Research program:
"The execution of investment services by financial intermediaries and their internal organizational rules"

Annex Code 1

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Description

Given the intrinsic dullness of financial products (i.e. credence goods) and the information asymmetries between intermediaries and investor, ample room is given to the rules protecting investors in modern legislation systems governing the financial market. Our legal system also follows this approach: among the first aims of the legislation on financial investment services providers there are in fact the protection of investors, the retention of their trust in the financial system and the market efficiency (Art. 5, Consolidated Law on Finance).

Such aims have always been pursued (including in Italy) by a type of regulations on the provision of investment services characterized by the principle of transparency (so-called mandatory disclosure). The centrality granted to this principle derives, first of all, from a comparison with the most significant solutions adopted abroad; secondly, from the results shown by the so-called efficient capital market hypothesis.

On this background, and with a view to providing (de jure condito) a more effective solution to the need to protect investors, and, at the same time, to ensuring an efficient allocation of savings, the research project proposed has the ambitious objective of providing a new framework to the category of investment services, which – we believe – will lay the foundations for a protection system that leaves mandatory disclosure aside.

The analysis will start from the consideration that the provision of all investment services depends on the observance, on the part of the investment services providers, of the rules stated by the primary or secondary legislation or, to a certain extent, of rules that are self-determined by the intermediaries themselves. Such rules aim to establish the procedures and internal organizational measures that support the provision of services. In other terms, it must be acknowledged that the methods by which the intermediaries organize their internal structure are not independently determined, as instead they are determined by rules which bind the intermediaries even if they ensure a certain degree of discretion. In particular, the rules to which reference is made are those on: i) conflict of interests, ii) best execution, iii) customer order management, iv) customers classification, v) adequacy and appropriateness of the financial instruments to the investors profile.

Therefore, all main and characterizing elements of service provision are based on a specific adoption of internal organization measures, which, on one hand, make it standardized, predictable and therefore steerable by determining the behavior of the intermediaries; on the other hand, by influencing the behavior of intermediaries in all of their relations with clients, these measures establish an interdependence between their organization and their business activity.

For the purpose of assessing if and which private-law remedies are afforded by the law to the investors in case of violation of the internal organization rules, the analysis will also try to explain the relevance of said rules in the relationships with investors, also keeping into account their relation with the business organization.

Moving away from the path followed so far by interpreters, we will try to follow a different one that – we believe – is more able to keep into account the need to combine both investors protection and the purpose of ensuring efficient savings allocation. The first step in this direction is the recognition of an intrinsic connection between the contracts for the provision of investment services and the business activity of the intermediaries.

Considering the serialization of the investment services contracts, the previous observation will lead, on one hand, to consider the internal organization rules for the provision of investment services as rules of conduct to be followed in the relations with investors. On the other hand, the link with the business activity will lead to believe that a contract inter partes is not totally adequate to regulate phenomena that concern not only the parties but also the whole activity of the entrepreneurs/intermediaries. Therefore, this analysis will aim to find a new kind of qualification for investment relationships that leaves contracts aside.
Moreover, this analysis is direct to verify the applicability of a recent investigation results to investment services. Such research showed the relevance of the fiduciary relationship (which amply used in common law) also in our legal system. The fiduciary relationship is defined in property terms and identified as a de facto situation (therefore regardless of a contract), in which a person (fiduciary) obtains the power to manage and use an asset of a third party (principal). The assumption of such powers on the entrusted assets determines the obligation for the fiduciaries to respect the interest of the principals. This obligation is composed by the duty of loyalty (i.e. the obligation not to use the asset in its own interest or not to seize the derived utilities) and the duty of care (i.e. the obligation to efficiently use the asset at least in order to retain its value).
Therefore, the analysis will verify first of all the possibility to consider investment services as typical fiduciary relations and, secondly, the possibility to qualify internal organization rules as a legal expression of fiduciary duties. The research will then define the non-contractual remedies that an investor/settlor may activate, when an intermediary/fiduciary violates the internal organizational rules, which are considered as expression of fiduciary duties. Reference is made in particular 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).
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, including possibly a visiting research period by an American university; ii) the following 3-6 months will be reserve to write an essay on the investigation results.

Description of expected results: novelty and effect on knowledge advancement
The transparency model (based on mandatory disclosure) is not enough per se to ensure effective protection of investors. It has been frequently acknowledged in doctrine (in Italy and abroad) and is confirmed by the recent crises in financial markets. This research project aims at investigating how to satisfy the need for greater protection in a new way. Indeed, describing organizational rules as a legal expression of fiduciary duties allows investors to apply property remedies against the violation of such rules. These remedies can afford a "strong" protection of individual investors that is congruous at the same time with the purpose of ensuring efficiency in the allocation of savings.
Finally, the analysis will give a significant contribution to the recently started debate about the general possibility to grant the principal a further form of protection (in addition to the contractual one) when the fiduciary violates his own duties.