THE ROLE PLAYED BY 'GRANULAR LEGAL NORMS' IN THE PROTECTION OF VULNERABLE CONSUMERS

EL PAPEL DESEMPEÑADO POR LAS "NORMAS LEGALES GRANULARES" EN LA PROTECCIÓN DE LOS CONSUMIDORES VULNERABLES

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RESUMEN: Este ensayo destaca cómo el impacto de las nuevas tecnologías en el comercio de servicios financieros es considerablemente alto hoy y está destinado a aumentar en el futuro. El desarrollo de la ley algorítmica tiene como objetivo idear nuevos procedimientos que permitan a las empresas y consumidores realizar transacciones, diseñados para que sean transparentes, confiables y convenientes. El advenimiento del análisis de Big Data, así como de las nuevas tecnologías predictivas, se ve como un cambio de una tipificación "en bruto" a una personalización "granular" de la ley.

PALABRAS CLAVE: Tecnologías; consumidores; ley.

ABSTRACT: *This essay highlights how the impact of new technologies on trade in financial services is considerably high today and destined to increase in the future. The development of the algorithmic law is aimed at devising new procedures that allow businesses and consumers to perform transactions, designed to be transparent, reliable and convenient. The advent of Big Data analysis, as well as new predictive technologies, is seen as a change from a "raw" typing to a "granular" personalization of law.*

KEY WORDS: *Technologies; consumers, law.*

I. THE ADVENT OF A DIGITAL LAW.

The impact of new technologies on the trade of financial services is already considerably high today and is likely to increase in the future. Robot trading and artificial intelligence systems are responsible for a growing share of financial transactions, even when executed by retail investors[1]. In the high-speed trading of financial products, contracts are often concluded on the basis of algorithms, which elect the terms to be offered to or accepted by the other party.[2] It would be hard to deny that these new techniques for entering into a contract and setting its terms will challenge many of the tenets of private law; [3] they could eventually undermine the paradigm of contract as an agreement based on the parties' free will.[4]

1 Under European law, an express definition of 'algorithmic trading' is provided by art 4, para 1, n 39), European Parliament and Council Directive 2014/65/ of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/1/EU [2014] OJ L173/349 (hereinafter also referred to as MiFID II). This provision stipulates that in algorithmic trading 'a computer algorithm determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention; and does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the processing of orders involving no determination of any trading parameters or for the confirmation of orders or the post-trade processing or executed transaction'. 'Algorithmic trading' is purportedly ruled by art 17 MiFID II, which is complemented by arts 18-20, Commission delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of the Directive [2017] OJ L 87/1 (hereinafter also referred to as MiFIR).

2 According to recital 61 MiFID II, 'high frequency algorithmic trading' occurs when 'a trading system analyses data or signals from the market at high speed and then sends and updates large number of orders within a very short time period in response to that analysis. In particular, high-frequency algorithmic trading may contain elements such as order initiation, generating, routing, and execution which are determined by the system without human intervention for each individual trade or order, short-time frame for establishing or liquidating positions, high daily portfolio turnover, high order-to-trade ratio intraday and ending the trading day at or close to a flat position'.

3 For an overall account, see Busch, C., De Franceschi, A.: "Granular Legal Norms: Big Data and the Personalization of Private Law", in Mak,V., Tjong, E.,Tai ,T., Berlee, A.(eds):*Research Handbook in Data Science and Law* ,Edward Elgar Publishing 2019,408ff; Hacker, P.: "Personalizing EU Private Law: From Disclosures to Nudges and Mandates", *25 European Review of Private Law 651*,2017.

4 Twigg-Flesner, C.: "Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law", in De Franceschi, A. (ed): *European Contract Law and the Digital Single Market: The Implications of the*

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Unprecedented and demanding challenges are thus cast upon law and upon lawyers. Particularly, the risk of new kinds of discrimination appears,[5] e.g., with regard to the prices set by suppliers on e-commerce platforms.[6] Privacy concerns inevitably arise as well, regarding the massive use of data analytics for monitoring individuals and groups.[7] Furthermore, digital contracting reflects novel asymmetries of information and power[8].

The development of marketing and contracting techniques that is driven by new technologies eventually points to the abandonment of law, which is silently assumed to represent a nuisance to everyday life and to be a potential hurdle to trade. It would be hard to deny that law is based upon techniques of social control that incur a high cost both for parties to a litigation and for society as a whole. This high cost is due mainly to the inner characteristics of legal procedures for settling social conflicts (formalism) and to the role played by actors entrusted with their management (judges, attorneys, etc.). The involvement of these legal professionals makes such procedures considerably lengthy and costly; furthermore, the resulting judgments are necessarily uncertain since human interpretation of law is – by definition – subjective and, therefore, mutable if not unpredictable; the more human decision-makers are involved, the less predictable judgments become.

More generally, law is moulded on the remnants of a pre-modern and analogic rationality, which, although secularized through the Enlightenment of the late 18th century, was bequeathed to it by religion. This rationality model is based on the invocation of non-negotiable principles that are to be applied to any single case through a bundle of formalized rituals, whose observance vouches for the justice of judgments. For modern law, it is the means that are paramount and that legitimize judgments, irrespective of a purported goal; conversely, no goal can determine whether the 'right' decision was reached in any single case.

Digital Revolution, Intersentia 2017, 21ff. See also the essays collected in Grundmann, S. (ed): *European Contact Law in the Digital Age*, Intersentia, 2018.

5 Wagner, G., Eidenmüller, H.: "Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions", *University of Chicago Law Review*, 2019, vol.86, p .581. Bar-Gill, O.:"Algorithmic Price Discrimination. When Demand Is a Function of Both Preferences and (Mis)perceptions", *University of Chicago Law Review* ,2019, vol. 86. p. 217; Busch, C., De Franceschi, A.: "Granular Legal", cit., p. 423f.

6 Resta, G.: "Digital platforms and the law: contested issues", *Media Laws*, 2019, issue 1, p. 231. From an antitrust perspective, see Maggiolino,M.: "Personalized Prices in European Competition Law", *Bocconi Legal Studies Research Paper No. 2984840 "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984840" accessed 30 May 2019*; Maggiolino, M.: *I Big Data e il diritto antitrust*,Egea,2018;Maggiolino,M.:"Big data e prezzi personalizzati", *Concorrenza e mercato, numero speciale, Big Data e concorrenza*, 2016, vol. 23, p.95.

7 Busch, C.: "Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law", *University of Chicago Law Review 309*, 2019; Busch, C., De Franceschi, A.: "Granular Legal", cit., p. 422f.

8 Daly, A.: *Private Power, Online Information Flows, and EU Law: Mind the Gap*, Hart, 2016. See also the essays collected in Devolder, B. (ed): *The Platform Economy. Unravelling the Legal Status of Online Intermediaries*, Intersentia, 2019.

By contrast, digital rationality underpinned by new technologies legitimizes any solution on the basis of a purported goal, whilst the procedures do not matter as such; all that is required is that they shrink to the minimum. If confronted with the alternative between 0 and 1, i.e. the bulk of digital rationality, the panoply of formalistic devices that are deployed by jurists to tackle social problems and sort them out looks like a repertoire of magic spells cast by a medieval alchemist.

A central issue of the 'disruptive' impact of new technologies on law is that they purport to do without lawyers,[9] in order to eliminate the cost and the uncertainty resulting from their subjective interpretation. To that extent, it is dealt with a well-known phenomenon that affects each layer of social and professional experience: new technologies perform a general 'disintermediation' of the access to services and immaterial goods (including knowledge), which become more and more directly attainable by their final users.

The development of what may be called an algorithmic law – or a digital law, or also cyber law or robot law – is (i) aimed at devising new procedures enabling businesses and consumers to execute transactions and (ii) designed to be fully transparent, reliable and cost-saving. The purpose of such law is annulling the risk of deceit, opportunistic behavior, etc.; its goal is sweeping legal professionals away[10].

In the essence, however, removing legal professionals means removing law as such. Without judges and lawyers committed to its interpretation and application, law is destined to wither away and become an empty shell of procedures pointing to nowhere. The illusion of instrumentalizing technology as a more suitable and efficient means to apply law (*law is code*) soon turns out to be a gradual but unstoppable replacement of law with technology (*code is law*).[11]

The 'computational turn' is thus not going to change the law;[12] it will instead eventually sweep it away. The announcement that rules and standards are (almost) dead represents a step towards that end.

Initially, predictive and communicative technologies were depicted as a means to personalize the duty of care upon which civil liability is based. Particularly, it has been advocated that the pattern of tort should be shaped upon a personalized standard of diligence, which should reflect not the 'reasonable person' of any non-

9 Verstein, A.: "Privatizing Personalized Law", 86 *University of Chicago Law Review*, 2019, p. 551.

10 Casey, A.J., Niblett, A.: "Framework for the New Personalization of Law",*86 University of Chicago Law Review*, 2019, p. 335.

11 Path-breaking was Lessig, L.: *Code and Other Laws of Cyberspace,* Basic Books, 1999.

12 Hildebrandt, M., De Vries, K. (eds): *Privacy, Data Process and the Computational Turn: The philosophy of law meets the philosophy of technology,* Routledge, 2013.

distinct member in a given pool (encompassing, for instance, the average diligence of doctors in cases of malpractice) but the 'reasonable you' of each individual.[13]

That step taken, however, it is inevitable to take another one in the same direction, and yet another, until, as has already been prophesized, law could (or should) be replaced by micro-directives, communicated to every user simultaneously through their online devices.[14] Even if all that could (or should) happen under the control of a public agency, or official, it would be hard to deny that a shift of power would occur from law to technology, and, therefore, from legal professionals to engineers, data scientists, etc.

II. THE TREND TOWARDS THE PERSONALIZATION OF PRIVATE LAW: FROM THE 'AVERAGE CONSUMER' TO THE 'IMAGES OF THE CONSUMER'.

Since World War II, the traditional typification of legal rules has been increasingly questioned, thus triggering the trend toward a gradual personalization of law.

A fundamental tenet of juridical and political culture of the Enlightenment was enshrined in the generality and abstractness of the State's law, which was thus empowered to overcome the legal particularism that had characterized the feudal order of the *Ancien Régime*. The State's law was predicated on being general because it had to be applied to all citizens irrespective of the social classes they belonged to; the State's law was predicated on being abstract because it had to be applied to any case irrespective of when and where a contract was entered into or a wrong was committed. The precept of equal treatment was therefore paramount (treat like cases alike).

From a political perspective, the State was thus entrusted with the monopoly of law production through the enactment of legislative measures, these being aimed at achieving a rational mediation between non-negotiable principles of natural law and the political needs of civil society, as advocated by Hegel.[15] In a State under the rule of law (*Rechtsstaat*), generality and abstractness of law ensure the equal treatment of citizens by the State and guarantee that general decisions will be taken through standardized procedures – and not captured by the interests of individuals or groups.

13 Ben-Shahar, O., Porat, A.: "Personalizing negligence law", *New York University Law Review*, 2016, p. 627. For further reference, see Busch, C., De Franceschi, A.: "Granular Legal", cit., p. 417ff.

14 Casey, A. J., Niblett, A.: "The Death of Rules and Standards", *Indiana Law Journal*, 2017, vol. 92, p. 1401.

15 Hegel, G, W.F.: *Grundlinien der Philosophie des Rechts* (first published 1821) § 211.

Generality and abstractness of law was explicitly categorized and advocated by Kant, who, together with Hegel, may for good reason be acknowledged as the initiator of modern philosophy of law.

Kant posited the 'general principle of law',[16] according to which: 'law is any action that, either directly, or through its formulation, is able to make the arbitrary liberty of each individual coexist with that of any other according to a universal regulation'.[17] Such a universal regulation was laid down by Kant himself in the following terms: 'Act in the outside world so as the free avail of your judgment may coexist with the liberty of anyone else'.[18] That way, law could be set out as a 'pure' concept, although directed to practice, i.e., to its application to cases experienced in the outside world.[19]

Kant's philosophy of law is undeniably the starting point and the source of inspiration for the 'pure theory of law' developed by Kelsen. Together with the milder version elaborated by Hart, the 'pure theory of law' is the cultural manifesto of legal positivism, what was to become the predominant doctrine of general theory and philosophy of law during most of the 20th century. According to Kelsen's depiction, law is a system of general and abstract rules that are to be styled as hypothetical propositions (legal norms); the 'pureness' of his theory is given not only by the strict seclusion of law, deemed to be isolated from religion, ethics, and any other field of human knowledge, but also by its insensitivity towards the particular issues of each case.

Within this conceptual framework, therefore, the legal subject is any undifferentiated member of society, meeting the same characteristics of generality and abstractness that are paramount for legal norms.[20] Legal subjects are classified by law into categories, just like legal facts are; for example, individuals are divided into those of age that hold the capacity to act, and those that are underage that do not hold such capacity. This typification has also a general and abstract character, because it is not sensitive to the concrete traits of each legal subject that is thus classified; for example, a minor is generally devoid of the capacity to act even if she is endowed with discernment and expertise exceeding those of a person of age, and vice versa. The capacity to act is achieved after attaining a certain age (e.g.,

16 Kant, I.: *Die Metaphysik der Sitten* (first published 1797, Akademieausgabe von Immanuel Kants Gesammelten Werken) 230, § C: 'Allgemeines Princip des Rechts'.

17 ibid: 'Eine jede Handlung ist Recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann'.

18 Kant, I.: *Die Metaphysik,* cit., p. 231, § C: 'handle äußerlich so, daß der freie Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetz zusammen bestehen könne'.

19 Kant, I.: *Die Metaphysik,* cit., p. 205, *Vorrede*: 'der Begriff des Rechts [ist] […] ein reiner, jedoch auf die Praxis (Anwendung auf in der Erfahrung vorkommende Fälle) gestellter Begriff'.

20 In this line of reasoning, see Falzea, A.: *Il soggetto come fattispecie*, Giuffrè, Milano,1939.

eighteen years) that is the same for any individual and that disregards her specific characteristics of education, intelligence, experience, etc.

Inevitably, however, typifications resorted to by private law tend to become increasingly refined over time. With regard to the division between legal subjects who are under age and those of age, for instance, German law came to accept that the capacity to act is progressively gained by individuals while growing up, so that also a minor is able to exercise some rights to personality;[21] furthermore, the newly enacted § 105a BGB stipulates that even one who is devoid of the capacity to act (like a minor) can perform legal transactions of everyday life (Geschäfte des täglichen Lebens).[22] After the reform of French law of contract and obligations passed in 2016-2018[23], a similar rule is provided by art. 1148 Code civil[24].

During the 20th century, moreover, the shift from a liberal State to a welfare State changed the understanding of the principle of equal treatment, which became aimed not only at formal but also at substantive equality.[25] It thus prompted the tendency towards a 'materialization' of (private) law (Materialisierung)[26], the purpose of which is to have account of the socio-economic or relational weakness of the addressees of legal rules. Under German law, § 138, para 2, BGB traditionally mandates the voidness of a contract by means of which one contracting party exploits the situation of need, inexperience, economic distress or mental weakness of the other, inducing the latter to give, or promise to give, a consideration that is grossly disproportionate to the performance[27]. Furthermore, a wide application of general clauses, like that of good faith, allowed German courts and scholarship to expand the law, adding solutions induced by moral values that require a 'contextualization' and a 'flexibilization' of rules enacted by legislators.[28] A renowned judgment issued by the German constitutional court (Bundesverfassungsgericht) did not refrain from declaring void a guarantee surety

21 Wolf, M., Neuner, J.: *Allgemeiner Teil des bürgerlichen Rechts*, CH Beck, 2016,11th edn, 128ff.

22 See Herrler, S.: "Sub § 105a ",*Staudingers Kommentar zum BGB* ,de Gruyter 2017; Spickhoff, A.: "Sub § 105a ",*Münchener Kommentar zum BGB* ,CH Beck, 2018.

23 See the essays collected in Cartwright, J., Fauvarque-Cosson, B., Whittaker, S. (eds): *La réécriture du code civil : le droit français après la réforme de 2016* ,Société de législation comparée 2018,; and those collected in Bien, F., Borghetti, J.S.(eds):*Die Reform der französischen Vertragsrechts. Ein Schritt zu mehr europäischer Konvergenz?*,Mohr Siebeck, 2018.

24 See Dehayes, O., Genicon, T., Laithier, Y.M.: *Réforme du droit des contrats, du regime general et de la prevue des obligations: Commentaire article par article* , Lexis Nexis ,2018,2nd edn, 266ff.

25 Habermas, J.: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, 1992, p. 498.

26 Canaris, C.W.: "Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung", *20 Archiv für die civilistische Praxis*,2000, p273; Wagner, G.: 'Materialisierung des Schuldrechts unter dem Einfluss von Verfassungsrecht und Europarecht – Was bleibt von der Privatautonomie?', in Blaurock ,U.,Hager ,G.(eds):*Obligationenrecht im 21. Jahrhundert*,Nomos 2010,13ff. In the same vein, see Medicus, D.:*Abschied von der Privatautonomie im Schuldrecht?: Erscheinungsformen, Gefahren, Abhilfen* ,O Schmidt, 1994.

27 See Fischinger, P.S.: " Sub §138 ", *Staudingers Kommentar zum BGB* , de Gruyter ,2017; Armbrüster, C.: " Sub §138 ", *Münchener Kommentar zum BGB,* CH Beck ,2018.

28 Auer, M.: *Materialisierung, Flexibilisierung, Richterfreiheit,* Mohr Siebeck, 2005.

that was issued by a dependant of the debtor who, due to her young age and her inexperience, was deemed to have taken a risk unbearably high relative to her patrimonial and financial situation.[29]

In the framework of the European Union's law, most directives governing contract law are targeted at business-to-consumer transactions, which are thus legally differentiated from peer-to-peer transactions, be they amongst consumers or businesses.

European law aims more at the establishment and the functioning of the single market than at the protection of consumers as weaker contracting parties.[30] Therefore, the division of businesses and consumers is not of a social or economic nature but is merely relational, and the subjective scope of the norms is shaped on the concrete relation that is entered into by the contracting parties. The same legal subject can conclude some contracts while acting like a consumer and others while acting like a professional; provided that she acts like a consumer, she can enter into a contract with another consumer or with a professional. The legal rules governing contracts change in accord not only with the abstract type of legal subject, but also with the concrete aim that is pursued by each of the contracting parties while performing the transaction. This technique is streamlined by the regulatory function that characterizes European contract law;[31] the latter is in fact deprived of much of the traditional autonomy it enjoys in national laws and is instead carved out to achieve some institutional goals of the European Union, starting with the establishment and the functioning of the European single market.[32]

29 BVerfG, 5 August 1994 - 1 BvR 1402/89.

30 However, see Mak, V.: "The Consumer in European Regulatory Private Law", in Leczykiewicz,D.,Stephen Weatherhill, S.(eds):*The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing,2016, 381ff, who distinguishes between European general law, targeted at a 'rational consumer', and European regulatory private law, aimed at protecting the consumer as the weaker party (or 'Calimero consumer').

31 Amongst many, see Grundmann, S.: "Privatrecht und Regulierung", in Auer, M., Grigoleit, H.G., Hager,J. and others (eds):*Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80.*,de Gruyter, Geburstag 2017,907ff; Brownsword, R., Rob, A.J., Van,G., Micklitz, H.W. (eds):*Contract and Regulation. A Handbook on New Methods of Law Making in Private Law* ,Edward Elgar, 2017; Comparato, G., Micklitz, H.W., Svetiev, Y.: "The regulatory character of European private law", in Twigg-Flessner, C. (ed):*Research Handbook on EU Consumer and Contract Law* ,Edwar Elgar Publishing ,2016, 35ff.; Mezzanotte, F.: "L'appartenenza come tecnica di regolazione (a proposito di "Regulatory Property Rights")", *Rivista critica di diritto privato*, 2016,p. 635; Svetiev, Y.: "European Regulatory Private Law: From Conflicts to Platforms", in Purnhagen, K.,Rott, P.(eds): *Varieties of European Economic Law and Regulation*, Springer 2014,153ff.; Micklitz, H.W.: " The Visible Hand of European Regulatory Private Law-The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation", *28 Yearbook of European Law 3,*2009.

See also the essays collected in Micklitz, H.W., Svetiev, Y.(eds): "A Self-sufficient European Private Law: A Viable Voncept? ",*EUI Working Paper Law*, 2012,issue n 31;and those collected in Micklitz, H.W., Svetiev,Y., Comparato, G. (eds):" European Regulatory Private Law – The Paradigm Tested ", *EUI Working Paper Law*, 2014, issue n 04. Among the monographs, see Hellgarth, A.: *Regulierung und Privatrecht: Staatliche Verhaltenssteurung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung*, Mohr Siebeck, 2016; Poelzig, D.: *Normdurchsetzung durch Privatrecht,* Mohr Siebeck, 2015.

32 Schmid, C.: *Die Instrumentalisierung des Privatrechts durch die Europäische Union. Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* , Nomos, 2010.

Although showing a considerable degree of novelty towards traditional contract law, however, European contract law is based on a typification technique that does not challenge radically the generality and abstractness of legal norms, instead combining them with the subjective quality of the contracting parties.

The scope of the rules belonging to European private law was determined by the European Court of Justice (ECJ) through the concept of the 'average consumer',[33] defined as a consumer that is 'reasonably well-informed and reasonably observant and circumspect'.[34] This definition was subsequently crystallized in the directive enacted by the European Union in the field of contract law. Only sporadically is European legislation instead addressed to particular groups of consumers: the most important case of this kind is that of the Unfair Commercial Practices Directive (UCPD).[35]

Pursuant to Art. 5, paragraph 2, lit. (b), UCPD, the assessment of unfairness of commercial practices is treated differently when it is targeted to 'a particular group of consumers', instead of the 'average consumer'.[36]

Moreover, Art. 5, paragraph 3, UCPD acknowledges that commercial practices may be 'likely to distort the economic behavior only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity'. The paradigm of the 'vulnerable consumer', which had already been used by the European legislature in directives governing universal service with regard to the supply of energy and telecommunication,[37] was thus introduced into European private law.[38]

33 Weatherhill, S.: "Who is the average consumer?", in Weatherhill, S., Bernitz, U.(eds): *The Regulation of Unfair Commercial Practices under EC Directive 2005/29,* Hart Publishing, 2007, 115ff; Mak, V.: "The "average consumer" of EU law in domestic litigation: Examples from consumer credit and investment cases", *Tilburg Law School Legal Studies Research Paper Series*, 2012, issue n 4, 5.

34 Case 210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachtung* [1988] ECR I-4657; Case 385/01 *Commission v Spain* [2003] ECR I-13143, n. 53. Already earlier, the ECJ had clearly mentioned the 'reasonably circumspect consumers' as a point of reference for applying European private law: Case 470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923, para 24.

35 European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council and Regulation (EC) No 2006/2004 of the European Parliament and the Council [2005] OJ L 149/22.

36 Cartwright, P.: "The consumer image within EU law", *Twigg-Flessner* ,199ff.; Poncibò, C.: "The average consumer, the unfair commercial practices directive and the cognitive revolution", *Journal of Consumer Policy,*2007, vol. 30, p.21.

37 Reich, R., Micklitz, H.W.: "Economic law, consumer interests, and EU integration", in Reich, N., Micklitz H.W., Rott, P., Tonner, K.: *European Consumer Law*, Intersentia ,2014, 2nd edn,46f.

38 Reich, N.: "Vulnerable consumers in EU Law", in Leczykiewicz, D., Weatherhill, A.(eds): *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing,2016,139ff.

This given, it should nevertheless be pointed out that this more nuanced approach does not detract the assessment of unfairness of commercial practices from being conducted along the standard of the 'average consumer', which is, however, to be identified with regard to the specific group at which such practices are targeted or with regard to the group of vulnerable consumers.

Subsequently, a (limited) reference to the 'vulnerable consumer' was made by the Consumer Rights Directive (CRD)[39]. Recital 34 CRD sets out that, in providing information with regard to arrangements by means of which the consumer is to pay a deposit to the trader, the latter 'should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee'. Nevertheless, it is immediately afterwards specified that: 'taking into account such specific needs should not lead to different levels of consumer protection'.

More recently, the European legislature has addressed the 'vulnerable consumer' in order to encourage her access to services that are deemed essential for participating in the internal market and benefiting from its advantages. With regard to the retail banking market in particular, payment accounts with basic features must be offered to clients so as to include also 'unbanked vulnerable consumers'.[40]

Such varieties of legislative references led scholarship to advocate in favor of spelling out different 'images of the consumer' (*Verbraucherleitbilder*),[41] which could (and should) be based on different traits of behavior or personality characterizing individuals. Attention was therefore drawn to vulnerable consumers; hasty consumers; consumers with inferior bargaining power; and uninformed consumers.[42] Along a different taxonomy, the following consumer images were to be set out: the fully informed consumer; the information seeker; the passive glancer; the snatcher; the irrational consumer; and the consumer without choices.[43]

39 European Parliament and Council Directive 2011/83/EU of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

40 European Parliament and Council Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257/214. In detail, see art 18, para 4, and art 20, para 1, as well as recitals 3, 46, 48, 49, and 54.

41 See the essays collected in Leczykiewicz, D., Stephen Weatherhill, S.(eds): *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing, 2016; and those collected in Klinck, F., Riesenhuber, K.(eds): *Verbraucherleitbilder.Interdisziplinäre und europäische Perspektive,* de Gruyter, 2015. Furthermore, see Schüller, B.: "The definition of consumers in EU law", in Devenny, J., Kenny, M.(eds): *European Consumer Protection: Theory and Practice,* CUP, 2012, p.123.

42 For some references, see Grundmann, S.: "Targeted Consumer Protection", in Leczykiewicz, D., Weatherhill, S. : *The Images,* cit.,p. 225f.

43 Wilhelmsson, T.: "Twelve Essays on Consumer Law and Policy"*, University of Helsinki*, 1996,p. 105ff.

III. THE DISCOURSE ON GRANULAR LEGAL NORMS (PARTICULARLY WITH REGARD TO THE DUTIES OF DISCLOSURE PROVIDED BY EUROPEAN CONTRACT LAW).

The advent of Big Data analytics, as well as new predictive and communicative technologies, is seen as prompting a radical shift from a 'crude' typification to a 'granular' personalization of law,[44] a change that would tremendously accelerate the trend towards a lessening and eventual abandonment of the generality and abstractness of legal norms.

Unlike other threads of 'contextualization' of law (e.g., the doctrine of *Materialisierung*),[45] the design of 'granular norms' would be prospectively based on a combination of individual characteristics that do not (necessarily) have a social dimension. Therefore, it would not be aimed at protecting social classes or groups, but at differentiating to the utmost amongst single individuals and emphasizing the idiosyncratic preferences of each. The expected goal is not only to inform private parties (especially consumers) more accurately, but also to drive their behavior so as to more effectively comply with the policies implemented by legislators;[46] in this line, the theory of 'granular norm' is aligned with some tenets of 'liberal paternalism' that advocate for a new theory (and design) of law based on 'nudging'.[47]

As to mandatory norms,[48] the process of personalization seems not to question the existence of legal prohibitions or impositions as such, but points to design and implementation of a process of continuous and automatic adjustment of their content, so as to ascertain how they should be applied in any discrete case. This scenario poses many novel questions as to the limits of civil, criminal, and administrative liability, and even leads one to wonder whether the divide between rules and standards is doomed to be overwhelmed by the advent of 'granular norms'.[49]

The theory of 'granular norms', however, has been developed particularly with regard to mandatory norms that do not provide a prohibition, or imposition, of a substantive nature (e.g., stipulating the voidness of contractual terms) but to those that enshrine information rules. Most typically, this is the case of rules stipulating

44 Porat, A., Strahilevitz, L.J.: "Personalizing default rules and disclosure with big data", *112 Michigan Law Review*, 2014, p. 1421.

45 See para 2.

46 Hacker, P.: "Personalizing EU", cit.,p.651.

47 Hacker ,P.: "Nudge 2.0 – The Future of Behavioural Analysis of Law, in Europe and Beyond", *24 European Review of Private Law* ,2016,p.297. For an insightful account of behavioral perspectives on private law, see Micklitz, H.W., Sibony, A.L., Esposito, F.: *Research Methods in Consumer Law: A Handbook*, Edward Elgar,2018; Hacker, P.: *Verhaltensökonomik und Normativität* ,Mohr Siebeck, 2017.

48 Ben-Shahar, O., Porat, A.: "Personalizing Mandatory Rules in Contract Law", *86 Chicago University Law Review*, 2019, p.255.

49 See para 1.

the duty of a professional to disclose information to a (prospective) client or customer, especially if a consumer.[50]

Imposing disclosure duties on traders (vis-à-vis consumers) is a technique of regulating markets that has been widely resorted to by European legislators.[51] This disclosure strategy has been long and sharply criticized.[52] Particularly, it has been pointed out that a great amount of standardized information engenders an informational overload that proves not only useless but even harmful to consumers, and therefore it has been advocated that the disclosure technique should be abandoned as such.[53] According to a milder version, disclosures should be abandoned solely insofar as undifferentiated, but their defects could be cured by the advent of 'granular legal norms':[54] in other words, these authors argue for the adoption and implementation of 'smart disclosures'.[55] In fact, information duties could, and should, be rejuvenated and adapted to the insights from behavioral and psychological research,[56] which have drawn increasing attention to the problems of bounded rationality and bounded attention.[57] These techniques would allow a curing of the defects of information overload in that they would reduce the information flow to consumer and increase the salience (i.e. the cognitive accessibility) of key information.[58]

It is, however, to be wondered whether the argument for a personalization of disclosures might be conveniently conveyed through the theory of 'granular norms'

As a matter of substance, personalizing disclosures of information means a personalization of duties of disclosure in respect of their content, not the rules

50 Even where the provider of financial services is obliged to abstain from trading (particularly due to conflicts of interests), disclosure remains available as an alternative to her and, that way, the doors to contract are still opened. Significantly, many a national law interprets the European rule of 'disclosure or abstain' in the sense that if the provider of financial services does not disclose a conflict of interests and the contracting client does not waive such conflict, the contract concluded between them is nevertheless valid, although the provider may be liable for damages.

51 For an insightful overview, see Busch, C.: "The future of pre-contractual information duties: from behavioural insights to big data", *Twigg Flessner*, (n 31), 224ff.

52 Bar-Gill, O., Sharar, O.B.: "Regulatory Techniques in Consumer Protection: A Critique of European Contract Law", *50 Common Market Law Review*, 2013, p. 109.

53 Ben-Shahar, O., Schneider, C.E.: "More Than You Wanted to Know*", Princeton UP*, 2014, 5f,110;Ben-Shahar,O.: "The Myth of the "Opportunity to Read" in Contract Law", *5 European Review of Contract Law 1*,2009. Ben-Shahar, O., Schneider, C.E.: "Coping with the failure of mandated disclosure", *11 Jerusalem Review of Legal Studies*, 2015, pp.83-93; Marotta-Wurgler ,F.: "Even more than you wanted to know about the failures of disclosure", *11 Jerusalem Review of Legal Studies*,2015,p. 63.

54 Porat, A., Strahilevitz, L.J.: "Personalizing default", cit. p. 1417.

55 Bar-Gill, O.: "Defending (smart) disclosure: A comment on More Than You Wanted to Know", *11 Jerusalem Review of Legal Studies*, 2015, p. 75.

56 Helleringer, G., Sibony, A. L.: "European Consumer Protection Through the Behavioral Lens", *23 Columbia Journal of European Law*, 2017, p. 621ff.

57 Busch, C.: "The future", cit. p. 230.

58 Busch, C.: "The future", cit. p. 231; Hacker, P.: "Personalizing EU" ,cit. p. 666ff.

governing them. To put it differently, personalizing disclosures of information has little in common with embarking on empirical research by means of guinea pigs, or similar experiments, aiming to ascertain the default rules which would better mimic the individual preferences of the different addressees of a norm.[59] By contrast, personification of information disclosures is pursued by obliging the more informed party, i.e. the business, to inquire of the less informed party, i.e. the consumer, about her personal characteristics and, consequently, to tailor information which most suits her profile and to present her with this tailored information. Therefore, the personalization of default norms pertains to legislation and is a job to be done by legislators, while the personalization of information disclosures pertains to business of conduct rules and is to be done by the parties themselves or, more accurately, by the more informed side, i.e. the business.

In the context of European contract law, uniform information is not properly aimed exclusively at the protection of the weaker party, or her awareness of contracts terms; rather, and maybe even to a greater extent, it also seeks to create a 'level playing field' for businesses of many different home countries, each of them compliant with a different national law.[60] To some extent, therefore, uniformity is paramount for the establishment of a single European market, given that it is confronted with twenty-seven national markets.

In the field of regulated financial services, particularly, European law promotes uniformity of information to overcome the national fragmentation of markets and legal systems.[61] From the viewpoint of private enforcement, uniformity of information enables consumers to compare on the same basis offers by suppliers of different nationalities and to assess and select the preferable one; it is intended to remedy adverse selection by consumers and moral hazard by professionals. From the viewpoint of public enforcement, uniformity of information is paramount for supervision by public authorities on the market, particularly when it stretches over transparency of contracts and fairness of conduct by traders.

With regard to credit services, the most important devices that European private law applies to convey uniform information are the following: 1) pre-contractual advertising and contractual indication of the annual percentage rate of charge (APR) for any credit arrangement, to represent the total costs of the

59 Porat, A., Strahilevitz, L.J.: "Personalizing default", cit. p. 1433 ff. For further reference, Busch, C., De Franceschi, A.: "Granular Legal",cit.p.420f.; Hacker, P.: "Personalizing EU",cit.p.670ff.

60 Grundmann, S.: "Information, Party Autonomy and Economic Agents in European Contract Law", *Common Market Law Review* ,2002, vol.39, p. 269.

61 For an overall view, see Mak, V.: "The Consumer", cit. p. 314ff.; Colaert, V.: "Investor Protection in the Capital Market Union", in Busch, D., Avgouleas, E., Ferrarini, G. (eds) *Capital Market Union in Europe,* OUP, 2018, p. 342.

credit, including any fees, expenses, etc.';[62] APR constitutes a comprehensive score for the credit arrangement that must be calculated according to the mathematic formula provided in Annex II of both the Consumer Credit Directive and the Mortgage Credit Directive; 2) a standardized document that spells out the items of information indicated in these Annexes: in the Consumer Credit Directive such document is titled the Standard European Consumer Credit Information (SECCI);[63] in the Mortgage Credit Directive it is titled the European Standardised Information Sheet (ESIS).[64]

Yet, uniform information must be accompanied by some personalized disclosures. Particularly, the Mortgage Credit Directive stipulates expressly that pre-contractual information is to be 'personalized';[65] particularly, it has to 'include adequate specific risk warnings, for instance about the potential impact of exchange rate fluctuations on what the consumer has to repay and, where assessed as appropriate by the Member States, the nature and implications of taking out a security'.[66]

Moreover, the ESIS must have a user-friendly structure and indicate an illustrative amortization;[67] it must be drawn up with simple and understandable language.[68]

With regard to investment and insurance services, the provider must inform (prospective) clients about conflicts of interest.[69]

After summarizing some key-points of the European law on financial services, one may wonder whether the plea for personalized information is really of core importance for improving and sharpening consumer protection (or the functioning of the market). A tentative answer should move from the assumption that information about financial services, however simplified and/or personalized it may be, is too complex for clients, even if professionals. This assumption explains one of the reasons why these services may be provided exclusively by authorized

62 European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC Directive 2008/48/EC [2008] OJ L 133/66 (hereinafter also referred to as the Consumer Credit Directive), art 5; European Parliament and Council Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60/34 (hereinafter also referred to as the Mortgage Credit Directive), art 11.

63 Consumer Credit Directive, annex II.

64 Mortgage Credit Directive, annex II.

65 Mortgage Credit Directive, art 14, para 1.

66 Mortgage Credit Directive, recital 22 and art 11.

67 Mortgage Credit Directive, recital 40.

68 Mortgage Credit Directive, recital 41.

69 MiFID II, art 23; European Parliament and Council Directive (EU) 2016/97 of 20 April 2016 on insurance distribution [2016] OJ L 26/19 (hereinafter also referred to as IDD), art 28.

intermediaries that are also subject to a system of supervision by public authorities, thereby ensuring not only their financial stability (prudential supervision) but also the transparency of their contracts and the fairness of their commercial practices. In fact, authorized intermediaries also play the role of honest brokers who explain information and make it more digestible to clients, especially when consumers.

It is therefore fully understandable that the European legislature aimed to achieve the personalization not of information as such, but of financial services contracts.[70]

To pursue this goal, European legislators applied two main types of devices: 1) with regard to investment and insurance services, pre-contractual tests of suitability or appropriateness of the contract in relation to the profile of the (prospective) client or customer;[71] 2) with regard to credit services, there is a pre-contractual assessment regarding the creditworthiness of the (prospective) client.[72]

The movement towards achieving a personalization of financial services contracts is specifically intertwined with the nature of such services. In fact, a fiduciary relation arises between the provider of financial services and its (prospective) clients.[73]

Generally, clients are not sufficiently acquainted with financial instruments or credit agreements and, therefore, they are *de facto* compelled to rely on the competence and professionality of the providers whom they trust. On the other side, the providers compete on the market by calling for the trust of their clients, who can make a choice based only on the competence and professionality of authorized intermediaries.

The fiduciary nature of the legal relation between the parties implies that the provider of financial services has a duty of loyalty and confidence towards the client. This duty, which is added to the bundle of obligations provided for by the common law of agency between the parties, has been 'translated' into a corpus of 'conduct of business rules', which have been laid down by self-regulatory organizations or public authorities responsible for the supervision of financial markets and traders of financial services.

70 On the personalized contracts at which European law on financial services aims, see Imbruglia, D.: *La regola di adeguatezza e il contratto,* Giuffrè , Milano,2017.

71 See paras 4.1. and 4.2.

72 See para 4.3.

73 Plato-Shinar, R., Weber, R. H.: "Three Models of the Bank's Fiduciary Duty", Law and Financial Markets Review, 2008, vol. 2, 422ff.

IV. THE PERSONALIZATION OF FINANCIAL SERVICES: THE KNOW-YOUR- CUSTOMER RULE IN INVESTMENT SERVICES.

Amongst the conduct of business rules that characterize the performance of investment services, one of the most important is that mandating the provider of such services to act in the best interest of the client.[74]

Up until the Great Depression of 1929 (Black Tuesday), the broker was granted full autonomy as to the choice of the investment that the client was to underwrite. The seriousness of this historical financial crisis taught, however, a lesson that had to be learnt by legislators and policymakers, obviously starting with those based in the United States of America. Thus, the rule was created according to which the broker could give advice on or perform only those financial services that she found suitable to her client's profile (suitability rule).

After being enacted by the United Kingdom (particularly through the 1986 Financial Services Act), the best interest rule spread to other legal systems and eventually became one of the tenets of European law on investment services.[75]

Pursuant to the rules provided by MiFID II,[76] the suitability test is required for the performance of investment services; for the other investment services listed in Annex I of the directive, a test of appropriateness is required instead. Both tests were streamlined in accord with the subjective categories into which the European legislature subdivided clients:[77] the main division is that between retail and professional clients, to which a further category was added, that of eligible counterparties. Moreover, professional clients are further subdivided into clients that are professional *per se* and clients that are elective professionals, i.e., those non-professional clients who, under given conditions, are allowed 'to waive some of the protections afforded by the conduct of business rules'.[78]

The least protected category of clients under MiFID II is that of eligible counterparties, which may be chosen by each Member State among the following subjects: investment firms, credit institutions, insurance companies, undertakings for collective investments in transferable securities (UCITS) and their management

74 MiFID, art 24, para 1, and recitals 91-97. See Enriques, L., Gargantini, M.: "The Overarching Duty to Act in the Best Interest of the Client", in Busch,D., Ferrarini, G. (eds): *Regulation of the EU Financial Markets. MiFID II and MiFIR*, OUP, 2017, 85ff.

75 See ESMA, "Final Report. Guidelines on certain aspects of the MIFID II suitability requirements", 28 May 2018, ESMA35-43-869.

76 MiFID II, art 25.

77 Kruithof, M.: "A Differentiated Approach to Client Protection: The Example of MiFID",in Grundmann, S., Atamer, Y.M.(eds) :*Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* ,Wolters Kluwer, 2011,105ff.

78 MiFID II, annex II, part II.1. Particularly, this may be the case of public sector bodies, local public authorities, and municipalities, as well as of private individual investors.

companies,[79] pension funds and their management companies, other financial institutions authorized or regulated under Union law or under the national law of a Member State, national governments and their corresponding offices (including public bodies that deal with public debt at national level), central banks and supranational organizations.[80] Transactions concluded between investment firms and eligible counterparties are not generally subject to the suitability test,[81] unless the contracting eligible counterparty requests, either on a general form or on a trade-by trade basis, to be treated as a client whose business with the investment firm is subject to the suitability test.[82]

Compared to MiFID I, MiFID II significantly raised the degree of legal protection provided to eligible counterparties. This is due to the fact that financial crisis has in fact shown that also non-retail clients are exposed to significant risks when contracting with investment firms, since they do not always have the capacity to assess the characteristics of financial products.[83] For that reason, MiFID II extended to eligible counterparties certain duties of information and reporting of the contracting investment firm, which MiFID I had provided only towards retail and professional clients.

A peculiar case is that of municipalities and local public authorities, which suffered high financial losses due to swaps contracts they were advised to enter into in order to make fast cash (instead of reducing the exchange rate risk). A large litigation between such public entities and the contracting banks thus arose in the United Kingdom and several other member States of the European Union (credit default swaps litigation). For this reason, such public entities have been taken out of the category of eligible counterparties, nor are they considered as professional clients unless, as already pointed out, they request to be treated as such (elective professionals).

Apart from eligible counterparts, the division of clients between the categories of professional and retail is paramount; an investment firm's information duties are differentiated accordingly, being, of course, broader and deeper in respect of retail clients.[84]

The suitability test is foreseen in the event the services to be provided are investment advice and portfolio management. This test requires that the investment firm involved obtains from the client the necessary information regarding: 1) the

79 About UCITS products, see Mak (n 30) 330f.

80 MiFID II, art 30, para 2.

81 MiFID II, art 30, para 1.

82 MiFID II, art 30, para 2, subpara 1.

83 MiFID II, recital 104.

84 MiFID, art 24; MiFIR, arts 44-51.

client's financial experience and knowledge; 2) her financial situation, including her ability to bear losses; 3) her investment objectives, including her risk tolerance.[85]

However, the duty of the investment firm involved to obtain such information is relaxed if the service is to be provided to a professional client. In that case, in fact, it is to be generally assumed that such a client possesses the necessary level of financial experience and knowledge regarding the envisaged products, transactions, and services;[86] particularly, if it is deal with a client that is a *per se* (and not an elective) professional, it is also to be generally assumed that she is financially able to bear any related investment risk.[87]

A specific report is due by investment firms providing investment advice to a retail client; the report is to include an outline of the advice given and how the recommendation provided is suitable for the client.[88] Before the transaction is concluded, the investment firm is, on a durable medium, to provide the retail client with a statement on suitability specifying how that advice meets her preferences, objectives, and other characteristics.[89]

Where such information is not provided, an investment firm is prohibited from recommending investment services or financial instruments to a (prospective) client;[90] the same applies in the event none of the services or instruments are suitable for the client.[91]

For other investment services, a test of appropriateness is foreseen whereby the investment firm involved is required to have obtained solely the necessary information regarding the client's financial knowledge and experience.[92]

However, an investment firm is entitled to assume that a professional client has the experience and knowledge needed to understand the financial risk at stake.[93]

By contrast, none of the 'know-your-customer' tests have to be applied to 'execution only' transactions, which consist of the mere reception and transmission of client orders (whether or not accompanied by any of the ancillary services

85 MiFID II, art 25, para 2.

86 MiFIR, art 54, para 3, subpara 1.

87 MiFIR, art. 54, para 3, subpara 2. By contrast, as stated in MiFID II, annex II, part II.1., elective professional clients will not 'be presumed to possess market knowledge and experience comparable to that' of *per se* professional clients.

88 MiFIR, art 54, para 12, subpara 1.

89 MiFID, art 25, para 6, subpara 2, and recital 82.

90 MiFIR, art 54, para 8.

91 MiFIR, art. 54, para 10.

92 MiFID II, art 25, para 3.

93 MiFIR, art 56, para 1, subpara 2.

specifically listed in the directive).[94] In order to be exempted, however, such services must fulfil three criteria: 1) they involve non-complex financial instruments, like shares and simple bonds;[95] 2) they are provided at the initiative of the client; 3) the latter must be informed that no 'know-your-customer' obligations apply.

However, it should be observed that the suitability regime tends to be pervasive, since European and national supervising authorities, including the Committee of European Securities Regulators (CESR), put a strong emphasis on individual advice and define it in a very broad way.[96] Particularly, even spot advice on a single product, where an 'execution only' transaction is accomplished, is considered by regulatory authorities to qualify as individual advice such that the suitability regime is deemed applicable.[97]

The ECJ has spelled out that the exclusion of suitability and appropriateness tests prior to the performance of investment services must be understood as exceptional since the tests constitute the bulk of MiFID II regulations; instances where such tests are excluded are therefore to be considered under strict and narrow interpretation.[98]

1. The know-your-customer rule in insurance services.

Also regarding the performance of insurance contracts, the European legislature has provided tests on suitability and appropriateness that are aligned with those required in the field of investment services; also stipulated are reporting duties to customers.[99]

2. The know-your-customer rule in credit banking.

The rules enacted by the European Union with regard to contracts for credit services are centered upon an assessment of creditworthiness that must be conducted and communicated to the (prospective) client before she is bound by any credit agreement.

94 MiFID II, art 25, para 4.

95 An indicative list of non-complex financial instruments is given by MiFID II, art 25, para 4, lit. (a). The criteria for assessing which financial instruments are to be considered as non-complex are spelt out by art. 57 MiFIR. For indications of compliant implementation, see ESMA, 'MiFID II Supervisory briefing. Appropriateness and execution-only', 4 April 2019, ESMA35-36-1640.

96 See also MiFID II, recital 85, in that it excludes that a service may be considered as provided at the initiative of the client insofar as 'the client demands it in response to a personalized communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction'.

97 CESR, 'MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements', 3 November 2009, CESR/09-559.

98 Case 604/11 *Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2013:344. For a comment, see Grundmann, S.: "The Bankinter Case on MIFID Regulation and Contract Law", *9 European Review of Contract Law*, 2013, p. 267.

99 IDD, art 30.

The Consumer Credit Directive of 2008 assigned great importance to creditworthiness assessment, which aims to hinder irresponsible commercial lending practices by creditors.[100] Similarly, major emphasis was put on such assessment by the Mortgage Credit Directive of 2014[101], which was adopted in the wake of the big financial crisis[102]: the subprime loan vicissitudes on the U.S. banking market had in the meantime taught the lesson that extending credit when the value of the mortgage that serves as a collateral is below the threshold required to cover the debt of the borrower, or when the overall burden of the debt is disproportionate to the borrower's overall financial situation, means creating a risk that may spread to the overall financial system, and in any case risks undermining the trust of consumers in such a system.[103]

In order to promote practices of responsible lending, therefore, the Mortgage Credit Directive applies two main devices: 1) an appropriate evaluation of residential immovable property;[104] 2) an assessment of creditworthiness that is made prior to the conclusion of any credit arrangement.[105] Furthermore, European legislators have required the Member States to support financial education of consumers, an idea that equally serves the purpose of promoting responsible lending practices by creditors.[106]

Under the Mortgage Credit Directive, assessment of responsible lending must be conducted by taking into consideration all necessary and relevant factors that can influence a consumer's ability to repay the credit over her lifetime.[107] In particular, in order to rank a prospective borrower as creditworthy, it does not suffice that the value of the residential immovable property exceeds the amount of the credit; even less compelling is the assumption that such property's value will increase.[108] Furthermore, the capacity of the consumer to transfer part of the

100 Atamer, Y.M.: "Duty of Responsible Lending: Should the European Union Take Action?", in Grundmann, S., Atamer, Y.M. (eds)*Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting*, Wolters Kluwer, 2011, p. 179. Onyeka, K.O.: "Responsible Lending: Consumer Protection and Prudential Regulation Perspectives", in Karen Fairweather, K., O'Shea, P., Grantham, R. (eds): *Credit, Consumers and the Law: After the Global Storm,* Routledge 2017,62ff.

101 Anderson,M.,Arroyo Amayuelas, E.: "The Impact of the Mortgage Credit Directive in Europe: Contrasting Views from Member States"*, Europa Law Publishing* ,2017.

102 Schmidt, J., Esplugues, C., Arenas, R.: *EU Law after the Financial Crisis,* Intersentia, 2016.

103 Mortgage Credit Directive, Recital 3.,

104 Mortgage Credit Directive, art 19 and recital 26.

105 Mortgage Credit Directive, art 18 and recitals 55-61.

106 Mortgage Credit Directive, art 6 and recital 29. Even if it is dealt with just one article, it is significant that it has been placed in an autonomous chapter, the second, of the directive; this choice of the European legislature is due to the importance it attributes to the financial education of consumers. See. Patti, F.P.: "L'educazione finanziaria e la direttiva 2014/17/UE (sui contratti di credito ai consumatori relative a beni immobili residenziali)" ,*Contratto* e *impresa* ,2015,p.1423.

107 Mortgage Credit Directive, art 18, para 1, recital 55.

108 Mortgage Credit Directive, art 18, para 3, recital 55.

credit risk to a third party should not lead the creditor to ignore the conclusions of the creditworthiness assessment.[109]

The source of information on which creditworthiness is to be assessed is the prospective borrower herself,[110] although the creditor has the duty to verify the information appropriately, including through reference to independently verifiable documentation when necessary.[111] In order to conduct such an evaluation, the creditor has the right to access credit databases, operated either by private credit bureaus or by credit reference agencies, and public registers.[112]

With regard to the Consumer Credit Directive, the ECJ stated: 'Notwithstanding the pre-contractual information which must be provided [...], the consumer may, before entering into the credit agreement, still need additional assistance in order to decide which credit agreement is the most appropriate for his needs and his financial situation'.[113] Although all obligations envisaged are pre-contractual and no indication about the chronological order of their fulfillment was given by the legislature, it was held that 'the assessment of creditworthiness means that the adequate explanations provided need to be adapted and that those explanations must be communicated to the consumer in good time before the credit agreement is signed, without this, however, requiring a specific document to be drawn up'.[114]

Although both European directives on credit services clearly set out that the creditor is obliged to give 'adequate information' to a prospective client,[115] they did not go so far as stipulating that the creditor is required to provide advice to the consumer. In particular, therefore, the creditor is not obliged to advise the consumer as to the credit agreement that is best suited to her interests, nor does the creditor have a duty to refrain from entering into a credit agreement that proves inappropriate in light of the consumer's interests (e.g., when it puts the consumer in a situation of over-indebtedness). Advice is governed by the credit service directives as a financial service in its own right.[116]

109 Mortgage Credit Directive, recital 57.

110 Mortgage Credit Directive, art 18 and recital 58.

111 False or inaccurate information as such does not entitle the creditor to terminate the contract (Mortgage Credit Directive, recital 58), unless it is demonstrated that the consumer knowingly withheld or falsified it (Mortgage Credit Directive, art 20, para 3, subpara 2).

112 Mortgage Credit Directive, art 21 and recital 59.

113 Case 449/13, *CA Consumer Finance SA v Ingrid Bakkaus, Charline Bonato (née Savary) and Florian Bonato*, ECLI:EU:C:2014:2464, para 41.

114 Case 449/13 (n 113) para 41.

115 Consumer Credit Directive, art 5, para 6; Mortgage Credit Directive, art 16 and recital 48.

116 Mortgage Credit Directive, art 22 and recitals 63-65.

Such an obligation of advising the consumer had been provided by the first proposal for the Consumer Credit Directive,[117] but it was later abandoned in the modified proposal of 2005.[118] This amendment was explained by the European Commission by saying that, in response to a request by the banking sector and some of the Member States, it was compelled to declare that it is the consumer who is ultimately responsible for her final decision whether or not to enter into a given credit agreement.[119] The duty of the creditor is, therefore, to put the consumer in a position to adequately assess the advantages and disadvantages of a credit agreement and to strike the appropriate balance.

This framework is consistent with the rules enacted by European legislators with regard to financial services. The MiFID II directive designates advice as an autonomous service;[120] the same applies to insurance services.[121]

Nevertheless, the ECJ came to the conclusion that the Consumer Credit Directive does not prevent a national legislation (like the Belgian one) from stipulating that the creditor and the credit intermediary are obliged to ascertain amongst the credit agreements that they usually offer or intermediate the type and amount of credit most suitable (i) to the overall financial situation of the consumer at that moment and (ii) to the objective pursued by the contract.[122]

Moreover, according to article 18, paragraph 5, lit. (a), of the Mortgage Credit Directive, the creditor is to refrain from entering into a credit contract where the result of the creditworthiness assessment indicates that the consumer is not likely to meet in the required manner the obligations prospectively arising from the credit agreement.

On the contrary, the Consumer Credit Directive 'does not contain any provision regarding the course of action to be taken by the creditor in case of doubts as to the creditworthiness of the consumer'. Based on its Recital 26 it has been tentatively assumed that, where the assessment of creditworthiness is negative, the creditor has to warn the consumer but is not obliged to refrain from entering into a credit arrangement with her.[123]

117 Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM (2005) 443 final.

118 Amended proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC, COM (2005) 483 final.

119 Case 377/14 *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, ECLI:EU:C:2015:769, para 64; Case 58/18 *Michel Schyns v Belfius Banque SA*, ECLI:EU:C:2019:467, para 34.

120 MiFID II, art 24.

121 IDD, art 20.

122 Case 58/18 (n 119) paras 35-36.

123 Rott, P.: "Consumer credit", cit.,p.199; Mak, V.: "The Consumer",cit.,p.322.

Yet, the ECJ came to the conclusion that the Consumer Credit Directive does not prevent a national legislation (like the Belgian one) from imposing such an obligation on the creditor 'if he cannot reasonably take the view, following the check of the consumer's creditworthiness, that the consumer will be able to fulfill the obligation arising from the proposed agreement'.[124]

V. SOME FINAL REMARKS.

In summation, the trend fostered by European law towards a personalized contract is dependent on the fiduciary obligation which is characteristically assigned to the traders of financial services; it impinges on the duty to act in the best interest of the client.[125]

Accordingly, the same trend is not to be broadened to general contract law, where no duties of confidence or trust bind one contracting party, even if a professional, towards the other one, even if a consumer. Although most European countries may wish to adhere to good faith requirements in negotiations and the performance of a contract, this cannot imply an obligation to act in the best interest of the other party and to advise the latter prior to and during the performance of contract.

The starting point is that European contract law has been designed and enacted as a technique to overcome the fragmentation of national markets and to construct a single market. From a constitutional viewpoint, the conferral of legislative competence to the Union on private law is aimed at the establishment and functioning of the internal market and solely to this extent does the European Union have an undisputed competence to adopt legislative measures for the approximation of national laws, at least where the ordinary legislative procedure is followed[126].

In other words, the primary goal of European contract law is that of creating a 'level playing field' for businesses and, therefore, to remove national hurdles and barriers to cross-border transactions.

It is undeniable that consumer protection should be conceived against the backdrop of a continuum of weaker parties,[127] which may eventually encompass small and medium-sized enterprises. However, the justifications for such protection

124 Case 58/18 (n 119) para 49.

125 See para 4.1.

126 Cfr. Gutman, K.: *The Constitutional Foundations of European Contract law: A Comparative Analysis*, Oxford University Press,UK,2014,277ff. and Kaupa, C.: *The Pluralistic Character of the European Economic Constitution,* Hart, Ebook, 2016.

127 Grundmann, S.: "Targeted Consumer", cit. p. 224.

must be consistent with the foundations of European contract law, a framework that is fashioned not only by the multi-levelled interplay with the national laws of Member States but also by its institutional goal of securing the establishment and functioning of an internal market (article 114 and article 26 TFEU).[128]

As has been demonstrated[129], the weakness of consumers as such is deemed to justify consumer protection only insofar as it creates the risk of a failure of internal market; in that case, European legislators and policymakers are called upon to enact appropriate legislative regulations that aim at neutralizing the risk. By contrast, if consumers are affected by individual and subjective weaknesses – on account of cognitive errors and bias (like most factors vitiating contractual will)[130] – justification for legislative regulation is not self-evident. Instead, each measure of the kind must be supported and justified by mandatory reasons of public good, that have to be demonstrated by the European legislator.

Insofar as cognitive errors and bias expose the consumer to the risk of an economic loss, the loss is going to be suffered by that individual herself and no regulatory intervention by European legislators would be justified. Different is the case where cognitive errors and bias expose the consumer to the risk of an existential loss.

A loss may be deemed existential not only when health and human life or other inviolable rights of the person are endangered, but also when a threat is posed to interests, albeit economic interests, that may affect other existential aspects of the consumer.[131] This is generally the case of financial services – not only because they may well create the danger of an economic loss much higher than that which may be incurred day-to-day and therefore affect the consumer for the rest of her life, but also because this kind of service may involve pensioning funds and other resources ensuring financial security at later stages of life.

Secondly, to better serve the purpose of personalizing financial services contracts, greater personalization of information rules (particularly of disclosure) may be welcome, but it is not likely to represent a significant innovation.

In fact, information is too complex to be personalized in a way that can actually enable the client (particularly the consumer) to master it. The role of intermediaries as 'honest brokers' is still paramount.

128 See para 2.

129 Grundmann, S.: "Targeted Consumer, cit. p. 224.

130 Patti, F.P.: "Fraud' and 'Misleading Commercial Practices": Modernising the Law of Defects in Consent", *12 European Review of Contract Law*, 2016, p. 307.

131 Grundmann, S.: "Targeted Consumer", cit. p. 232.

Therefore, such intermediaries should be explicitly obliged to provide in the pre-contractual stage fitting advice for any prospective clients. Particularly, they should be held liable in damages in the event clients enter into a contract that creates over-indebtedness.

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