ANNEX A

PUBLIC SELECTION BASED ON QUALIFICATIONS AND INTERVIEW FOR THE AWARDING OF NO. 1 GRANT LASTING 12 MONTHS FOR CONDUCTING RESEARCH IN ACCORDANCE WITH ART. 22 OF LAW OF 30.12.2010 NO. 240 AT THE DEPARTMENT OF LAW OF THE UNIVERSITY OF BERGAMO (ACADEMIC RECRUITMENT FIELD 12/E3 - ECONOMICS, FINANCIAL AND AGRI-FOOD MARKETS LAW AND REGULATION, NAVIGATION AND AIR LAW – ACADEMIC DISCIPLINE IUS/05 - ECONOMICS LAW

announced with decree of the Rector Rep. no. 674/2017 of 21.11.2017 and posted on the official registry of the University on 21.11.2017

RESEARCH PROJECT

"The execution of investment and financing services by intermediaries and their internal organizational rules"

Due to the credence nature of financial and credit products, and the inevitable information asymmetries between intermediaries and clients, modern legislation pays special attention to the regulation of brokerage and credit intermediation services in order to remedy market failure hypothesis and to potentially ensure both investor protection and sound and prudent management of intermediaries. It is, therefore, hardly surprising that among the main goals of the Supervisory Authorities, as well as secondary legislations or self-regulations, there are: (i) investor protection and the safeguarding of their trust in the financial system (see Article 5, T.U.F.); and (ii) the sound and prudent management of intermediaries and the stability and competitiveness of the financial system (see Article 5, T.U.B.).

Pursuing these aims has required finding a way to address intermediary and client relationships, which is capable of balancing protection of investor's needs with the stability and efficiency of the market, and is capable of avoiding fraud conduct without burdening intermediaries with the risks of investment or service. In Europe and in the US, for both brokerage and credit intermediation, in line with the traditional conception of private autonomy and with the results of certain law and economics studies, this way has been found by using information requirements, essentially due to the good faith criteria in pre-contractual and contractual bargaining.

However, this system has been proven to be unable to provide both effective protection for clients in the case of misleading conduct by intermediaries and efficient protection mechanisms capable of hindering opportunistic initiatives of clients and of burdening intermediaries with only the costs of their actual defaults. It should not be overlooked how much this approach fails to give importance to the link between business and brokerage services' contracts. Even though the issue has long been known, it has not yet been solved and, given the recent enactment of Directive 2014/65/EU (MiFID 2 - Dlgs. 3 August 2017, n. 129), this discussion is extremely timely. It is therefore appropriate to start a specific research (*de jure condito*) participating in the present international debate and suggesting new findings.

To this end, the research will have to move from the idea that both financial and credit intermediation are mostly carried out by corporations which entrust the providing of financial services to internal procedures and organizational policies. By a new and original approach, it wants to consider the internal organization of intermediaries as a tool for investors/clients protection and market efficiency. In particular, in the area of brokerage, the rules to which reference is made are those on: i) conflict of interest, ii) best execution, iii) customer order management, iv) clients classification, v) adequacy and appropriateness of the financial instruments to the investors profile; and (vi) product governance. In the field of credit intermediation, we should recall articles 127 and 128-novies of the T.U.B and article 6, D.M. January 22, 2014, n. 31. It should, therefore, be noted that credit and brokerage intermediaries do not have broad autonomy in the definition of their internal procedures but they are subject to regulatory provisions.

Internal organizational procedures make the conduct of intermediaries standard, predictable and therefore steerable. There is a connection between organization and business activities capable of undertaking professional requirements and of ensuring prevention investor protection requested by regulation. There is no specific scholarship in civil law or common law aimed at clarifying the implications of this link. In order to determine which private remedies can be triggered in the event of violations of internal organizational policies, the research aims to clarify the relevance of such rules in relation to investor relationship, also taking into account the logical/systematic connection of standard contracts with business organization. It is believed that this way will offer a new solution to clients protection in brokerage services able to take into account also MiFID 2 Directive.

The research should clarify the connection between brokerage contracts and intermediaries' business activities. Notwithstanding, the relationship between act and activity in the field of standard contract is already known, the relationship between the organization of the business and contracts with third parties is not as deeply understood, especially where self-regulation of the business activity is limited by board decisions based on regulation objects. An in-

depth understanding of this relationship will lead to perceiving the rules of internal procedure as rules governing investor relationships. Moreover, the inadequacy of the contract to fully regulate phenomena related to business activity will be more apparent. After this in-depth analysis, it will be possible to reach a new qualification of brokerage relationships independent of contract regulation. The analysis has important intersections both with the studies related to suitability of contract to regulate activity and with the recent analysis on suitability of organization and management arrangements of corporations and their relevance in regulating relations with third parties.

In the attempt to solve the failure of contractual regulation the research will verify the possibility of importing recent research outlined from American scholarship, which has showed the existence of the fiduciary relationship defined in property terms and identified as a de facto situation (therefore regardless of a contract) in which a person obtains the power to manage and use an asset of a third party). The fiduciary relationship could be both interpersonal and social where the fiduciary is charged with pursuing abstract purposes rather than the interests of persons. The assumption of such powers entails the creation of specific duties (duty of loyalty and duty of care), the violation of which implies the application of special remedies guided by the need to ensure effectiveness in the realization of the injured interest. The fiduciary view of cases in which there is an entrustment of power on productive assets is strictly related to the problem of corporate social responsibility to stakeholders involved in the business activity. This link is almost totally ignored by Italian scholarship.

After clarifying the chance to transplant the fiduciary view (interpersonal and social one) in our legal system, it is necessary to ascertain in which brokerage services it is possible to recognize the fiduciary relationship and then to understand what the consequences are in the interpretation of internal organization rules. The analysis allows underlining some possible implications on the debate about unification of the broker-dealers and investment advisors regulation (see recently Department of Labor, Employee Benefits Security Administration, April 2016). In particular, it is possible to argue that the Shingle Theory is based on social fiduciary relationships, which also leads to the extension of the best interest requirement to broker-dealers.

Lastly, it is necessary to point out the consequences of the research on property remedies that investors could trigger where the trustee-intermediaries violates the internal organizational rules in the context of an interpersonal or a social fiduciary relationship. Reference is made to restitution remedies aimed to protect those *de facto* positions that grant the holder a real power on other people's property (see for instance article 1148 of the Italian Civil Code) and to those remedies which afford protection to widespread social interests detrimental to the enterprise (like for example class actions and inhibitor remedies referred to article. 140 and 140-bis, consumer code).

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The research period will last twelve months and will be divided in the following way: i) the first 6-9 months will be dedicated to a theoretical in-depth analysis of the issues mentioned above; ii) the following 3-6 months will be reserved to write an essay on the investigation results. Given the international character of the topic and of its debate, a part of the research should be conducted, preferably, in a Common Law country's research institute or in an institute of international studies (e.g. Heidelberg).

Expected results

It has been noted that the transparency model is not enough to ensure effective protection to investors/clients. Among possible solutions already proposed, there is not yet specific analysis on internal organizational rules as a private protection tool. This research project aims to fill this gap by an original research.

The research will decisively contribute to: *i)* make a new paradigm to protect investors different from transparency; *ii)* clarify the role of standard contract in the organization of business activity; *iii)* understand the corporate social responsibility to stakeholders involved in the business activity.

In this way, there will be some important insight capable of further applications on general issues of civil and corporate law related to the role of freedom of contract and to the organization and assets structure of corporations.

The research will significantly contribute to the ongoing international debate on: *i)* the nature, extent and aim of the fiduciary relationship in interpersonal and social form; *ii)* the general possibility to define property remedies enabling the principal to obtain effective and further protection than the contractual one; *iii)* regulation of broker-dealers in US system. Therefore, the research will ensure the possibility to participate to the debate on issues frequently discussed in Common Law countries.