distance contracting of financial services is designed to protect "financial consumers", natural persons who, in payment services, distance contracts or consumer credit, are acting for a purpose outside of their business or professional activity.[56] The TRLMV protects the customer who is the recipient of investment services, a broader concept than that of a consumer.[57] In turn, the Credit Agreements on Immovable Property Act protects all natural persons, whether or not they are consumers.[58] This disparity hinders application of the regulations. The trend is to apply the

[46] This is what the Supreme Court and the provincial high courts have been doing, most notably the 11th Chamber of the Madrid Provincial High Court, with Judge Jesús Miguel Alemany Eguidazu writing for the court.

[47] According to Della Negra: "General private law should assist or facilitate conduct of business rules in achieving their policy goals", Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), p.26.

[48] In this regard, Supreme Court Judgment 400/2015 of 9 July, Rafael Saraza Jimena writing for the court, integrates the financial supervisors' own technical criteria when judging compliance with the standards of diligence required of a discretionary portfolio manager who had acquired shares in a fund affected by the Madoff fraud for an investment company. According to this judgment, the "manager's diligence cannot be measured by the result of the investment but instead by observance of the required professional parameters". It thus integrates the good faith and the diligence that must prevail over the commission agent's actions with the technical criteria of financial regulation.

[49] See F. Bassan, "La riforma della regolazione bancaria. Dalla discrezionalità delle scelte a una flessibilità di sistema" in *Banca Impresa Società*, No.3 (2017), p.385, cited by Gaudiosi, "Il valore dell'informazione nella 'contrattazione tra ineguali' in materia di investimenti. Riflessioni sulla (presunzione del) nesso di causalità a margine della sentenza Cass. civ. n.7905/2020", *Rivista De Iustitia* (June 2020), p.21. Conversely, Agüero Ortiz considers that the judiciary have not been able to define the conduct of business rules by adopting the "maximalist rule", requiring the intermediary to provide all the information "that would have led the investor not to contract if they would have suffered losses" creating "case law obligations" in an "underlying social injustice", in Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), p.481. We do not agree with these considerations, since case law, with its ups and downs, does not create the "MiFID protocol", but instead fills it with contents and contributes to legal certainty.

[50] We are faced with the "gurisdionalizzazione del diritto", which is no scandal for Common Law but causes perplexity in continental systems. See Bassan, *Potere dell'algoritmo e resistenza dei mercati in Italia. La sovranità perduta sui servizi* (Soveria Mannelli, Rubbettino, 2019), p.26; according to whom the judge "crea il diritto perché non lo aplica, lo esegue", p.25.

[51] See Supreme Court Judgments 336/2020 of 22 June and 21/2016 of 3 February, Ignacio Sancho Gargallo writing for the court, and previously Supreme Court Judgment 660/2012 on the so-called "Depósito Estructurado Tridente", a true structured investment.

[52] Supreme Court Judgment 769/2014 of 12 January 2015, Plenary Session, Rafael Saraza Jimena writing for the court, hastily applied the securities market's conduct of business rules to the marketing of unit-linked products. This doctrine was repeated in Supreme Court Judgment 116/2016 of 1 March. The judgment of the CJEU (4th Chamber) of 31 May 2018 (C-542/16), clarifies that the marketing of unit-linked products is subject to the insurance distribution regulations and not MiFID II, although it uses this directive as a criterion for interpretation, forcing the Supreme Court to revise its doctrine.

[53] Supreme Court Judgment 323/2015 of 30 June, Rafael Saraza Jimena writing for the court, considered that what has become colloquially known as a "multi-currency mortgage" is "a derivative financial instrument whereby quantifying the obligation of one of the parties to the contract (loan repayments and calculation of outstanding principal) depends on the value of a different security, known as the underlying asset, which in this case is a foreign currency. As a derivative financial instrument related to foreign currency, it is included within the scope of the Securities Market Act". However, the CJEU Judgment, 4th Chamber, of 3 December 2015, clarified that "an investment service or activity within the meaning of that provision [art.4(1)(2) MiFID] does not encompass certain foreign exchange transactions, effected by a credit institution under clauses of a foreign currency denominated loan agreement such as the one at issue in the main proceedings, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated". The Supreme Court in its Judgment 608/2017 of 15 November, Rafael Saraza Jimena writing for the court, accepts the doctrine of the aforementioned CJEU judgment and reiterates it in Judgments 599/2018 of 31 October, 158/2019 of 14 March, 317/2019 of 4 June, 435/2020 of 15 July and 443/220 of 20 July. See A. Agüero Ortiz, "Fin del debate: tras el CESR y la Comisión Europea, ahora es el TJUE quien confirma que los préstamos multidivisa no son instrumentos financieros, ni están sujetos a MiFID", *Blog CESCO* (6 December 2015).

[54] See art.1.4 of MiFID II, a provision transposed by art.145.3 of the TRLMV. According to para.39 of the preamble of MiFID II, structured deposits have emerged as a new form of investment product, and it is necessary to "make regulatory treatment concerning the distribution of different packaged retail investment products more uniform in order to ensure an adequate level of investor protection across the Union".

[55] MiFID II calls in its preamble for "a consistent regulatory approach concerning the distribution of different financial products which satisfy similar investor needs and therefore raise comparable investor protection challenges … to achieve as much consistency as possible in the conduct of business standards for those investment products".

[56] Cf. art.2.1 of Act 16/2011 of 24 June 2011 on consumer credit agreements; arts 3.8 and 28.2 of Act 16/2009 of 13 November 2009 on payment services, which extends protection to microenterprises as defined in art.3.25; and art.5, final, of Act 22/2007 of 11 July 2007 on distance marketing of financial services to consumers.

[57] In fact, they are intersecting circles: customers may be consumers but not every consumer is a customer. It is common to refer to investor rather than customer, but not every customer is an investor, for example, the adviser's customer receives investment recommendations that they may or may not follow. Not investing does not mean you are no longer an adviser's customer. Accordingly, the CJEU Judgment (4th Chamber) of 2 April 2020, Case C-500/18 (*AU v Reliantco Investments Ltd, Reliantco Investments Ltd Limassol Sucursala Bucuresti*), states that a "retail client" may be a "consumer", since "a natural person who, under a contract such as a CFD concluded with a financial company, carries out financial transactions through that company may be classified as a 'consumer' for the purposes 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 verify", and for these purposes "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" and "the fact that that same person is a 'retail client'" are, as such, in principle irrelevant.

[58] Directive 2014/17 on credit agreements concluded with consumers relating to residential immovable property [2014] OJ L60/34 protects consumers. The transposition of Act 5/2019 of 15 March, regulating credit agreements on immovable property (LCCI) extends protection to natural persons, whether or not they are consumers, by following "the traditional line of our legal system of extending the scope of protection to groups such as the self-employed" (Preamble LCCI).

MiFID system and protect all financial service customers, in particular retail customers who, even when they are informed, lack the ability to analyse financial risks.

According to case law, the existence of financial regulations on transparency and customer protection does not preclude the application of general consumer protection legislation, which raises a problem of coordination between financial regulation and consumer law.[59] In claims based on consumer protection rules, it is common to allege the customer's lack of understanding of the legal or financial implications of the contracted product. According to this doctrine of "material transparency", the defendant bank bears the burden of proving that the customer has understood the product's nature and risks. But in the financial market, characterised by the complexity of its products, this is an almost impossible test.[60] An "average financial consumer", i.e. one who is reasonably well-informed and reasonably observant and circumspect, will never be able to understand the financial implications of a financial product of a certain complexity.[61] Applying this doctrine to finance without proper adaptation is causing undesirable effects by creating legal uncertainty and commercial tension between banks and their customers.[62] It is assumed that there is a financial asymmetry between the bank and the customer. The bank that designs or distributes the product is fully aware of the nature and risks of the products it offers on the market. As a professional organisation it knows the contents of the structured product or swap that is being marketed. However, the customer, in particular a retail customer, is unaware of the financial implications of the product and its associated risks. According to this doctrine, the bank has a duty, not only to inform the customer about the product, but also to make them understand its implications so they can overcome the asymmetry and make a decision with full knowledge of the facts. In theory, the customer can overcome the asymmetry through the financial education and information provided, i.e. they can catch up with the bank in terms of understanding of the product. This is actually a fallacy, since a retail customer will never be able to overcome the asymmetry between what they know and what the bank knows.[63] The lack of training and the cognitive biases they suffer from prevent them from understanding the technical information received.[64] The law itself presumes that retail customers lack the experience, knowledge and qualifications necessary to make their own investment decisions and correctly assess their risks.[65] The doctrine of material transparency allows the contracting of any financial product to be challenged. This situation creates a scenario of legal uncertainty that affects both institutions and customers, as it reduces the offer of financial products and services. One way out of this serious situation could be through regulating contracts and setting the terms and contents of financial information in the law. This is the strategy followed by the law regulating the contracting of mortgage loans.[66] But it is not the most appropriate strategy. It creates rigidity, harms competitiveness, and provides loopholes for litigators. It does not prevent claims due to lack of material transparency.[67]

In the absence of a private law framework for breaches by financial service providers, customer protection is facilitated through alternative dispute resolution (ADR) systems. In this field, complaints services are not effective.[68] They do not rule on contractual issues, which are left to the courts.[69] Their reports are not binding on the institutions and can be disregarded when they are favourable to the customer. The creation of the Financial Customer Protection Authority (*Autoridad Protectora del Cliente Financiero*), as a financial ADR, with binding decisions and the power to approve criteria for good

[59] When they apply the regulations protecting financial customers, the courts "do so with a 'pro-retail customer' bias, in complete parallel to how consumer regulations are normally interpreted", according to E. Valpuesta Gastaminza, "El cambio de paradigma en la protección del 'cliente de productos financieros' [Reglamento (UE) PRIIPS y OM 2316/2015] sujeto protegido y técnica de protección" (2019) 38 *Revista de derecho bancario y bursátil* 154, s.III.1.

[60] In investment services, "even though the presumption of error can be overturned by proof to the contrary, a set of evidence assessment rules are established for these cases, which make it practically impossible to prove it, since it requires *probatio diabolica*". Judgment of Madrid Provincial High Court, 21st Chamber, 23 June, Ramón Belo González writing for the court.

[61] Information obligations "do not tackle the growing complexity of contractual documentation in both loan and securities transactions". Della Negra, "The civil effects of MiFID II between private law and regulation" in D'Ambrosio and Montemaggi (eds), *Private and public enforcement of EU investor protection regulation*, Conference papers, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, No.90 (October 2020), pp.128–129.

[62] According to Valpuesta Gastaminza: "If the information provided is insufficient or misleading, and if case law interprets the rules with a certain 'pro-retail investor' bias, the result is what we have seen in Spain in recent years: the ineffectiveness of the vast majority of financial product subscription or acquisition transactions carried out by retail consumers" in Valpuesta Gastaminza, "El cambio de paradigma en la protección del 'cliente de productos financieros' [Reglamento (UE) PRIIPS y OM 2316/2015] sujeto protegido y técnica de protección" (2019) 38 *Revista de derecho bancario y bursátil* 154, s.III.1 final.

[63] See Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), p.472, who starts from the failure of the "information paradigm", a false pillar of investor protection regulation "since the consumer is not capable of taking rational and autonomous investment decisions", even with the supposed empowerment provided by financial education.

[64] See CNMV, *Guía de Psicología económica para inversores*, 23 October 2019, which aims to facilitate the practical application of behavioural economics, e.g. taking into account that investors "overestimate their knowledge and personal experience without taking into account the difference between what is actually known and what is thought to be known", available at: *https://www.cnmv.es/DocPortal/Publicaciones/Guias/Psicologia_economica_para_inversores.pdf*.

[65] See arts 204 and 205 of the TRLMV.

[66] See Ch.II of the LCCI.

[67] Despite making contracting conditional on the customer's responsible declaration of having received an explanation of the contents of the contract (see art.15 of the LCCI).

[68] Covered by arts 29 and 30 of Act 44/2002 of 22 November on Financial System Reform Measures.

[69] See art.10.1 of Order ECC/2502/2012 of 16 November and art.9.2 of CNMV Circular 7/2013 of 25 September.

financial conduct, will contribute to a faster and fairer resolution of mass disputes and to achieving the legal certainty that the financial market needs.[70]

Financial services as a contractual category

Now that we know the sources, in order to analyse contractual remedies, it is important to identify the contract between the financial service provider and the customer. Neither EU law nor Spanish law stipulate a type of financial services contract. A financial service is defined as "any service of a banking, credit, insurance, personal pension, investment or payment nature",[71] but financial services do not have a contractual framework beyond that governing distance contracting.[72] Spanish case law has also failed to define the legal nature of the different financial services.[73] The law defines the various products through which financial services can be provided in order to establish the regulatory perimeter subject to the control of sectoral authorities. It is a sectoral, siloed framework. We will focus on the investment services framework because it is the model applied to regulating other financial services and because it is the sector with the richest case law in response to the abundance of litigation.

The MiFID system defines professional activities that take place in the securities market as "investment services"; the system also does not define what "investment services contract" means.[74] It merely lists the activities that are considered investment services in order to regulate access to the market and discipline the actions of the firms providing such services.[75] The usual provision of these services is reserved for investment firms and credit institutions, including banks.

Contractual process

In the plethora of lawsuits filed after the financial crisis broke out in 2008, as opposed to the usual claims for compensation for intermediary liability,[76] the most common claim in Spain has been for nullity of the contract due to a defect of consent by not defining the contractual relationship with all due clarity.[77] The usual grounds for these claims are more concerned with the product itself than with the legal relationship. For example, they are more extensive in their analysis of preference shares or swaps than in determining the nature of the contractual relationship between the claimant and the defendant.

Determining the applicable legal framework begins with identifying the service to be provided and the instrument through which it is provided. Only those who provide investment services through financial instruments must follow the conduct of business rules for the securities market.[78] However, there are judgments that apply the conduct of business rules because the dispute concerns preference shares, a swap or another financial instrument listed in art.2 of the TRLMV, without analysing the investment service that justifies their application. These are judgments that treat the contracting of financial products as if they were purchase transactions (*caveat emptor*). They do not consider the investment service "dealing on own account", which is how they are usually framed.[79] What determines the application of the conduct of business rules is the provision of an investment service through a financial instrument,[80] in a service relationship typical of commercial mandate (*causa mandati*). If it were a mere purchase, the conduct of business rules would not apply.[81]

[70] See Directive 2013/11 of 21 May 2013, on alternative dispute resolution for consumer disputes, which harmonises ADR in the EU. This Directive was transposed into Spanish law by Act 7/2017 of 2 November 2017. Within this framework, consumer boards already operate as ADRs. Their decisions are binding. Their procedures are free of charge. They do not require the assistance of a lawyer. Disputes that affect many consumers can be resolved in this way, even if the individual damages are small. However, for alternative resolution in the field of financial activity, additional provision one of Act 7/2017 (Act 7/2017 of 2 November 2017 transposing into Spanish law Directive 2013/11 of 21 May 2013 on alternative dispute resolution in consumer matters) provides for the creation of a single resolution body, whose decisions may or may not be binding, for consumer disputes in the financial sector. It gives the government eight months to put a bill before Parliament regulating the institutional system for the protection of financial customers, as well as its organisation and functions, yet this mandate had not been fulfilled at the time of writing. In this impasse, the complaints services regulated in art.30 of Act 44/2002 of 22 November on Financial System Reform Measures function as alternative financial dispute resolution systems. There is a draft bill in parliamentary procedure on the creation of the Independent Administrative Authority for the Protection of Financial Customers, available at: *https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-134-1.PDF#page=1*.

[71] Article 2(b) of Directive 2002/65 concerning the distance marketing of consumer financial services [2002] OJ L271/16.

[72] See Act 22/2007 of 11 July 2007 on distance marketing to consumers of financial services. Unlike other European jurisdictions with a contractual framework for the various banking and financial contracts. In this respect, see arts 321–343 of the chapter on "Contratos de intermediação" in the Portuguese Securities Code.

[73] For an analysis of Spanish case law, see Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020); R. Marimón Durá, "Capítulo 1. Cambios en el mercado de crédito: Nuevos operadores y nuevos modelos de negocio" in R. Marimón Durá, J. Martí Miravalls (Dirs) and A. O'Flynn (Coord.), *Problemas actuales y recurrentes en los mercados financieros: Financiación alternativa, gestión de la información y protección del cliente* (Aranzadi, 2018), pp.39–104.

[74] However, the Spanish Judicial Documentation Centre groups judgments on financial instruments under the category "Investment service contracts", as a sub-heading of "Obligations and commercial contracts".

[75] Annex I of MiFID II contains the list of investment services and activities.

[76] See Busch and Van Dam (eds), *A Bank's Duty of Care* (2017).

[77] The usual grounds for claims are more concerned with the product than with the legal relationship. For example, they are more extensive in their analysis of preference shares or swaps than in determining of the nature of the contractual relationship between the claimant and the defendant.

[78] See art.202 of the TRLMV in relation to art.140.

[79] Article 140.1.c) of the TRLMV. It is common in the business for banks to market their own products. There is confusion between the positions of producer and distributor. The bank acts as an intermediary by placing its own instruments in a proprietary trading investment service. These are transactions in which the intermediary bank offers the counterparty to the customer instead of going to the market to find it. See P.H. Conac, *Mis-selling of subordinated debt and other junior liabilities and weaknesses of MiFID (I)* (European Parliament, 2018) in an activity it defines as "self-placement" the "practice of financial institutions selling proprietary financial instruments" (p.12), with references to the Spanish market, pp.18–24 and 33–38, noting that "between 1998 and 2012 €115.3 billion of hybrid subordinated debt-capital instruments were issued, mainly preferred shares, subscribed by 3.1 million of retail clients" (p.20).

[80] Article 202.1, in relation to art.138.1, of the TRLMV.

[81] This is the view taken by Italian case law, according to which the activity of "negoziazione per contro proprio" on a swap "suppone pur sempre un ordine impartito del cliente all'esecuzion", such that "il contratto derivato, pur avendo causa variabile difficilmente può essere ricondotto allo schema della compravendita, sì da potersi agevolmente ricondurre, al di là delle complessità strutturale che gli è propria, alla figura dell'ordine di acquisto, come emesso in attuazione di un contratto quadro" (Sentenza Corte Suprema di Cassazione, 23 October 2020).

In the chain of contracts in market operation, a distinction should be made between the framework contract and the contracts for the provision of the various investment services. A distinction should also be made between the order to purchase the securities and the market purchase through which the mandate received is executed,[82] distinguishing in turn between investment services and the ancillary service of custody of the securities purchased. In fact, the provision of financial services is a contractual process that goes through various stages. It covers the entire product life cycle from design to commercialisation, including the execution of financial market transactions. The provider's obligations to act include product governance, which includes a prohibition on providing investment services that do not meet customers' needs. These are conduct of business and internal organisation rules that must be adopted by the producer and distributor of financial products. Compensation may be paid for the damage caused to the customer as a result of breaching the product governance rules.[83] These are rules that ensure the proper functioning of the market and customers' trust that the offer of financial products meets their needs, preventing the offering of products that could cause them a financial loss. There is a kind of "Hippocratic Oath", just as doctors undertake to do no harm to patients' health, the investment service provider makes a professional commitment to do no harm to its customers' wealth.

Beyond product governance, the preliminary stage of contracting begins with the customer signing a framework contract.[84] Under the MiFID system, investment service providers must enter into a basic written agreement setting out the essential rights and obligations of the provider and the customer.[85] This requirement entails that, prior to providing services, the firm must sign a regulatory agreement, which sets out the contractual provisions that will apply in the event that the customer contracts any investment service, whether intermediation, management or advice.[86] The obligations arising from the framework contract focus on the correct performance of individual transactions. These are obligations of activity, enforceable in accordance with the conduct of business rules, which in some way involve achieving a result consisting of correct performance of the individual transaction. They guarantee the quality-of-service provision. The services provided are not acts of performance of the framework contract; they are legal transactions with their own autonomy.

The firm must classify the customer before providing any investment service. The MiFID system distinguishes customers from eligible counterparties. Eligible counterparties are the financial institutions and public bodies listed in the law.[87] In turn, the law distinguishes between professional and retail customers. "Professional customers are those who are presumed to have the experience, knowledge and qualifications necessary to make their own investment decisions and correctly assess their risks".[88] In turn, "[r]etail clients are all those who are not professionals",[89] and as such lack the experience, knowledge and qualifications necessary to make their own investment decisions and correctly assess their risks. Spanish case law has created a category of an "expert retail investor" who is considered capable of analysing financial risks.[90] This case law is contrary to MiFID II. In fact, during the consultation process on the reform of MiFID II, there was discussion about the creation of an intermediate figure between retail and professional customers, but the CNMV did not consider it necessary.[91]

[82] There is no point in requesting the voiding of the market sale, since there is a strict law concerning this type of sale (Act 41/1999 of 12 November on payment and securities settlement systems). What may be voided is the fee for receipt of an order to be executed in the market. "The securities trading fee may be voided (voiding of the 'marketing' between the 'parties to the marketing', according to the expression used in Judgments of the 1st Chamber of the Supreme Court 625/2016, 24.10; 716/2016, 30.11 and 718/2016, 1.12)", as clarified by Madrid Provincial High Court, 11th Chamber, 107/2018, 23 March, Jesús Miguel Alemany Eguidazu writing for the court, which states that "the issuer of the Securities cannot claim the finality of the settlement against the subscriber of the securities, who is not a third party".

[83] The producer will be liable for defective design. The distributor will be liable for going outside the target market. According to Rabitti, this is a "remote" liability in the absence of doctrinal reflection on this point, although, when the producer and distributor are the same "tutta la compliance ricade sullo stesso soggetto e, se questo viola le regole, a qualunque livello esse operino, ne risponde a titolo di responsabilità contrattuale verso l'investitore", in M. Rabitti, "Prodotti finanziari tra regole di condotta e di organizzazione. I limiti di MiFID II", *Rivista di Diritto Bancario*, Supplemento Fascicolo I (2020), p.167.

[84] The provision of payment services is also conditional upon signing a framework contract that "governs the future execution of individual and successive payment transactions" (see art.4.21 of Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2); art.3.9 and title II of Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures).

[85] Article 25.5 of MiFID II, as set out in art.58 of Regulation 2017/565 supplementing Directive 2014/65 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2017] OJ L87/1, which regulates the minimum contents of the framework contract. According to art.218 of the TRLMV, firms must register agreements on the essential rights and obligations of the company and the customer, as well as the conditions under which it will provide services. As an exception, no prior agreement is required for the provision of investment advice. A written record of the personalised recommendation is sufficient, unless a periodic suitability assessment is carried out (art.58I final Regulation 2017/565).

[86] After the framework contract has been signed, there is an obligation to maintain an internal organisation that enables the customer to contract the specified services and products. In Italian doctrine there is a debate between the normative nature of the framework contract to trade financial instruments (binary thesis) and the unitary nature in which orders are instructions from the agent to perform the master agreement (unitary thesis). See Gaudiosi, "Il valore dell'informazione nella 'contrattazione tra ineguali' in materia di investimenti. Riflessioni sulla (presunzione del) nesso di causalità a margine della sentenza Cass. civ. n.7905/2020", *Rivista De Iustitia* (June 2020), pp.7–12.

[87] See art.207 of the TRLMV.

[88] According to art.205.1 of the TRLMV.

[89] Article 204 of the TRLMV.

[90] See, inter alia, Supreme Court Judgment 12/2017 of 13 January, Rafael Saraza Jimena writing for the court, according to which "when the contracting party, despite being legally considered a retail investor, has the profile of an experienced investor and the information provided to them, although it may not be sufficient for a non-expert investor, is sufficient for one who has financial knowledge and experience". Doctrine applied for the inadmissibility of cassation appeals, inter alia, Supreme Court Order of 15 July 2020. A good summary of this doctrine that "inserts" the figure of the retail investor who "far from being a financial ignoramus, has sufficient knowledge of the nature and risks of the financial product in which they are investing", in the Judgment of the 21st Chamber of Madrid Provincial High Court 186/2020 of 23 June, Ramón Belo González writing for the court. See Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.203–209, who describes it as a "confusing category created with the aim of curbing these claims, which leads to internal contradictions in the High Court's own doctrine" (p.203) with "experts" by training or experience, but also by size or speculative purpose (pp.203–207, citing numerous judgments).

[91] "The CNMV does not consider that a new category of clients (intermediate between retail and professional investors) is required as we have not identified any issue or shortcoming in the current classification regime", in *CNMV comments on certain aspects of MiFID II in the context of the public consultation launched by the European Commission in February 2020* (18 May 2020).

In addition, the investment firm is obliged to assess the customer and have the necessary information on each customer at all times. The customer assessment is a passive information obligation (Know Your Customer).[92] This should be done through questionnaires known as "MiFID tests".[93] The extent of the assessment will depend on the service provided, the instrument through which it is provided, and the customer's category. It is more extensive for advisory or management services.[94] Following classification and assessment, the firm may offer the customer instruments appropriate to their profile, with an obligation to refrain from offering unsuitable instruments.[95] In any case, offering an instrument inconsistent with the customer's profile requires a risk warning to put the customer on their guard.[96] According to Spanish case law, the tests fulfil the function of offsetting the "information asymmetry".[97] This doctrine clings to the paradigm of information as the best way to protect the customer and to ensure freedom of choice.[98] However, the aim of the assessment is not so much to provide information as to protect the customer from themselves, in particular from their cognitive biases.[99] For this reason, when the result of the suitability test is negative, the institution is prohibited from recommending its acquisition or including the product in the portfolio it manages.[100] This measure causes the customer to forfeit the opportunity to purchase the unsuitable product.[101] This is a legal ban, breach of which renders the transaction null and void by operation of law.[102] However, in the case of mere intermediation, the firm must warn the customer of the lack of suitability.[103] Compensation is the natural remedy to repair the damage caused by not warning of the lack of suitability.

The offer to the customer must contain sufficient information to enable the customer to understand the product's risks and make a decision with full knowledge of the facts.[104] Case law contrasts markets for tangible goods, in which the parties are on an equal footing and no obligation to disclose is imposed on one party, with financial markets for credence goods, in which the law imposes an obligation to inform on the professional providing the investment service.[105] In the securities market, the obligation to inform is not met merely by providing information, "it is an active obligation, not a

[92] Stipulated in arts 212–216 of the TRLMV, developed by arts 72–74 in Ch.II, Title IV, of Royal Decree 217/2008, of 15 February, on the legal framework for investment service companies and other firms that provide investment services, CNMV Circular 3/2013 of 12 June, and CNMV Circular 3/2013 of 12 June.

[93] See ESMA, *Guidelines on certain aspects of the MiFID II suitability requirements* (28 May 2018) and CNMV, *Guía de actuación para el análisis de la conveniencia y la idoneidad* (17 June 2010).

[94] See Supreme Court Judgment, Plenary Session, 840/2013 of 20 January 2014, Ignacio Sancho Gargallo January writing for the court. Assessment is excluded for mere execution of simple instruments, such as listed shares, when the initiative comes from the customer, under the regulated conditions. See art.216 of the TRLMV, which contains the presumption that any customer, including a retail customer, is aware of the nature and risks of listed shares. This presumption does not apply to bank shares, which may be subject to a bail-in and are therefore complex instruments.

[95] See *R. Natoli, Il contratto "adeguato". La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Milano, Giuffrè, 2012), according to whom, in order to overcome the cognitive deficit implicit in the complexity of financial services, the intermediary "deve offrire ai clienti assistenza e cooperazione" (p.77).

[96] Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court.

[97] The legal provision concerning the duty to provide information "which is based on the information asymmetry that usually occurs in the contracting of these financial products with retail customers, affects the assessment of the error". Supreme Court Judgment 481/2020 of 21 September, Mª Ángeles Parra Lucán writing for the court, for example, citing Judgment 840/2013 of 20 January 2014, and Judgment 559/2015 of 27 October. However, the role of the suitability assessment is to know what the customer is likely to understand in order to tailor the information to their profile. It is not a test of material transparency such as that introduced in the contracting of mortgage loans for notaries (cf. § 15 Act 5/2019 of 15 March, regulating credit agreements on immovable property (LCCI), commented on by the author in F. Zunzunegui, "Capítulo VIII. Asesoramiento en Ley de crédito inmobiliario" in L. Prats Albentosa (Dir.), *Ley de contratos de crédito inmobiliario. Estudios y comentarios* (Civitas, 2020), para.XIV).

[98] Supreme Court Judgment, Plenary Session 840/2013 of 20 January 2014, Ignacio Sancho Gargallo writing for the court.

[99] See Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), according to whom the purpose of the suitability test is "to ascertain that the customer's cognitive background is sufficient to understand the product's risk" (p.341), and to prevent "their cognitive biases from being exploited" (mentioned at pp.377 and 483–484); I. Navarro Frías, "De sesgos y retrocesiones: MiFID II y las nuevas perspectivas de protección del inversor", *Revista de derecho del mercado de valores*, No.23 (2018).

[100] The provider "shall not recommend or decide to trade where none of the services or instruments are suitable for the client" (art.54.10 of the Commission Delegated Regulation 2017/565). The offer of subordinated debt eligible for bail-in by credit institutions (subordinated eligible liabilities "SELs") is conditional, irrespective of the investment service provided, on prior assessment of suitability (see art.44a of Directive 2019/879 amending Directive 2014/59 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms [2019] OJ L150/196, as specified by ESMA, *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics*, ESMA 35-43-349 (21 December 2020), pp.128–130). It is therefore prohibited to place such instruments on the market without verifying their suitability.

[101] It is contrary to good faith and the conduct of business rules to recommend the customer to carry out the unsuitable transaction as if it were their own in order to skirt the prohibition, in particular in proprietary trading. That would be fraud in law. It is a different matter if the customer, on their own initiative, insisted on operating outside of an unsuitability recommendation received from the firm (insistent clients). See ESMA, *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics*, ESMA 35-43-349 (21 December 2020), pp.40–41. The MiFID protocol resolves this type of situation; conversely, Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), considers: "Nor is there any impediment to the contracting of an unsuitable product outside of the advisory service" (p.474), without making any distinction as to who took the initiative.

[102] Void due to breaching a mandatory rule, according to Rabitti, "Prodotti finanziari tra regole di condotta e di organizzazione. I limiti di MiFID II", *Rivista di Diritto Bancario*, Supplemento Fascicolo I (2020), p.157.

[103] Article 214.4 of the TRLMV.

[104] The information about the risks "is not mere ancillary matters of calculation, but instead essential matters, as they are projected onto the assumptions regarding the substance, qualities or conditions of the purpose or subject matter of the agreement" (Supreme Court Judgment 60/2016 of 12 February, Ignacio Sancho Gargallo writing for the court). Cf. G. Hernández Paulsen, *La obligación precontractual de la entidad de crédito de informar al cliente en los servicios bancarios y de inversión* (Marcial Pons, 2014), which aims to provide a *core of especially relevant information*, in *the interests of the customer*, the main factor in the regulation, in an environment of *transparency and efficient competition*.

[105] Financial instruments are agreements, knowledge of which is provided through information. In contrast to tangible goods that can be tested and once acquired, whose characteristics may be known through use, financial instruments cannot be tested prior to acquisition and, once acquired, may be held in one's portfolio for years without gaining knowledge about them. Accordingly: "when contracting in the securities market, the legal system imposes a duty on one of the parties to inform the other party in detail and clearly about the assumptions that constitute the cause of the contract, as is the case for the risks in the contracting of investment products and services" (Supreme Court Judgment, Plenary Session, 769/2014 of 12 January 2015, Rafael Saraza Jimena writing for the court).

mere availability obligation".[106] The provider has the obligation to assist the customer in making a decision.[107] It must verify that the customer understands the instrument and is making an informed decision.[108] Customer information must be comprehensible and appropriate, which is achieved when it is "fair, clear and not misleading".[109] Accordingly, the "information shall be accurate and shall not highlight the potential benefits of an investment service or financial instrument without also stating the relevant risks, in an impartial and visible manner", on the one hand, and "shall not hide, cover up or minimise any important aspect, statement or warning", on the other hand.[110] The information covers all stages of contracting. Information must be provided about the service being provided, stating whether advisory services are being provided in addition to intermediary services, and about the nature of the instrument being contracted and its costs.[111] The information must be comprehensible in accordance with the customer's profile. Technicalities must be avoided. Products must thus be classified, and warnings must be incorporated, so that the customer receives clear and comprehensible information about whether or not to contract the product.[112]

Banks are not obliged to give advice unless they have agreed to do so.[113] The duty to inform should not be confused with the duty to advise, which requires an agreement, although it may be implicit.[114] An agreement is presumed when a product is offered as suitable for the customer.[115] The existence of investment advice "does not depend on the nature of the financial instrument it consists of, but on the way in which the latter is offered to the customer".[116] What is crucial is that the customer perceives the professional's opinion, creating the legitimate trust in being advised. It is not a contract that needs to be in writing,[117] unless "a periodic assessment of the suitability of the recommended financial instruments or services is carried out".[118]

In mere intermediation, the important matter is to inform about the risks of the products being marketed so the investor can make a decision with full knowledge of the facts. However, in a portfolio management or advisory relationship, what is important is for the provider to refrain from dealing with unsuitable products. It is true that the managed or advised customer has special protection, not because they deserve enhanced information, but because of the work of the manager who must assess not only the customer's knowledge and experience, but also their financial situation and investment objectives, with a prohibition on recommending unsuitable products. It is the responsibility of the manager or adviser to assess the suitability of the investment on the basis of the customer's profile. It is the manager or adviser who must analyse the financial risks and make the investment decisions or recommendations. So, in a managed or advised relationship it is not so much the information on the risks of the product that is relevant, but instead the suitability of the product that is being contracted or recommended according to the customer's profile. What is important is for the client to be aware of

[106] Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court, reiterated in Supreme Court Judgment 769/2014 of 12 January 2015.

[107] See D. Busch, V. Colaert and G. Hellinger, "An 'Assist-Your-Customer Obligation' for the Financial Sector?" in Colaert, Busch and Incalza (eds), *European Financial Regulation: Levelling the Cross-Sectoral Playing Field* (2019), pp.343–375, according to whom: "it is very clear that traditional 'caveat emptor' principle no longer holds in the financial sector; 'assist-your-customer' rules apply in all traditional sectors" (p.373). What they must not do is mislead them with product offers unsuited to their profile. According to the Italian Court of Cassation: "l'inadempimento dei doveri informativi da parte della banca intermediaria costituisce di per se un fattore di disorientamento dell'investitore che condiziona in modo scorretto le sue scelte di investimento e ingenera una presunzione di riconducibilità alla banca intermediaria della responsabilità dell'operazione finanziaria" (Cassazione Civile, Sentenza 7905/2020, 17 April).

[108] From "knowing the customer" we move on to informing the customer so that they "know the product", the following moment in which "l'intermediario assumere un ruolo attivo—è connotato da un' 'inversione di direzione'", according to Gaudiosi, "Il valore dell'informazione nella 'contrattazione tra ineguali' in materia di investimenti. Riflessioni sulla (presunzione del) nesso di causalità a margine della sentenza Cass. civ. n.7905/2020", *Rivista De Iustitia* (June 2020), p.15. According to case law: "There is no doubt about the importance of the impartial, clear and non-misleading information that must be provided to customers by firms that provide investment services, so that they understand their nature and are aware of the risks involved" (Supreme Court Judgment 447/2014 of 4 September, Jose Ramón Ferrandiz Gabriel writing for the court). Cf. M.L. Ferrando Villalba, "Preferentes y otros instrumentos financieros de riesgo: deber de información y buena fe (a propósito de la STS de 18 de abril de 2013)", *Revista Aranzadi Doctrinal*, No.10, pp.93–115.

[109] See art.209.2 of the TRLMV.

[110] Article 60 of Royal Decree 217/2008 of 15 February on the legal framework for investment service companies and other firms that provide investment services.

[111] For example, it is difficult to understand a derivative instrument without disclosing the up-front fees generated at the time of contracting. The provider must thus inform them about the "costs and associated charges associated with the manufacturing and managing of the financial instruments" (art.50.2.b of Regulation 2017/565).

[112] In the terms stipulated in Order ECC/2316/2015 of 4 November on information obligations and classification of financial products, and in CNMV Circular 1/2018 of 12 March on warnings regarding financial instruments.

[113] See Judgment 585/2020 of 6 November, Rafael Saraza Jimena writing for the court, according to which the lender must inform the consumer "about the legal and economic burden of the agreement, but this does not imply that the bank has an obligation to advise on the different financing possibilities"; and Supreme Court Judgments 595, 596, 597 and 598/2020 of 12 November reject the "obligation on financial institutions to provide comparative information on the different official indices or their future evolution or to advise customers on the best possible loan".

[114] According to the Judgment of Madrid Provincial High Court, 11th Chamber, 388/2019 of 20 November, Jesús Alemany Eguidazu writing for the court: "some minority doctrine argues that the principle of acting in the best interests of the customer implies an obligation to advise even in the absence of any agreement, i.e. that all agreements subject to this duty belong to the class of fiduciary or quasi-fiduciary (*causa mandati*) relationships, with no room for purely non-advised sales (*causa vendendi*). In any case, the duty to act in the best interests of the customer is an accompanying duty typical of correct advice and, moreover, fills gaps in protection because its scope is not constrained by the MiFID concept of advice".

[115] See Supreme Court Judgment 535/2015 of 15 October 2015, Rafael Saraza Jimena writing for the court.

[116] *Genil v Bankinter* (C-604/2011) C:2013:344, according to which the recommendation to subscribe to a swap "presented as suitable for that person" will be considered advice. Case law applied by Supreme Court Judgment 27/2016 of 4 February, Rafael Saraza Jimena writing for the court, and other previous ones: Supreme Court Judgments 387/2014 of 8 July, and 384/2014 and 385/2014 of 7 July. The initiative is relevant. Offering a complex, high-risk product, unknown to the customer, presented as adequate, presupposes the existence of advice. This part of the MiFID protocol is criticised by Agüero *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.382–389, for identifying advice as "a kind of obligation" for institutions (p.385).

[117] It is settled doctrine of the Supreme Court to consider that "for advice to exist, the existence of an ad hoc remunerated contract is not an essential requirement" (Supreme Court Judgment 666/2016 of 14 November, Pedro José Vela Torres writing for the court, citing the previous Supreme Court Judgments 102/2016 of 25 February and 411/2016 of 17 June, and previously Supreme Court Judgment 535/2015 of 15 October). It is sufficient for "there to be a relationship between the parties within the framework of which the institution offers the product to customers and recommends its acquisition" (Supreme Court Judgment 666/2016 of 14 November).

[118] Article 58 of Regulation 2017/565.

the nature of the service and its scope, to be informed of the suitability of the investments as they are in accordance with their profile.[119]

Standard contract terms prepared by the investment service provider in which the customer states that the bank has complied with the conduct of business rules are irrelevant.[120] The firm undertakes the legal obligation to produce the customer's profile, in order to offer them products that are appropriate to their profile, and this legal requirement is not fulfilled with a generic mention prepared by the bank.[121]

Within the scope of the framework contract, the provider has an obligation to accept and execute the orders received from the client or to carry out the agreed management or advisory actions. These actions are themselves contracts to which their own legal framework applies.[122] These may be purchase orders, advice or management mandates. The provider's contractual liability arises from both a breach of the framework contract and a breach of the contract through which the investment service is performed. For example, the provider may be liable for failing to assess the customer in accordance with the provisions of the framework contract, such as being late in executing the order in the market or failing to comply with the best execution obligation.[123]

Investment services are a special category of services with their own regulations,[124] but they do not constitute a contract type differentiated from contracts subject to the Spanish civil law. The provision of each service gives rise to legal transactions that are characterised by the type of civil law contract that best matches their economic function. The activity of receiving orders to execute them in the market is an intermediary activity that is specific to the commercial mandate to which the Spanish Commercial Code apply.[125] Portfolio management is a commercial mandate with power of attorney.[126] Investment advice is an information service also covered by commercial mandate. Therefore, a commercial mandate is the best match for the economic function and the interest sought by the contracting parties.

It should be noted that portfolio management and advice are particularly hazardous contracts in which customers put themselves in the hands of the manager or are swayed by the adviser's opinion. In view of the customer's increased vulnerability when using these services, the obligation to know the customer is reinforced through a more extensive suitability assessment than that applicable to all other investment services. It is a differentiated framework that aggravates the liability of the manager and the adviser in relation to that of a mere intermediary. For this reason, one essential issue in court claims is to prove the existence of management or advice, because if such a contractual relationship exists, the standard of liability is higher.[127] This does not mean that the obligation to inform the customer is intensified for the providers of these services. Management and advice modulate the obligation to inform; they qualify it but do not intensify it. These are fiduciary services in which the customer is guided by the trust placed in the professional.[128] It is the service provider who, after analysing the customer's profile, decides or recommends what is suitable for the customer.

Contractual diligence

The bank-customer relationship of trust defines the scope of the investment service provider's responsibility, which is that of a professional who is an expert in the field, acting in a complex market, in which inter-bank relationships arise that are outside of the customer's knowledge.[129] The trend is towards strict liability for the financial institutions involved in financial transactions in

[119] ESMA clarifies that "when portfolio management is to be provided, as investment decisions are to be made by the firm on behalf of the client, the level of knowledge and experience needed by the client with regard to all the financial instruments that can potentially make up the portfolio may be less detailed than the level that the client should have when an investment advice service is to be provided" (para.38, *Guidelines on certain aspects of the MiFID II suitability requirements*, 28 May 2018). This places management on a different level from advice in relation to assessing the product's suitability to the customer's profile. In this sense, see Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.353–354 and 455.

[120] According to Supreme Court Judgment 398/2015 of 10 July, Ignacio Sancho Gargallo writing for the court, "We must understand that it is irrelevant that the following statement appears in the purchase order: 'the customer acknowledges that he/she has been advised on the risk of the product and on whether the investment in this product is suitable for his/her investment profile'. This is a generic mention, which does not relieve the bank of its duty to prove that it has complied with these requirements."

[121] According to Supreme Court Judgment 476/2020 of 21 September, Jose Luis Seoane Spiegelberg writing for the court: "prepared statements in which bank customers acknowledge having received the corresponding information on the characteristics and risks of the financial product acquired are not acceptable to justify compliance with the pre-contractual duty to inform (Supreme Court Judgments 439/2019 of 17 July, 607/2019 of 14 November and 443/2020 of 20 July, among many others)".

[122] As Supreme Court Judgment 654/2015 of 19 November, Pedro José Vela Torres writing for the court, states, the framework contract must be developed "in a series of particular operations", in such a way that "the existence of the contract was not sufficient for the financial institution to be able to purchase securities on behalf of the customer; instead, the customer's subsequent consent was required for each specific transaction".

[123] See art.221 of the TRLMV.

[124] According to *Diccionario del Español Jurídico*, a Spanish legal dictionary, a service contract means "a contract for the performance of services in the performance of an activity". In Spanish law there is no category of service contracts; the model is constructed on the basis of their regulation in the Draft of a Common Frame of Reference (DCFR). See, inter alia, the thesis of G.F. Severin Fuster, *Los contratos de servicio: su construcción como categoría contractual*, y el derecho del cliente al cumplimiento específico, N. Fenoy Picón (Dir. Tes.), Universidad Autónoma de Madrid (2014), para.IV.C.-1:102 of the DCFR exempts financial services from the service contract framework, as they have their own regulations. Contracts for financial services "are of a specialised nature and are subject to, or likely to be subject to, initiatives at EU level", says the commentary on the paragraph.

[125] Supreme Court Judgment 243/2013 of 18 April, Jose Ramón Ferrándiz Gabriel writing for the court.

[126] On the nature of portfolio management as a commercial mandate contract and the relevance of applying the provisions of art.259 of the Commercial Code, see C. Rojo Álvarez-Manzaneda, *El contrato de gestión de carteras de inversión* (Madrid, Editorial Thomson Reuters Aranzadi, 2020), pp.23–24 and 63.

[127] Sometimes they are mixed together in "advisory management", a term coined by Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court, and also accepted by Supreme Court Judgment 460/2014 of 18 April, the same judge writing for the court.

[128] "Fiduciary" means a relationship of trust in which the customers place themselves in the hands of the professional, not in the sense of a "trust" in English-speaking countries. See J. Garrigues, *Negocios fiduciarios en el derecho mercantil* (Madrid, Civitas, 2016). "Nevertheless, it must be recognized that the institution of the trust plays a very important role in business affairs, especially in banking", J. Garrigues, "Law of Trusts" (1953) 2(1) *American Journal of Comparative Law* 35.

[129] See Supreme Court Judgment, Plenary Session, 769/2014 of 12 January 2015, Rafael Saraza Jimena writing for the court.

relation to service users.[130] It is that of a professional who is held to "a very high standard in the duty to inform his/her customers".[131] The diligence required of a banker is that of a skilled trader exercising custodial and mandate functions as a source of profit, and special care is required of him/her in these functions.[132] It is *in concreto* diligence, looking after the customer's interests "as if they were his/her own", i.e. *quam in suis*,[133] which does not correspond to the *in abstracto* standard of the "orderly paterfamilias" stipulated in art.1719 of the Spanish Civil Code for an attorney.[134] Minor negligence is the average diligence of the *bonus argentarius*. This should be understood as the ideal figure of the investment service provider who complies with the internal organisational rules of his or her business and the conduct of business rules in relations with customers. He or she engages in a regulated activity that attracts customer trust, which has relevance for the smooth functioning of the market and is therefore subject to a high standard of conduct.

In relation to diligence in the provision of financial services, we have moved from *caveat emptor* to *caveat vendor*.[135] However, this distinction does not envisage that the actions of financial service providers must be "in the best interest of the customer", which is a *causa mandati*. In addition, where there is portfolio management or advice, it is a fiduciary relationship.

The linking of the investment service with the ancillary activity of financing the transaction multiplies the risk and requires extreme caution. The leveraged securities purchase transactions to which we are referring require a dual assessment of the customer: the suitability of the investment and the customer's creditworthiness as a borrower.[136]

Remedies for breach

The natural consequence of financial service providers breaching professional obligations is protection in damages through compensation,[137] without ruling out absolute nullity due to breach of the mandatory rules governing conduct in the financial market, voidability due to defect of consent or termination of the contract.

However, the Spanish Supreme Court has been restrictive in accepting remedies for banking *mala praxis*.[138] It focuses on the legal duty to provide information to the customer on the part of investment service firms, breach of which:

> "could give rise, where appropriate, to the voidability of the contract due to a defect of consent, or to action for compensation for breach of contract, in order to seek compensation for the loss caused to the customer by the contracting of the product as a result

[130] See Busch and Van Dam (eds), *A Bank's Duty of Care* (2017): "The breach of a contractual duty to investigate, disclose or warn usually gives rise to damage" (p.379).
[131] According to Supreme Court Judgment, Plenary Session, 769/2014 of 12 January 2015, Rafael Saraza Jimena writing for the court, the "commission agency must be liable for the damages caused to investors by bad investment, according to the standard of minor negligence specifically referred to in the Supreme Court Judgment of 24 May 1943 in relation to the diligence required of an 'expert trader' (Supreme Court Judgment of 15 July 1988), which follow the guideline of caring for other people's business as if it were their own".
[132] As stipulated in arts 255 and 307 of the Commercial Code. See Supreme Court Judgments of 14 December 1984, 12 June 1985, 20 March 1988 and 15 July 1988. This contractual liability of the bank providing investment services derives from the joint interpretation of the precepts in the Civil Code concerning the effects of obligations (see arts 1,101, 1,103, 1,104 and 1,105 *a sensu contrario*, in relation to art.1,258 of the CC, according to the criterion of the Supreme Court Judgment of 15 November 1994), and it is enforceable under arts 259 of the Commercial Code and 1,258 of the Civil Code.
[133] See art.208.1 of the TRLMV. They are conduct of business rules that specify the professional diligence required of intermediaries "determining the notion of 'specific minor negligence" (A.J. Tapia Hermida, "Las normas de actuación en el mercado de valores" in A. Alonso Ureba and J. Martínez Simancas (Dirs), *Instituciones del mercado financiero* (Madrid, La Ley) (p.2857).
[134] Supreme Court Judgment of 20 January 2003.
[135] According to the judgment of Madrid Provincial High Court, 11th Chamber, 388/2019 of 20 November, Jesús Alemany Eguidazu writing for the court: "The old maxim of buyer beware (*caveat emptor*), gives the buyer their own duty to act carefully in the purchase and bear the risks of it. Whoever does not keep their eyes open, will have to open their purse. However, in situations of a structural imbalance of knowledge (information asymmetry), such as that existing in the securities markets, since the Securities Market Act we have moved to a framework of caveat vendor, which imposes or encourages the burden of providing information on the seller". According to Enriques and Gargantini: "there can be no caveat emptor between banks and their clients", L. Enriques and M. Gargantini, "The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case" (2017) 3 Italian L.J. 507, according to whom "all the agreements subject to the duty to act in the client's interest fall into the scope of fiduciary or quasi-fiduciary relationships (*causa mandati*), while no space is left at all for pure sales (*causa vendendi*) unaccompanied by advice". This trend is criticised by A. Ruiz Ojeda, "Caveat vendor, o el volteo regulatorio de la asignación de riesgos en las transacciones financieras por la normativa MiFID" (2017) 2 InDret 23; according to whom: "It is one thing to protect the investor and quite another to replace their behaviour as an economic agent through regulation".
[136] Unsuitable leveraged transactions do not deserve the support of the legal system. For this reason, we cannot share the doctrine which maintains that: "When investors request a loan to make a specific investment, the nature and risks of which they were aware, it is not reprehensible that the investment company did not recommend diversification in the investments, since it is clear that the investors were interested in making an investment that they considered particularly interesting, which compensated them for the added risk involved in requesting external financing to make a 'leveraged' investment" (Supreme Court Judgment 558/2019 of October, José Luis Seoane Spokgelberg writing for the court). This is a case of "concessione di finanziamenti agli investitori per consentire loro di effettuare un'operazione relativa a strumenti finanziari, nella quella interviene il soggetto che concede il finanziamento", a financial product that may give rise to a causal dysfunction not deserving of the support of the legal system. See A. Tucci, "Il contratto inadeguato e il contratto immeritevole" (2017) 3 *Contratto e Impresa* 921–955.
[137] According to the Judgment of Madrid Provincial High Court, 11th Chamber, 388/2019 of 20 November, Jesús Alemany Eguidazu writing for the court: "the natural action of the investor against the investment service firm is action for compensation". In Portuguese Law, art.304-A.1 of the Securities Market Code contains a general principle of compensation for damages: "Os intermediários financeiros são obrigados a indemnizar os danos causados a qualquer pessoa em consequência da violação dos deveres respeitantes à organização e ao exercício da sua atividade, que lhes sejam impostos por lei ou por regulamento emanado de autoridade pública", con presunción de culpa "quando o dano seja causado no âmbito de relações contratuais ou pré-contratuais e, em qualquer caso, quando seja originado pela violação de deveres de informação" (304-A.2). See N. Reis, "Responsabilidade civil aquiliana do intermediário financeiro—mito ou realidade?" (2017) 4 *Revista de Direito das Sociedades* 781–799, who considers that this precept "consagra um regime hibrido com presunção de faute para as situacoes obrigacionais e presunção de culpa em sentido estrito para as situacoes aquilianas de violação de deveres de informação" (799).
[138] For an analysis of the evolution of the case law, see Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión*, Aranzadi (2020), pp.177–470.

> of incorrect advice. However, it cannot give rise to termination of the contract due to non-performance."[139]

Nor does it allow absolute nullity on the grounds of breach of mandatory rules.[140]

Absolute nullity

The absolute nullity of the contract may arise from the absence of its essential elements (consent, subject matter and cause), or from breach of mandatory rules.[141] The most recent case law rejects the nullity due to breach of mandatory rules stipulated in art.6.3 of the Civil Code.[142] The reasoning for this doctrine is that the rules governing the securities market "do not envisage the nullity of investment contracts when, in concluding them, the investment firm has breached its duty to provide information, but instead stipulate administrative penalties".[143] Notwithstanding that "breach of these legal duties to provide information may have an effect on the validity of the contract, insofar as lack of information may result in a defect of consent".[144]

However, we cannot rule out that there may be cases of absolute nullity in financial contracts.[145] Absolute nullity is based on the protection of the public interest in the proper functioning of the market. This should not be confused with the customer's interest in making financial decisions with full knowledge of the facts.[146] When there are breaches of mandatory rules that are essential for the proper functioning of the markets and for investors to be able to access the securities market with a certain degree of legal certainty, absolute nullity of the contract, pursuant to art.6.3 of the Civil Code, cannot be ruled out.[147] Securities market regulations are aimed at preserving the channelling of savings into investment through the market.[148] Through the CNMV, the regulatory rules ensure "the transparency of the securities markets, the correct formation of prices in the markets and investor protection"[149] and "determine whether the investment firm has complied with all of its obligations, including those related to its customers or potential customers and the integrity of the market".[150] The conduct of business rules are aimed at ensuring that investment firms act "with honesty, impartiality and professionalism, in their customers' best interest"[151] to "protect the interests of investors and the smooth operation of the markets".[152] In accordance with these goals, the conduct of business rules in the securities market are incompatible with the contracting of products that are unsuited to the customers' profile.[153] For this reason, apart from the possibility of a defect of consent, a serious breach of the conduct of business rules in the securities market results in the absolute nullity of the contract.

[139] Supreme Court Judgment, Plenary Session, 491/2017 of 13 September, Pedro José Vela Torres writing for the court, citing Supreme Court Judgments 244/2013 of 18 April; 458/2014 of 8 September; 489/2015 of 16 September; 102/2016 of 25 February; 603/2016 of 6 October; 605/2016 of 6 October; 625/2016 of 24 October; 677/2016 of 16 November; 734/2016 of 20 December; and 62/2017 of 2 February. It is doctrine that adds both voiding due to defect of consent and compensation for breach of contract to the lack of information.

[140] See Supreme Court Judgment 558/2019 of 23 October, José Luis Seoane Spiegelberg writing for the court, citing the previous judgments 716/2014 of 15 December and 323/2015 of 30 June.

[141] According to Supreme Court Judgment 654/2015 of 19 November, Pedro José Vela Torres writing for the court, in a case of absolute lack of consent in the absence of a purchase order, radical nullity is "structural, radical and automatic". It is also an action that does not lapse since "in the case of absolute nullity, the action is not time-barred".

[142] "It is settled case law that breach of the regulations stipulating the duties of information by investment firms in the marketing of complex financial products to non-professional investors, before and after the transposition of the MiFID Directive, does not render the contracts for the purchase of these products null and void, but it may have caused a defect of consent, which could also justify their nullity" (Supreme Court Judgment 576/2020 of 4 November, Ignacio Sancho Gargallo writing for the court, citing the previous Judgment 14/2016 of 1 February). "The penalty of nullity by operation of law stipulated in article 6.3 of the Civil Code is not applicable to these cases" (Supreme Court Judgment 558/2019 of 23 October, José Luis Seoane Spiegelberg writing for the court, citing the previous Judgments 716/2014 of 15 December and 323/2015 of 30 June, to which Judgment 840/2013 of 20 January 2014 must be added). This doctrine is equally applicable to "breach of the rules that oblige the investment firm providing advice to inform itself about the customer's profile" (Supreme Court Judgment 558/2019 of 23 October).

[143] Supreme Court Judgment 558/2019 of 23 October, José Luis Seoane Spiegelberg writing for the court.

[144] Supreme Court Judgment 558/2019 of 23 October, which consolidates the doctrine of Supreme Court Judgment, Plenary Session, 840/2013 of 20 January 2014.

[145] Supreme Court Judgments of 834/2009 of 22 December and 375/2010 of 17 June. The first of these states that "this Court, in application of article 6.3 CC, which it is claimed has been infringed, has declared that when, having analysed the nature and purpose of the infringed legal rule and the nature, motives, circumstances and foreseeable effects of the actions performed, the administrative rule is incompatible with the contents and effects of the legal transaction, the relevant consequences regarding its ineffectiveness and invalidity must be applied (Supreme Court Judgment of 25 September 2006) and it is no obstacle to nullity that the administrative prohibition is not absolute (Supreme Court Judgment of 31 October 2007)".

[146] "We are, in short, dealing with a regulation of economic public policy that clearly protects the weaker party in the contracting, in a similar way to what happens with the protective regulation of consumers and users" (Judgement of Madrid Supreme Court 13/2015 of 28 January 2015).

[147] Cf. E. Rodríguez Achútegui, "La alegación de nulidad en los contratos bancarios" (2014) 3 *Revista Aranzadi Doctrinal* 21–28, who considers that there is a sufficient case-law basis to conclude that the breaching of mandatory rules regulating the banking sector may lead, in accordance with art.6.3 of the Civil Code, to radical nullity, with the advantage for the plaintiff that the void contract cannot be confirmed by subsequent actions and that their action is not time-barred.

[148] As the Constitutional Court states: "The concept of the Securities Market cannot be understood unless it is integrated into the broader concept of the 'financial system' of which it is part. If by financial system we mean the set of institutions, firms and operations through which savings are channelled towards investment, providing (supply) money or other means of payment to finance the activities of economic operators (demand), the Securities Market is but one element or integral part of the financial system" (Constitutional Court Judgment 133/1997 of 16 June, Legal Ground 3); "The importance that the regulations governing the securities market give to information about the risks associated with investment, by requiring complete and comprehensible information on this issue, shows its direct relationship with the socioeconomic function of the legal transactions that fall within the scope of regulation of the securities market" (Supreme Court Judgment, Plenary Session, 769/2014 of 12 January 2015, Rafael Saraza Jimena writing for the court).

[149] Article 17.2 of the TRLMV.

[150] Article 194.1 of the TRLMV.

[151] Article 208 of the TRLMV.

[152] Article 75.1 of the TRLMV.

[153] *As Genil v Bankinter* (C-604/2011) C:2013:344 points out, it is necessary to analyse whether the national legal system regulates the contractual consequences of breaching such obligations. In other words, it is necessary to review whether the legal system establishes a contractual, non-administrative consequence other than nullity when mandatory rules are breached. In this analysis, "la normativa di settore viene qualificata come parametro per valutare la meritevolezza degli interessi", Della Negra, "I rimedi per la violazione di regole di condotta MiFID II: una riflessione di diritto UE", *Banca borsa e titoli di credito*, No.5, Pt I (2020), p.722.

Voidability

In Spain, there is settled case law on the relevance of an investment service provider breaching the information obligations for the voidability of the contract due to error.[154] Breaching the duty to provide information does not necessarily mean there is a defect of consent, but it may have an impact on its assessment.[155] According to this doctrine, the substantial error must concern the subject matter of the contract and affect the specific risks associated with the contracting of the product (*error in substantia*).[156] Failure to provide information about the issuer of the product or the absence of a guarantee fund constitutes an essential error regarding the subject matter and conditions of the contract.[157] The information, which must necessarily include guidelines and warnings about the risks associated with financial instruments, is essential for retail customers to be able to validly give their consent. It being understood that what vitiates consent through error is the lack of knowledge of the product and its associated risks, but not, by itself, breach of the duty to provide information.[158] What is relevant is the intermediary's compliance with the duty to disclose the risk involved in contracting the product to the customer in a clear and comprehensible manner.[159] The randomness of the investment is at another level, i.e. the sharing of risks in the investment business.[160]

The financial institution's duty to inform has a direct bearing on the concurrence of the requirement of excusability of the error, since if the retail customer needed that information and the financial institution was obliged to provide it to them in an understandable and adequate manner, then the erroneous knowledge of the specific risks associated with the complex financial product contracted in which the error consists is excusable for the customer.[161] The existence of legal duties of information breached by the investment service provider justifies that the error is excusable.[162] What this case law seeks to make clear is that the relationship between a retail customer qualified in terms of their experience or knowledge by the bank providing investment services is not one of information asymmetry and breach of the information obligations cannot be used to void the contract. Investors qualified by their knowledge or experience do not need to be informed because they know or should have known what they were acquiring. In any case, the error would not be excusable in view of their qualification. This case law, which creates the figure of an "expert retail investor", makes the effects of lack of information conditional upon the customer's profile. If the investor is experienced, lack of information about the product's issuer may not give rise to nullity due to error.[163]

Termination of the contract

Breach of the investment service provider's essential obligations may give rise to the right to request termination of the contract in accordance with that stipulated in art.1224 of the Spanish Civil Code. However, the case law that emerged with the financial crisis rules out contractual termination in the provision of investment services due to lack of pre-contractual information, since

[154] Cf. Supreme Court Judgment 384/2014 of 7 July, Francisco Marín Castán writing for the court, doctrine followed by, among others, Supreme Court Judgments 385/2014, 387/2014 and 376/2015. In Spain, nullity has been chosen as the main means of obtaining redress. There are practical reasons for choosing this path, in which the consideration paid for the contract declared null and void is returned, as opposed to difficult calculations of damages. See V. Roppo and G. Afferni, "Dai contratti finanziari al contratto in genere: punti fermi della Cassazione su nullità virtuale e responsabilità precontrattual", *Danno e Responsabilità*, No.1 (2006), p.31.

[155] According to the Supreme Court: "breach of the duties to provide information does not necessarily entail assessment of a defect of consent, but there is no doubt that the legal stipulation of these duties, which is based on the information asymmetry that usually occurs in the contracting of these financial products with retail customers, may have an impact on the assessment of the error" (Supreme Court Judgment 376/2015 of 7 July, Ignacio Sancho Gargallo). For severe criticism of this doctrine, which "entails an evident moral hazard" and discourages the adoption of rational investment decisions due to "automatic protection disconnected from specific causes of material justice", see Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.324–326, following an exhaustive analysis of case law (pp.279–285).

[156] As stated in Supreme Court Judgment, Plenary Session, 769/2014 of 12 January 2015, Rafael Saraza Jimena writing for the court, there is an error of consent "due to lack of adequate knowledge of the product … and the specific risks associated with it, which leads the customer … to a mistaken mental representation of the essential characteristics of the subject matter of the contract, due to the investment company … breaching the duty to provide information imposed by the securities market regulations when contracting with customers when there is asymmetry of information".

[157] See Supreme Court Judgment 376/2015 of 7 July, Ignacio Sancho Gargallo.

[158] Supreme Court Judgment, Plenary Session, 840/2013 of 20 January 2014, Ignacio Sancho Gargallo writing for the court, applied by Judgment 205/2015, which distinguishes between the randomness of any investment and the real representation that the customer has at the time of contracting the product's risk. It should be noted that according to that stipulated in art.209 of the TRLMV, there is a "general duty to inform" all customers, including professionals, who, according to art.205.1, are presumed to have "the necessary experience, knowledge and qualifications to make their own investment decisions and correctly assess their risks". It is contrary to the MiFID system to consider that the obligation to provide information about risks is waived for professionals.

[159] It is not enough to be willing to invest, i.e. to speculate, to enter the "realm of chance", to rule out error (the opposite view is taken by Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.304–309). "The differences between these products and ordinary bank deposits in terms of return, risk and liquidity must be pointed out to the investor", including "appropriate guidance and warnings on the associated risks" (art.210 of the TRLMV), in the regulated terms (arts 44–51 of Commission Delegated Regulation 2017/565) and specified in the authorities' guidance (ESMA, *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics*, ESMA 35-43-349, 21 December 2020).

[160] And of course: "a defect of consent is totally unrelated to an absence of information subsequent to entering into the contract" (Supreme Court Judgment 41/2014 of 17 February, Jose Ramón Ferrandiz Gabriel writing for the court).

[161] In order for the error to be declared, it is necessary for it to be excusable: "What is not possible is to consider that the defect of consent is an inevitable consequence of the inexistence or deficiency of the information, since even those informed may have suffered from the error—whether it is excusable is another matter—and, on the contrary, it may not have been suffered by those who were not informed" (Supreme Court Judgment 41/2014 of 17 February).

[162] Supreme Court Judgment 376/2015 of 7 July, Ignacio Sancho Gargallo. However, the "error which, while excusable, vitiates consent is that which relates to the product's nature and risks. What does not vitiate consent and is therefore not suitable to justify the voiding of the contract, is the conduct of a person who, knowing the highly random component of the contract and the nature of its risks, considers that he/she can profit from these characteristics of the contract, errs in his/her calculation and, contrary to what he/she foresaw, makes a loss, not a profit".

[163] In this regard, Supreme Court Judgment 323/2015 of 30 June, Rafael Saraza Jimena writing for the court, considers that the importance that should be given to the customer's profile and their classification as a retail customer "are not matters related to the assessment of the evidence, but instead to legal assessments of the proven facts". According to the same ruling, being a retail customer does not mean that "the client is necessarily a 'financial ignoramus', as it may be that clients who do not meet the rigorous requirements that the MiFID regulations demand to be considered a professional client may, due to their profession or experience, have in-depth knowledge of these complex financial instruments that allows them to know the nature of the product they are contracting and the risks associated with it, even in the case of not receiving the information that the MiFID regulations oblige these companies to provide". This is highly debatable doctrine since experienced investors cannot see the future. Knowing

such a lack "is not linked to the breach of an obligation within the framework of a contractual relationship for the provision of an investment service, but is instead connected with the pre-contractual stage of the formation of the will prior to the conclusion of the contract".[164] What is true is that information obligations in the provision of investment services are contractual, either because they derive from the framework contract or from the corresponding intermediary, advice or portfolio management transaction. In a market transaction, in which orders are received to be executed in the market, the obligation to inform of the risks of the product ordered is contractual. It is pre-contractual in relation to the execution of the market purchase, but contractual in relation to the market mandate. In turn, in advisory management, lack of information would be a breach of a contractual obligation. After the management or advice has been contracted, the management actions or recommendations are conditional upon the prior fulfilment of information obligations.

Protection in damages

Another avenue to obtain redress for breaches of conduct of business rules in the provision of investment services is compensation action. Through civil liability, the affected customer may obtain redress from the breaching company without voiding the contract. This is the main remedy in most European legal systems.[165] Spanish case law allows it when information obligations are breached in portfolio management[166] or in advisory relationships,[167] although the most recent case law bases awards not only on breaches of the duty to inform in this type of relationship, but also on the failure to adapt the recommended product to the investor profile "despite the fact that it must necessarily have analysed it".[168] It is contractual liability.[169]

Under private contract law, in order for the duty to pay compensation to arise, there must be breaching conduct, damage caused to the customer, a cause-effect relationship between the breach and the damage, and finally, the damage must be attributable to the breaching firm.[170] Breaching conduct is required in the first place. This is the case when the obligation to refrain from offering unsuitable products or the obligation to inform or warn of risks is breached.

The burden of proof of performance of the information obligations lies with the investment service provider as a financial market professional.[171] The person under the

who the issuer is or what the product's risks are is essential information for both the inexperienced and the experienced investor. According to the Italian Court of Cassation, "anche l'investitore, speculativamente orientato e disponibile ad assumersi rischi, deve poter valutare la sua scelta speculativa e rischiosa nell'ambito di tutte le opzioni dello stesso genere offerte dal mercato e alla luce dei fattori di rischio che gli sono stati segnalati" (Cassazione Civile, Sentenza 7905/2020 of 17 April).

[164] According to Supreme Court Judgment, Plenary Session, 491/2017 of 13 September, Pedro José Vela Torres writing for the court: "Breach of the legal regulations concerning the duty to inform the customer about the economic risk of acquiring preference shares may cause an error in the granting of consent, or damage derived from such a breach, but it does not determine a breach with terminating effect". This doctrine is reiterated in, among others, Supreme Court Judgment 172/2018 of 23 March. However, voidability due to a defect of consent may be based on pre-contractual information when it is considered that "the lack of information may produce an alteration in the process of formation of will that entitles one of the parties to void the contract" (Supreme Court Judgment, Plenary Session, 491/2017 of 13 September).

[165] Busch and Van Dam (eds), *A Bank's Duty of Care* (2017). In Germany, as Binder, points out, negligent actions by intermediaries contrary to the conduct of business rules "will be held liable in damages to their clients for breach of contractual duty", J.H. Binder in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), p.81. In France, according to Bonneau, the grounds for breach of information obligations are "to repair the damage borne by clients", T. Bonneau in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), p.121. In Italy, although nullity was the initial choice, based on the distinction between rules of validity and conduct of business rules, case law has leaned towards compensation for damages, since the Supreme Court Judgment of 29 September 2005, F. Rossi and M. Garavelli in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), pp.135–165, although the most recent case law on swaps opts for nullity (Judgment of the Court of Cassation No.8770 of 12 May 2020, inter alia). In the Netherlands, according to Busch, Van Dam and Van der Wield, "In relation to a breach of a bank's duty of care the most important remedy in practice is a claim for damages", D. Busch and B. Van der Wield in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), p.212. In Ireland, as Clarke notes: "A breach of fiduciary duty may give rise to an action for damages", B. Clarke in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), p.299. Only in Austria does nullity apply in some cases, J. Ring and M. Spitzer in Busch and Van Dam (eds), *A Bank's Duty of Care* (2017), p.104.

[166] Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court, orders a portfolio management bank to pay compensation for breaching its information obligations "as such information does not contain the necessary data for the plaintiffs to know that the products did not suit the very low risk profile they had chosen". However, it is not portfolio customers that must assess their own profile in order to reject unsuitable investments. It is the managing bank that undertakes the duty to know the customer and assess their profile in order to fill the portfolio with suitable products and refrain from including unsuitable ones. Regarding lack of diligence on the part of the manager due to an investment contrary to the customer's conservative profile, the Supreme Court Judgment, Plenary Session, 240/2013 of 17 April, Francisco Marín Castán writing for the court, orders the managing bank to pay compensation "for having held an investment contrary to their conservative profile, as set out in the contract".

[167] Supreme Court Judgment 476/2020 of 21 September, Jose Luis Seoane Spiegelberg writing for the court, citing Supreme Court Judgments 677/2016 of 16 November; 62/2019 of 31 January; 249/2019 of 6 May; 646/2019 of 28 November and 139/2020 of 2 March, states: "within the framework of an advisory relationship provided by a financial service firm and in view of the customer's investment profile and interests, civil liability may arise under article 1101 CC for breach or negligent performance of the obligations arising from that financial advisory relationship, which causes the investor harm consisting of the total or partial loss of their investment". See also Supreme Court Judgment 526/2020 of 14 October, Jose Luis Seoane Spiegelberg writing for the court, citing Supreme Court Judgments 677/2016 of 16 November; 62/2019 of 31 January; 303/2019 of 28 May; and 165/2020 of 11 March.

[168] Supreme Court Judgment 526/2020 of 14 October, Jose Luis Seoane Spiegelberg writing for the court.

[169] Regarding the tort liability of the "registered advisor" of issuers with securities listed on multilateral trading facilities, as authorised by art.320.2(i)(e) of the TRLMV and envisaged in art.19 of the General Regulations of the MAB, see A. Fernández de Araoz Gómez-Acebo, "Responsabilidad civil del asesor registrado por los daños y perjuicios sufridos por los inversores en salidas al MAB: notas sobre la jurisprudencia recaída en torno al caso 'Gowex'", *Revista de Derecho Bancario y Bursátil*, No.160 (2020), commenting on the Judgment of Madrid Provincial High Court, 11th Chamber, of 13 February 2019, Jesús Miguel Alemany Eguidazu writing for the court.

[170] "In order for an action for damages arising from a breach of contract to be upheld, there must be a breach of an obligation arising from a contract (even if that obligation is a consequence of the legal regulation of the contract) and that breach must have caused a certain damage that is legally attributable to the breach" (Supreme Court Judgment 558/2019 of 23 October, José Luis Seoane Spiegelberg writing for the court).

[171] Although there is no specific rule in Spanish law, case law imposes on the intermediary the burden of proof of compliance with the obligations, due to its better position in relation to the sources of proof (Supreme Court Judgment, Plenary Session, 840/2013 of 20 January, Ignacio Sancho Gargallo writing for the court), or because it is the party obliged to perform the duties to inform (Supreme Court Judgments 726/2015 of 22 December and 397/2017 of 27 June, inter alia). In Italy, art.23.6 of the Testo unico delle disposizioni in materia di intermediazione finanziaria states that: "Nei giudizi di risarcimento dei danni cagionati al cliente nello svolgimento dei servizi di investimento e di quelli accessori, spetta ai soggetti abilitati l'onere della prova di aver agito con la specifica diligenza richiesta".

obligation must do so and has the ease of proof.[172] It is then up to the provider to prove that it has performed its information obligations.[173] To do otherwise would be force the customer to prove a negative—that the firm did not inform them—which is *probatio diabolica*.[174] The customer must allege in the claim that the intermediary breached its obligation. The intermediary is discharged by proving that it performed the obligation whose non-fulfilment was alleged by the customer.

The second element necessary for the compensation obligation to arise is the existence of damage, which takes the form of loss of all or part of the invested capital. It is up to the plaintiff customer to prove the damage. This is an issue fraught with difficulties. Case law simplifies it by considering that the "harm is loss of the investment".[175] The damage is assessed on the basis of negative contractual interest, placing the customer in the same position they were in before acquiring the product purchased through the investment service. Compensation is paid for the difference between the amount invested and the market value of the product at the time the claim was accepted.[176] The resulting amount accrues legal interest from the date of the court appeal. However, it is *restitutio in integrum*, such that "the affected party's assets are left, as a result of the compensation and at the expense of the liable party, in a situation equal or at least equivalent to that prior to the damage being suffered".[177]

Another essential element of liability for damages is causation. According to the Spanish Supreme Court, breach of the conduct of business rules, in particular the failure to assess the customer with the corresponding test, is the basis for action for damages "provided such breach has resulted in the damage for which compensation is claimed".[178] However, when analysing the causal link, it considers that omission of information causes investors to unwittingly undertake a risk and that is why the damage resulting from the updating of that risk "is a natural consequence of the breach".[179] When there is a breach and damage, causality between the breach and the damage is presumed:

> "Such that breach of the duties inherent in the suitability test requirement can be considered the legal cause of the damage suffered, because if there is no evidence that the plaintiff was a high-risk investor, or that, not being so, they had insisted on the purchasing of this bond, the bank should have refrained from recommending its purchase. Therefore, by doing so, it caused the plaintiff to undertake the risk that led to loss of the investment."[180]

Then, once breach of the conduct of business rules has been established, causation of the damage is presumed *iuris tantum*. There is a shifting of the burden of proof of the cause-effect relationship; a case law presumption of causation between the breach of the conduct of business rules and the causation of the damage.[181] A presumption that the intermediary must rebut in order to be discharged.

Finally, the fourth element necessary for the obligation to compensate to arise is the existence of a title attributing the damage to the debtor. In a commercial mandate such as this, the agent is liable for the damage caused by the lack of diligence.[182] According to the Spanish Supreme Court: "This serious breach of the duties required of a professional who operates in the securities market in their relationship with potential or current customers constitutes the legal title of attribution of liability for the damages suffered by such customers as a result of the loss".[183] However, in order for the breach to constitute a legal attribution, a phenomenological cause-effect relationship is required.[184] However, compensation for non-material damages would require "not only the establishment of a

[172] Article 217.7 of the Civil Procedure Act, according to which "the Court must bear in mind the availability and ease of proof of each of the parties in litigation", a rule that undoubtedly shifts the burden of proof to the defendant" (Supreme Court Judgment, Plenary Session 840/2013 of 20 January, Ignacio Sancho Gargallo writing for the court).

[173] In Italian law, art.23.6 of the TUF stipulates that "spetta ai soggetti abilitati l'onere della prova di aver agito con la specifica diligenza richiesta". See M. Maggiolo, *Servizi ed attività d'investimento. Prestatori e prestazione* (Giuffrè Editore, 2012), pp.532–537.

[174] Judgments of Ourense Provincial High Court, 1st Chamber, 472/2019 of 3 December and Castellón Provincial High Court, 3rd Chamber, 660/2019 of 29 November, inter alia.

[175] See, inter alia, Supreme Court Judgment 677/2016 of 16 November, Rafael Saraza Jimena writing for the court.

[176] Action for damages is governed by art.1108 of the Civil Code, and not by art.1303, which applies to contractual nullity (Supreme Court Judgment 607/2020 of 12 November, Pedro José Vela Torres writing for the court).

[177] Supreme Court Judgment 525/2015 of 28 September, Eduardo Baena Ruiz writing for the court.

[178] Supreme Court Judgment 677/2016 of 16 November, Rafael Saraza Jimena writing for the court, citing previous the judgments 754/2014 of 30 December, 397/2015 of 13 July, and 398/2015 of 10 July. For severe criticism of this doctrine, which considers that lack of the suitability test in advisory relationships is a non-essential breach, see Agüero Ortiz, La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión (2020), p.468, following a full analysis of the case law (pp.450–467).

[179] Supreme Court Judgment 754/2014 of 30 December, Ignacio Sancho Gargallo writing for the court.

[180] Supreme Court Judgments 754/2014 of 30 December, 397/2015 of 13 July and 398/2015 of 10 July; cited by Supreme Court Judgment 677/2016 of 16 November, and other subsequent ones. There is a lack of understanding of the legal framework governing the provision of investment advice services, because if the test is not carried out, or the test performed is not suitable, the firm should not provide the service and should therefore refrain from recommending the acquisition of the product, no matter how hard the customer pushes. This is a breach of the minimum standard of diligence and loyalty in the provision of financial advice (Supreme Court Judgment 398/2015 of 10 July). These transactions are null and void by operation of law because they contravene a legal prohibition.

[181] Requiring the client to prove how they would have acted if given correct advice would be *probatio diabolica*, which is why the courts use judicial presumptions (see the Judgment of Madrid Provincial High Court, 11th Chamber, 336/2019 of 9 October, Jesús Miguel Alemany Eguidazu writing for the court, paras 123–129: "whoever goes to an advisor is likely to make their decision on the information provided and follow the recommendation given", para.125). Article 304-A, para.2, of the Portuguese Securities Code establishes the presumption of the intermediary's negligence for breach of their professional obligations, in these terms: "A culpa do intermediário financeiro presume-se quando o dano seja causado no âmbito de relações contratuais ou pré-contratuais e, em qualquer caso, quando seja originado pela violação de deveres de informação", see G.A. Castilho Dos Santos, *A responsabilidade Civil do Intermediário Financeiro Perante o Cliente* (Almedina, 2008), p.189.

[182] Article 259 of the Commercial Code.

[183] Supreme Court Judgment, Plenary Session, 244/2013 of 18 April, Rafael Saraza Jimena writing for the court.

[184] "It is not correct to state that case law declares that a cause-effect relationship between the breach attributable to the investment firm and the damage suffered by the customer is not necessary because the breach suffices as a title for legal attribution. Breach suffices as such a title of legal attribution when there is a phenomenological cause-effect relationship" (Supreme Court Judgment 558/2019 of 23 October, José Luis Seoane Spiegelberg writing for the court). Thus, serious breach of the duties to

phenomenological cause-effect relationship between the defendant's conduct and the facts through which such damages are manifested (anguish, distress, anxiety), but also that an objective attribution can be established".[185] In short, it is a system that tends towards strict liability for the investment services provider. Once the breach, the existence of damage and the legal assessment of the cause-effect relationship have been evidenced, the damage is considered attributable to the firm for having failed to meet the standard of professional conduct.

Concluding remarks

The EU leaves it up to Member States to establish the civil consequences of breach of securities market conduct of business rules. The solutions vary and each Member State provides its own remedy. The effectiveness of the objectives of investor and financial customer protection in guaranteeing the proper functioning of the financial market requires progress towards a contract law that interprets the standards of diligence of the conduct of business rules in accordance with the doctrine of European regulatory private law. This law arises from interaction between financial regulation of European origin under public law and the contract law of Member States. Based on this approach, we have analysed this interaction in Spanish law, in which contracts for the provision of investment services are atypical and there is a lack of provisions concerning the consequences of breach of contractual obligations. However, art.259 of the Spanish Commercial Code allows the contractual obligations of a mandate relationship to be supplemented with the securities market conduct of business rules in the provision of investment services, such that a breach of due diligence, the standard for which is the conduct of business rules, gives rise to the corresponding compensation as a natural solution.

In line with the most common claims, case law deals with the remedy of contractual nullity on the basis of a defect of consent due to breach of information obligations, ruling out, in principle, absolute nullity for breach of mandatory rules. In the credit market, claims are based on the unfairness of general terms and conditions, which are settled in most cases in the consumer's favour by applying the doctrine of "material transparency", according to which it is not enough to provide information, since it is necessary for the lender to prove that the customer has understood the legal and financial content of the general terms and conditions incorporated in the contract. According to this doctrine, most of the general terms and conditions of financial contracts may be annulled because, due to their natural complexity, they are impossible for financial consumers to understand.[186] This doctrine applies solutions specific to exchange relationships to collaboration contracts. It is an option that creates legal uncertainty by leading in Spain to the cancellation of tens of thousands of financial contracts. In reaction to this, the Supreme Court, with a *caveat emptor* interpretation, has created the figure of the "expert retail investor", which moves away from the combination of contract law with conduct of business rules. According to this doctrine, there is no cause-effect link between the breach of the conduct of business rules and the damage in the case of an expert retail investor. In these cases, according to this case law, there is no information asymmetry justifying the special framework. These customers have the capacity to know what they are buying, and lack of information cannot be the cause of the loss or the basis for the error. This doctrine turns retail investors with knowledge or experience into professional customers contrary to EU financial regulation.

Academic doctrine is seeking a safe harbour for the industry that increases legal certainty. Based on these positions, as long as the contents of the contract have been filed with and approved by the supervisor, the wording could be considered to be clear, legible and understandable by the customer, and the information provided to the investor could be presumed to be sufficient to enable the investor to make an informed decision.[187] According to this proposal, in addition to administrative liability, the law should expressly state that breach of the conduct of business rules obliges the intermediary to compensate the retail customer for the damage caused.[188] To complete the proposal, the bank could exclude its liability if it can prove that it has complied with the conduct of business rules. These approaches apply the substitution model of European Regulatory Private Law in order to achieve the desired

inform the customer and diligence and loyalty with regard to financial advice, "imposes on the person providing a financial advice service, once the cause-effect relationship has been determined, the legal title of attribution of the damages suffered by the customer consisting of the loss of value of the investment products acquired, which may constitute the legal title of attribution of liability for the damages suffered by the customer consisting of the loss of value of the investment products acquired" (Supreme Court Judgment 558/2019 of 23 October, following the doctrine in Judgment 583/2016 of 30 September, in which the previous judgments 244/2013 of 18 April, 754/2014 of 30 December, 397/2015 of 13 July and 398/2015 of 10 July are cited).

[185] Supreme Court Judgment 583/2016 of 30 September, Rafael Saraza Jimena writing for the court, which states "when compensation for non-material damages is claimed for breach of a contract with purely economic content, as in the case of investment advice, even if it could be understood that there is a phenomenological cause-effect relationship between the defendant's conduct and the psychological damage that the plaintiff may have suffered, an objective attribution cannot be established on the basis of the criterion of the purpose of protection of the rule when explicitly or implicitly no consideration has been given to the violation of aspects of personality (such as integrity, dignity or personal freedom) in relation to the fulfilment of the contractual obligations undertaken".

[186] Although the Supreme Court has specified that the clause "not being transparent, does not mean that it is always, automatically abusive" and therefore null and void, since "the declaration of lack of transparency would be a necessary, but not a sufficient, condition for the assessment of abusiveness" (Supreme Court Judgments of 595, 596, 597 and 598/2020 of 12 November, IRPH [mortgage loan reference index] case).

[187] See A. Fernández de Araoz Gómez-Acebo, "El 'private enforcement' en la protección del inversor minorista: de la aplicación de la doctrina del error-vicio en la contratación de productos financieros a una acción de daños específica", *Revista de Derecho Mercantil*, No.315 (2020), p.4 onwards; in which he expands on and develops his initial proposal published in A. Fernández de Araoz Gómez-Acebo, "Repensar la protección del inversor: bases para un nuevo régimen de la contratación mobiliaria", *Diario La Ley*, No.8549 (2015), p.1 onwards.

[188] With compensation equivalent to the amount paid when acquiring the product plus legal interest, minus the resulting market value. See Fernández de Araoz Gómez-Acebo, "El 'private enforcement' en la protección del inversor minorista: de la aplicación de la doctrina del error-vicio en la contratación de productos financieros a una acción de daños específica", *Revista de Derecho Mercantil*, No.315 (2020), p.4 onwards.

legal certainty.[189] However, this proposal still considers transparency to be a sufficient requirement to protect the investor, when the truth is that the asymmetry between the financial professional and the customer cannot be overcome through the contract wording and the informative documents. This proposal would create a safe harbour for the banks but would sacrifice the customer's interest in receiving a service that meets their needs.

In turn, from a consumerist perspective, it is proposed to make consumer participation in the financial market conditional on contracting independent advice or portfolio management, with a prohibition of the figure of the salesperson.[190] In order to align interests, results-based remuneration of a "percentage of profits earned by the customer" would be imposed.[191] This is a radical proposal in line with some regulatory trends that make market access conditional on verification of suitability in a fiduciary relationship. In a way, it proposes applying the suitability test to all investment services for any type of financial instrument, as is already the case for debt subject to internal bail-in.[192] However, a balance must be maintained between freedom of access to markets and investor protection against opportunistic behaviour by firms. The MiFID system goes beyond the information paradigm from the efficient market theory by ensuring that the supply of financial instruments is appropriate to the needs of customers and that it is suitable for their knowledge and experience. Product governance enables distribution to be made conditional on the use of advice or management.[193] In this way, the retail customer can be protected against indiscriminate distribution of hybrids, derivatives and other complex high-risk financial instruments. Otherwise, it is a system governed by the principle of best execution and acting in the best interest of the customer, avoiding conflicts of interest that may be detrimental to the customer. Although it is true that opportunistic behaviour still exists, and the ineffectiveness of the MiFID system might make it advisable to make the offer of any financial instrument subject to prior verification of its suitability. In fact, product governance makes it possible to make distribution conditional on the provision of advice based on the product's complexity and risk.[194]

Essential financial factsheets, financial education and cognitive bias warnings are steps forward in protecting the financial customer. All of these measures contribute to improvement of the market. However, they are far from being the solution. The key lies in the professionalism and loyalty of the intermediaries. A more efficient financial market requires a change in the culture of intermediaries. They must act as the law states in the interests of the customer. They must become guides who accompany customers through the financial jungle.[195] But this improvement in banking conduct must be accompanied with effective enforcement of conduct of business rules in contractual relations in accordance with the doctrine of European Regulatory Private Law. Redress must be guaranteed for customers affected by banking misconduct.

Legal certainty requires that investment services be considered collaborative contracts governed by the general rules of obligations and contracts, guided by the criteria of the financial authorities, with subsidiary application of the commercial mandate framework.[196] The cases in which intermediaries are liable for the investor's loss due to their *mala praxis* must be clearly established. What is at issue is not the application of the *pacta sunt servanda* principle in the investment business. In the same way that the investor customer must fulfil their obligations and undertake their responsibilities, the intermediary must also fulfil, within the predefined framework of product governance, their obligations to identify and qualify the customer, assess their profile, refrain from offering them products unsuitable for their profile and to provide them with complete and comprehensible information on the nature of the product and its risks, and accept the consequences of breach, whether these be compensation, termination of the contract or nullity of the contract, including absolute nullity in cases of the most serious breach of mandatory rules.

[189] Doctrine criticised by Wallinga, according to whom: "The exclusive reliance on EU investor protection regulation under the subordination model can prevent civil courts from realising the appropriate level of investor protection in individual disputes", in M.W. Wallinga, *EU investor protection regulation and private law: a comparative analysis of the interplay between MiFID & MiFID II and liability for investment losses* (2020), p.107.

[190] See Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), pp.484–486, a model that would "transfer to the professional the task of assessing suitability to the investor's needs, investment objectives and financial situation, which they are unable to assess on their own" (p.485).

[191] Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), p.485.

[192] See art.44a of Directive 2019/879.

[193] See ESMA, *Final Report Guidelines on MiFID II product governance requirements* (2 June 2017), ESMA 35-43-620, paras 44 and 46.

[194] See ESMA, *Final Report Guidelines on MiFID II product governance requirements* (2 June 2017), ESMA 35-43-620, according to which "the manufacturer should propose the type of investment service through which the targeted clients should or could acquire the financial instrument" (para.26), taking into account that "investment advice and portfolio management services allow for a higher degree of investor protection" (para.44).

[195] See F. Zunzunegui, "En defensa de la intuición del inversor", *Revista de Derecho del Mercado Financiero* (20 August 2017), final paragraph.

[196] In Spain, this is regulated in arts 244–280 of the Commercial Code dedicated to commercial mandate.

With all of its ups and downs,[197] Spanish case law is contributing to the creation of a financial services contract law that complements the general framework of obligations and contracts with financial market conduct rules.[198] It is law created through case law, specific to European regulatory private law, which provides the financial system with legal certainty. The financial authorities' criteria guide this case law. The complementary model that preserves the autonomy of contract law in the judicial enforcement of conduct of business rules applies. It is the judges who decide in each case whether the bank is liable for breach of the conduct of business rules on the basis of due diligence. The subordination model whereby the judge is bound by the conduct of business rules, giving rise to compensation in the event of breach, is discarded.

Last but not least, the creation of a financial customer protection authority with the ability to issue criteria binding on financial institutions, with financial ADR functions,[199] may contribute to the development of this contract law.[200] The task of creating a "MiFID protocol" that does not go beyond the legal and regulatory framework falls to the courts, but it is a task of such breadth and complexity that it requires the crutch provided by the new authority in the exercising of its powers as an alternative dispute resolution mechanism.

[197] With frequent changes of criteria, as has occurred with multi-currency mortgages, unit-linked products, the retroactive nullity of floor rate clauses, lapsing of nullity action and the transparency of the IRPH. In addition to the volatility of the markets, there is also the "volatility of the courts", a term coined by F. Greco and M. Lecci, "Intermediazione finanziaria tra 'precauzione' normativa ed alea giurisprudenziale: possibili rimedi", (2018) 83(3) *Responsabilitá civile e previdenza: Rivista bimestrale di dottrina, giurisprudenza e legislazione* 771–776.

[198] First, the information obligations are harmonised and then product governance is harmonised based on private law principles. According to Marcacci: "from negative harmonisation (barriers imposed by national laws on the establishment of the unified market are removed), to positive harmonisation of, first, disclosure-based duties and, then, conduct-of-business requirements (which are used as public enforcement tools rather than private remedies), eventually resulting in public regulation of intra-firm processes led by contract-law principles", A. Marcacci, "European Regulatory Private Law Going Global? The Case of Product Governance" (2017) 18 *European Business Organization Law Review* 328. For a highly critical view of Spanish case law, see the broadside by Carrasco Perera, in "Prólogo" in Agüero Ortiz, *La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión* (2020), p.29.

[199] On Financial Alternative Dispute Resolution (Financial ADR), see O.O. Cherednychenko, "Financial regulation and civil liability in European law: towards a more coordinated approach?" in O.O. Cherednychenko and M. Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar, 2020), pp.2–46, according to whom: "ADR entities not only act as quasi-judicial bodies, providing compensation for aggrieved individuals, but, especially in mass damage cases, also perform a quasi-regulatory function" (p.4).

[200] Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules* (2019), pp.217 and 218, according to whom: "call for a more central role for extra-judicial private enforcement mechanisms … strengthen the co-ordination between supervisory authorities, on one hand, and national courts and ADR bodies, on the other". However, Spanish financial ADR is rightly placed in the public sphere.