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«They say things are happening at the border, but nobody knows which border» (Mark Strand)

Transparency and Circulation of Cryptocurrencies

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ABSTRACT: *From a legal point of view, some cryptocurrencies incorporate particular rights. it seems appropriate to assess – first – the legal profiles of these rights – second – their traceability to the definition of product / financial instrument contained in the European sectoral regulations and – third – the recognition of the need (also widely highlighted by the European institutions) to regulate autonomously and in parallel to the MIFID II all the operations that differ from the qualification of cryptocurrencies in terms of financial product.Pending the development of the MICA regulation, it remains the general idea that the positive outcome of such assessments is linked to the traceability of crypto within the scope of application of the rules of conduct which intermediaries are required to comply with in the performance of their activities. It is clear that our legal system pursues purposes of protection that must apply equally to the same needs of protection, whereby the obligation of correctness in the professional conduct involving the investors remains firm, regardless of the technological means supporting the investment*.

SUMMARY: 1. Introduction. – 2. Transparency and rules of conduct for the intermediaries. – 3. The most urgent questions. – 4. The offer of cryptocurrenciesbythe intermediaries. – 5. Asymmetries between the offer of the supervised intermediaries and the off-shoreoffer. – 6. MiFID and MiFID II regulation: the tripartite classification of clients. – 7. The new role of transparency.

1. The wide-ranging debate on the legal nature of *cryptocurrencies* and their usefulness for the economy has led to conclusions that are useful for framing the profiles that deserve a public intervention.

At the end of the day, from a legal point of view, the *immateriality* ofthe asset that fills *cryptocurrencies* withcontent is relevant, bearing in mind that some of them incorporate particular rights. Hence the assessment – first – of the legal profiles of such rights and – second – of the traceability of the same to the definition of product/financial instrument contained in the European sectoral discipline (i.e. MIFID II and MIFIR). It follows – third – the recognition of the need (also widely highlighted by the European institutions) to regulate autonomously and in parallel to the MIFID II all the operations that differ from the qualification of cryptocurrencies in terms of financial product, such as, for example, the management of cryptocurrency as object of payment or those related to contracts developed for the management of currency (qualification that, to date, is almost univocally precluded to cryptocurrencies in the European scene[1]) such as bank deposit contracts or even the so-called Crypto-ATM. In both cases, these aspects are at the heart of the proposal for a Regulation of the European Parliament and of the Council on crypto-assets markets (COM/2020/593 final – the so-called MICAR Regulation).

Indeed, pending the development of the regulation, and despite some critical issues to be still resolved (for example, it is well known how Article 5 of MiFID II requires for the application of the Directive, among the requirements for authorization, "the provision of services and/or the exercise of investment activities as an occupation or habitual activity on a professional basis", whereas up to now the creation and circulation of crypto-assets is in significant part the work of subjects operating outside the professional circuit; or, again, the fact that the provisions on the initial capital base of art. 15 MiFID II are difficult to comply with by start-up operating in the crypto markets, which as a consequence are often reduced to "hiding" behind the execution of agreements with authorized financial service providers, thus frustrating the aims of the regulation) it remains the general idea that the positive outcome of such assessments is linked to the traceability of *crypto* within the scope of application of the rules of conduct which intermediaries are required to comply with in the performance of their activities.[2]

Therefore, and following this line of interpretation, the doubts regarding the possibility that the innovation of the instrument incorporating the rights (i.e. an intangible asset encrypted and encoded with the language of the *blockchain*, instead of the dematerialized asset not encrypted and encoded with the language chosen by the central depositary) may modify the law applicable to the case at hand appear concrete but easy to resolve. It is clear that our legal system pursues purposes of protection that must apply equally to the same needs of protection, whereby the obligation of correctness in the professional conduct involving the investors remains firm, regardless of the *technological means* supporting the investment.

This being said, it seems appropriate to begin this investigation with considerations relating to the principles of transparency that govern the performance of financial activity and the rules of conduct. In this logic, it will be possible to assess whether there is an *agere* compliant with the indications of the law and, therefore, transparent in terms of relations between market operators.

2. As is well known, the need to protect the contractual relationship that occurs in the financial sector has led our legal system to provide a series of rules regarding the so-called transparency of contractual conditions. In particular these concern the set of information obligations which the intermediaries are required to provide to the authorities and their negotiating counterparts so that the relationships established are clear and do not give rise to interpretative perplexities which prevent the reading of the concrete contractual contents.

Since a long time the specialist doctrine has highlighted the modalities of a correct relationship between the saver and the intermediary, underlining the importance of contractual transparency for this purpose[3]. The latter, in fact, acts as a catalyst in the protection of the users of financial services, avoiding that forms of competition in negotiations result to be detrimental for them.

In fact, the European directives of the early 2000s (see the Prospectus Directive, the *Transparency* Directive and following) have regulated the system of information exchange between the client and the intermediary focusing mainly on the amount of information that the intermediary must provide to the client; and this in view of the shared objective of increasing the level of transparency through the increase of data and the facilitation of their access.

This objective, in concrete, has failed. This is due to three reasons: a) the *technicality* of the financial information (which cannot be oversimplified); b) the *low financial education* of the average saver (which probably cannot be remedied in a short time); c) the significant limitation of the *decision-making time* [4] (a factor which plays an essential role in the failure of the quantitative approach adopted by the legislator)[5].

In fact, the search for new organizational schemes of banking subjectivity has brought to light the need to resort to disciplinary forms that enhance the function of the transparency typically connected to the quality and quantity of information provided by the operators to the savers[6], but also to the attention to the methods of communication[7]. Transparency, therefore, is no longer merely the intermediary's obligation to provide the public or the individual investor with as much information as possible.

The reference to "quality" and, therefore, to balanced competitive canons has found its compendium in the possibility allowed to the investor to know the suitability(the *suitability rule*)[8] or not of the products that are provided by the negotiating counterpart.

The requirement of suitability becomes an effective instrument for rebalancing the inequality of contractual positions, allowing the information to be model in such a way as to constitute a counterweight to the state of manifest superiority of the subject endowed with greater possibility of access to knowledge[9] (being the latter entrusted with the task of putting the consumer in a position to avoid that "unscrupulous counterparts, or at least concerned solely with increasing their profits, place invalid products or in any way with different characteristics from those with which they are advertised and sold").

This objective has been pursued by the legislator until recently by imposing the compliance with rules of special law (articles 21 and seq. of the consolidated financial act), hence the disciplinary function of the contract, dynamically aimed (through the provision of specific clauses) at integrating the provisions in force on the subject[10].

Basically, the rules of conduct in the financial field are designed to ensure an *agere* characterized not only by operational transparency, but also by lines of conduct which prevent the intermediary from profiting from the position of substantial weakness of the negotiating counterpart. Hence the link between the rules of conduct and the so-called information asymmetries of the market in which the gap between the positions of the various operators may result in the possibility of abuses at the investors' expense. It follows that the primary function of the rule of conduct is to implement an integration in the contents of the negotiation relationship by introducing in the latter elements of evaluation that add to the professional diligence governed by articles 21 of the consolidated financial act and 1176 of the Italian civil code.

The rule of conduct is therefore to be considered as a provision set forth in the code of operational ethics of the financial intermediary even before it constitutes a significant part of the disciplinary system set up to protect the correct *modus agendi.*

3. What needs to be assessed, instead, is the need for protection regarding the circulation of cryptocurrencies which may not be qualified as financial products/instruments.

Indeed, assuming that some of these cryptocurrenciesdo not incorporate rights envisaged by our legal system (as, for example, in the case of financial instruments or electronic currency), it seems necessary to pay attention to the results of the first monitoring actions in order to understand whether, in this case, there is a need for protectionthat justifies a public regulatory intervention.[11]

In order to better understand the scope of such a conclusion, with reference to the European market, a brief mention shall be made to the significant changes that have taken place in the European legal system during the new millennium, as a result of the overall variation in global economic structures and the digitalization of trades.

In fact, at the present time, there has been an affirmation of the techniques of distance communication which, usually, place financial operations in a virtual and immaterial context in which it is difficult (*rectius*: almost impossible for the client) to distinguish between cross-borderand national operations,

with the obvious consequence of finding – in the digital infosphere – a level of integration of national markets never seen before (in terms of speed of interaction and strategic placement).

As known, the process of economic globalization – which began in the nineties of the last century – has led to an ever increasing "financialization of the economy" (in the sense that "financial wealth grows progressively [12]… with respect to real wealth")[13] which has found expression above all through the size of international financial flows, the speed and variety of investments, the faster circulation of information, the international diversification of portfolios and the push by investors "to use intermediaries professionally dedicated to the management of savings", as highlighted in the literature.[14]

This process is still today experiencing exponential growth, thanks to the strong contribution made by technological innovation and the developments that characterize the *fintech* sector, such as the spread of high-frequency algorithmic trading forms.[15]

This is also in line with the expansive monetary policies that – for a long time now – have characterized the actions of the ECB, which have allowed the authorities of the sector to *tolerate* the introduction of goods into the capital market which – at first sight – are suitable for supporting the circulation of capital, sometimes as *substitutes* forlegal currency.

Of course, the presence of differentiated types of financial products does not exhaust the solutions that have given content to the banking offer, being well-known the cases in which gold, diamonds and other valuables were offered, as well as artworks or real estate. Hence the need for mechanisms to assess the size of the risks underlying the products offered to the client; as well as for weighing up the possible scenarios by means of increasingly in-depth information from and to the investors: the latter must be, first of all, well known to the intermediary and, then, made aware (by the intermediaries) of the market mechanisms and of the actual *quality* ofthe products object of their negotiations.

In brief, what the European system outlines is a perimeter of greater security, in which the client enters whenever he/she deals with a supervised entity.

4. In considering, therefore, that the investor comes into contact with an intermediary subject to public supervision, it should be borne in mind that – over time – the intention of the national regulator, first, and the European one, then, has been not only to fill gaps in knowledge but also to identify innovative rules and techniques aimed essentially at protecting individual rights and ensuring the regular functioning of the capital market.[16]

The system aims at safeguarding the market together with the protection of individual investors; both in terms of the consequences that the breach of the rules of conduct may determine in the execution of negotiations, and in terms of the reflections on the reliability of intermediaries in the eyes of the public. There is, therefore, a reciprocal relationship between the correctness of operators and the good functioning of the market, considering that the former is *condicio sine qua non* for the affirmation of the confidence of savers in the market mechanisms, thus interacting on the relative possibilities of development and, therefore, on its good functioning.

Beginning the legal analysis of the rules of conduct for a correct use of *cryptos* in the internal market, it can be said that the reference to the techniques of behavioral finance provides useful hints in order to understand if the informative transparency may be sufficient to guarantee the effectiveness of the regulation (or if, as it seems probable already, further safeguards are necessary to guarantee the solvency of the operators and the stability of the market). This, in particular – and this is evident if we consider the development of the crypto market in the last 15 months – in light of the difficulties shown by consumers (who, following the reasoning carried out so far and referring to the vocabulary accepted by MiFID II, should more probably be defined as retailinvestors) in understanding the

profiles connected to the deep volatility of the cryptocurrencies: consider the fact that a Bitcoin one year from now – on 21 January 2021 – was worth about $31.000, then arising up to 57.000 a month later (February 22, 2021), returning below $30,000 in June and arising its annual peak ($67,000) last November and being, as of today, around $40,000. An oscillation, therefore, of up to 100% of its value which, if on the one hand, is certainly attractive in appearance from the perspective of an unsophisticated investor, on the other hand, involves obvious and known risks for the same, with respect to which he/she must be adequately made aware and informed.

More in particular, it is highlighted the difficulty for consumers – faced with the possibility of investing in crypto-assets– to perceive the latter as real financial instruments characterized, as such, by intrinsic uncertainty and, we could also say, profound speculative nature. The reasons behind this phenomenon are, in part, attributable to the diffusion of crypto offers outside institutional/monitored channels, ascribable to the phenomenon of the so-called shadow banking[17]; this has caused the original perception of crypto as something "other" compared to financial products, not as in terms of qualification (an aspect that, indeed, is more interesting for the jurist and the economist than to the retailinvestor) as, rather, in terms of earning possibilities and risk profiles. Certainly it is interesting to underline – especially if connected to the effects of the current discipline on the subject of transparency and supervision on investors' confidence – that, even today, the identification of cryptos as assets that still move largely outside of supervision determine not reticence, but interest in investment from consumers.

In addition, the literature has noted the particular qualification as credence good[18] of the assets chosen to make an investment (i.e., assets which are difficult to evaluate for the purchaser with reference to their quality until they have to be sold to recover their value). From here, the reference to the economic consideration that ascribes a limited usefulness to the information received at the time of the conclusion of the investment.[19] Of course the intention of protecting the investor implies accountability of the intermediary; if necessary also through an adjustment (or an extensive interpretation) of the rules of conduct to which the latter is bound.[20] This is also because the tendency of cryptocurrencies to fluctuate significantly in short periods of time is well suited (and much more than for regulated financial products) to exacerbate the influence on the investor of cognitive *bias* related to the interpretation of information under uncertainty conditions, such as over-optimism *bias* and *status-quo bias*. An issue, as is known in the literature, that is difficult to resolve through a mere increase in the amount of information provided, also considering the well-known difficulty of the unsophisticated investor in correctly interpret the notions presented to him/her.

In other words, if an investor turns to an intermediary to buy a cryptocurrencyfor investment purposes, the protection of the client necessarily passes through the professional evaluation (by the intermediary) of the adequacy and appropriateness[21] of the asset with respect to the purpose, having regard also to the dynamics of the capital market and the other information in his/her possession. Otherwise, the intermediary would be performing a mere distribution service (of assets) which seems hardly compatible with the role assigned to it by the banking and financial system.[22]

Therefore, the regulation's orientation towards the personalizationof the relationship between the supervised intermediary and the client, and the close correlation between professionalism in the financial *agere* and the integrity of savings, are of significant importance. In this way, a short path – which can be followed by intermediaries – isidentified in the attempt to interpret in a concrete way the "duty to act in the best interests of the client" (and for the integrity of the market) – already present in the MiFID Directive[23] and further strengthened by the provisions of MiFID II – with respect to the circulation of cryptocurrencies.

5. From the previous analysis, a first consequence of the above conclusion can be identified with regard to the behavioral obligations of transparency and correctness attributable to the supervised intermediaries. In fact, this conclusion determines an asymmetry between the operating conditions of

the supervised intermediaries and those of the offshoreplatforms, by which are meant those solutions that support the circulation of cryptocurrenciesthrough thematching of sale and purchase orders of the same, to be regulated through legal currency or in another way (i.e. through other cryptocurrenciesor financial products/instruments or other).[24]

To this asymmetry of access to the cryptocurrenciesmarket is accompanied the absence of customer protection safeguards [25] (including the suitability rule and know your customer) provided under the aforementioned MIFID discipline. This is accompanied bythe simultaneous increase in the risks of instability typical of innovations, amplified in this case by the lack of institutional financial operators and, with these, by the absence of a firm resistance to the temptations of the investors to take high-risk[26], hidden under the declared intention of introducing volatility components into their portfolios.[27]

It comes to light the need to identify the way to overcome the mentioned asymmetry in the access to the cryptocurrenciesmarket; hence the question concerning both the high level of protection ascribable to the relationships intermediated by supervised subjects, and the absolute freedom and negotiation autonomy to which the negotiations on the off-shoreplatforms are submitted. It is necessary to evaluate the usefulness, in terms of costs and benefits, of the choice of proceeding towards disciplinary paradigms (of various kinds) capable of ensuring more efficient forms of operation, which tend to achieve – together with more intense forms of social control – a responsibility based on an appropriate economic and financial culture (by all the market operators). This in order to ensure, on the one hand, the deployment of types of investment actually aware (if necessary, with high volatility) and, on the other hand, to stimulate more in general private investment towards sustainable and resilient instruments, functional to the success of the real economy. Therefore persists the need to identify the precautionary mechanisms necessary to remedy the lack of protection in the case of trading on the off-shore platforms [28] (given the lack of assistance from supervised intermediaries) as well as to create an ordered environment for the development of crypto markets, also considering their spillover effects – such as their environmental impact.[29] This implies the need to implement appropriate forms of interaction between general canons of correctness, transparency and fairness, even when trading on the aforementioned platforms (these also become reliable and able to guarantee greater security).

The outcome of such an assessment is important, even before banking and financial law, in the context of a broader reflection on the social market economy and on the need for the European Union to promote a development of global markets that oppose the presence of *legal heavens* (even before tax), in which products lacking the minimum quality levels to safeguard the individual rights of European citizens are made and traded.[30]

From this point of view, and with an eye always turned to the *de lege ferenda* discipline, it is worth highlighting how, if on one hand the current project of Regulation on cryptocurrencies seems to be structured around the same pillars that characterize the MiFID II framework(governance, prudential and organizational obligations, and an authorization system), the very choice of proceeding by means of a Regulation seems to further want to acknowledge the need of a complete parity of burdens incumbent on crypto operators, whereas vice versa the system outlined by MiFID II – even though conceived within a process of maximum harmonization – still left margins of discretion to Member States for those assetswhich are not qualified as financial instruments according to Article 4 of the Directive. This is not a casual example if we think of the German case, which with reference to BitCoins has considered that, since they had to be qualified as “units of account”, the German national banking law could be applied to cryptocurrencies, thus introducing an element of deep heterogeneity within the European panorama.

In this regard, it is worth highlighting the culture underlying the European regulation, in which the *rationality* (economical) and the *ethics* (behavioral) interact in a logic of integration that takes into account the essence of values of the activity carried out in the capital market.[31] This interaction is, in particular, expressed by the MIFID complex on financial services that – since the emission of the MiFID I[32] Directive and, subsequently, of the MiFID II and the Regulation 2014/600/EU (so-called MiFIR) – has developed certain techniques aimed at overcoming the typical problems of the financial *agere*, which appear to be of necessary application in the event that a European citizen purchases a cryptocurrencyfor investment purposes.

6. It is well known that citizens have different degrees of financial awareness[33], as the outcome of the European regulator's judgement of merit which has led to the adoption of a discipline based on different levels of investor protection, also in relation to the quality and professional characteristics of the same.

In this regard, it should be remembered that the MiFID II Directive makes a distinction between non-qualified operators (mainly families, the so-called *retail* clients), qualified counterparties (among which a particular role is played by institutional clients: banks, insurance companies, SIM, SGR, SICAV) and professional clients, and namely the subjects who, for various reasons, perform activities in the financial sector and who have high experience requirements.[34]

With reference to the classification of clients within the different categories, the circulation of cryptocurrenciesin a regulated environment must take into account the ability to adequately assess the content of the contractual proposals and, consequently, the risks of the investment, as well as the economic availability and the presence (if any) of forms of control of a public nature represent essential elements in order to modulate the content of the intermediaries' duties in the panorama outlined by MiFID II.[35]

7. Given the aforementioned uncertainties, the new meaning of transparency in the modern sense emerges clearly, to be interpreted as a principle aimed not only at counteracting the phenomena of information asymmetry (which, of course, represent today a significant risk connected to the commerce and circulation of cryptocurrencies) but also at preventing issues of a systemic nature deriving from an ill-structured allocation of risk in banking activity, capable of creating gaps in responsibility, phenomena of overexposure and inefficiencies.

It derives the emphasis placed on the binomial transparency-responsibility, traditionally indicated as the rationalefor the provision of a special and innovative model – legally and historically – for the protection of the investor, as well as the specialty of investment services and financial instruments identified as an essential element to qualify the intermediary-client relationship in terms of a service relationship, rather than the sale of a product. Therefore, the progressive diffusion of crypto-assets– both as an auxiliary function and as a substitute for traditional investment services – leads to a more complete and desirable reflection on the new balances in the relationship between the two categories. This is done by linking the rules on responsibility not to transparency in the formal sense (providing all the information) but to transparency in the substantial sense that requires the intermediary to do what is appropriate to allow the investor to make an informed decision.

Pending a possible *ad hoc* discipline such as that outlined by MiCAR (which, however, it is essential to remember, does not operate in prejudice to the rules outlined by MiFID 2, being expressly excluded its applicability to financial instruments), the analogical and integrative application of the general principles will be the main reference for the purposes of the construction and interpretation of the *ius conditum*, which enhances an interpretation of the provisions on obligations and organization of intermediaries functional to the respect of criteria of substantial justice towards the investor, and favors – when appropriate – a specific declination based on the characteristics of crypto-assets.

In this direction finds its place the recent jurisprudence of the Criminal Court of Cassazione which, having had the opportunity to rule on the classification of bitcoins as cryptocurrencies or financial[36] products, has shown that, even if cryptocurrencies are not qualified as financial products in the proper sense, the circulation of such assetsis subject to the rules on financial intermediation (Article 94 of the consolidated financial act), with the related rules of responsibility, when the sale of bitcoins is advertised as a real investment proposal. Therefore, the need to interpret the principles of transparency and responsibility in a very substantial way is emphasized, leaving aside the reflections on the most appropriate *nomen iuris* for cryptocurrencies according to the application of rules more favorable to the protection of the user / investor.

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[1] On September 7, 2021, in the small Central American State of El Salvador, came into force the *ley Bitcoin*, the cryptocurrency that has assumed the status of legal currency along with the U.S. dollar, adopted in 2001 to remedy the systematic hyperinflation of the old state currency, the colón. The goal of attracting investment from abroad is evident where the law introduces tax reliefs for those who invest in the local economy and even citizenship is guaranteed under certain economic conditions. See https://formiche.net/2022/01/in-viaggio-el-salvador-bitcoin/; LOPS, *Con il bitcoin nella giungla del Salvador: "Test riuscito"*, in IlSole24Ore of 6/2/2022.

[2] On the rules of conduct to be followed by intermediaries in providing investment services to investors, see, among others, Roppo, *La tutela del risparmiatore fra nullità e risoluzione (a proposito di Cirio bond & tango bond)*, in *Danno e responsabilità*, 2005, p. 624 ff.; Pellegrini, *Le controversie in materia bancaria e finanziaria. Profili definitori,* Padua, 2007, chapters V and VI. On the importance of investor information see, among others, Perrone, *Informazione al mercato e tutele dell'investitore*, Milan, 2003. Recently, see also DELLA NEGRA, MiFID II and Private Law. Enforcing EU Conduct of Business Rules, Bloomsbury, 2019. On the specific topic of the interaction between such rules and the cryptocurrencies market see Massad, *Regulating cryptocurrencies isn't just about avoiding systemic risk,* Brookings, Oct. 52021.

[3] On contractual transparency, see, among others, ALPA, *La trasparenza dei contratti bancari,* Bari, 2003; URBANI, *La «trasparenza» nello svolgimento dell'attività*, in AA.VV., *Manuale di diritto bancario e finanziario,* edited by Capriglione, Wolters Kluwer, 2019, p. 527 ff. Also DELGADO, *Transparency in the banking sector*, Speech by Ms Margarita Delgado, Deputy Governor of the Bank of Spain, at the Banking Law Conference, organized by the Malaga Lawyers' Association, 4 June 2021, www.bis.org.

[4] The *retail* investor tends not to engage in the critical evaluation of the negotiation proposal by the intermediary – because he/she is disoriented or disinterested – believing that "it is more convenient … to use his/her own time otherwise than in the study of the financial markets, their dynamics and the products that circulate therein". See RORDORF, *La tutela del risparmiatore: norme nuove e problemi vecchi*, in AA.VV., *La distribuzione di prodotti finanziari, bancari e assicurativi. Nuove regole e problemi applicativi*, edited by Antonucci and Paracampo, Bari, 2008, p. 99.

On the time factor see *La rilevanza del tempo nel diritto commerciale,* edited by Morera, Olivieri and Stella Richter jr., Milan 2000; more recently see the reports in the Conference "*La rilevanza del tempo nel diritto bancario e finanziario*", organized in Padua on June 15, 2015 by the Law School of the University and the Association of Professors of Business Law – ADDE.

[5] See Girino, *L'inspiegabile riduzione della trasparenza sul rischio finanziario: realtà normativa ed equivoci europeisti*, in *http://www.dirittobancario.it*, 2, 2013; CHIU, *Transparency Regulation in Financial Markets – Moving into the Surveillance Age?*,in European Journal of Risk Regulation, Vol. 2, No. 3, 2011, pp. 305-321.

[6] See Girino, *mentioned*, according to whom "it does not appear possible to postulate an investment choice after a thorough and meditated analysis and investigation of the contents of the information received: who will ever have the patience, the ability, but above all the technical time to conduct the examination of prospectuses that are increasingly similar, in terms of the thickness of the tome and the size of the printing characters?"

[7] This is a particularly relevant aspect for the digital offering as on the go access to financial services and products requires a careful analysis of the customer journeydesign(e.g. positioning of information on the web page/phone screen; clarity and simplicity of the language used to describe contractual conditions; alertsand questions that require to the saver and the investor to review and validate the options that have been selected to ensure a careful reading of information especially in light of the tendency to quickly scroll through smartphone/computer screens).

[8] See Booth, *The Suitability Rule, Investor Diversification, and the Using Spread to Measure Risk*, *Business Law*, 1998, 1599, who notes that the *suitability rule* is «*one of the most common issues arising in disputes between brokers and customers*».

[9] See Greco, *Rileggere le regole dell'informazione nel rapporto tra intermediario e risparmiatore*, in *Responsabilità civile e previdenza*, 2014, No. 3, p. 939; Tamar, *The Failure of Investor Protection by Disclosure*, in 81 U. Cin. L. Rev. 2012, 422.

[10] In this regard, see Capriglione, *Introduzione,* in *I contratti dei risparmiatori*, edited by Capriglione, Milan, 2013, p. 8 ff.

[11] See Masera, *Nuovi rischi e regolazione delle cryptovalute*, 2022 (forthcoming); Savona, *Features of an economics with cryptocurrencies,* Lectio Magistralis at the University of Cagliari, Oct. 5 2021.

[12] Cf. Fazio, *Sviluppo economico e mercato globale*, in *Documenti della Banca d'Italia*, 1997, no. 566. See also, among others, Stiglitz, *La globalizzazione che funziona*, Turin, 2006; Berti, *Il mercato oltre le ideologie*, Milan, 2006; Padoa Schioppa, *La veduta corta,* Bologna, 2009; Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato,* Turin, 2009; Della Cananea, *Al di là dei confini statuali*, Bologna, 2009.

[13] For a reconstruction of the doctrinal debate, see, *ex multis*, Nardozzi, *Riflessioni sulla finanziarizzazione dell'economia,* in *Economia e politica industriale*, 1987, p. 121 ff.; Ciocca, *La nuova finanza in Italia*, Turin, 2000; Masera, *La crisi globale: finanza, regolazione e vigilanza alla luce del rapporto De Larosiere*, in *Riv. trim. dir. econ.*, 2009, p. 147 ff.; more recently Capriglione and Troisi, *L'ordinamento finanziario europeo. Dopo la crisi. La difficile conquista di una dimensione europea*, Milano Assago, 2014; Carruthers, *Financialization and the institutional foundations of the new capitalism*, in Socio-Economic Review, Vol. 13, Iss. 2, 2015, 379–398.

[14] Cf. Pontolillo, *Globalizzazione, finanza ed etica*, Lecture given at the Almo Collegio Borromeo, University of Pavia, November 13, 2003.

[15] To which the MiFID II Directive pays specific attention (see Recital 61).

[16] Beyond the choice between the paternalistic approach and the anti-paternalistic one, it should be shared the opinion of those who emphasize the importance, from the legal point of view, of the distinction between conscious decisions and decisions that are the result not only of an error but also of manipulation by experts capable of misleading groups of consumers, suggesting them and exploiting their psychological weaknesses. In this regard, see Caterina, *Psicologia della decisione e tutela del consumatore*, in *Analisi giur. dell'economia*, 2012, n. 1, p. 82 ff. For a survey of behavioural studies in finance see Barberis, Thaler, A Survey of Behavioral Finance", in Handbook of the Economics of

Finance, G.M. Constantinides, M. Harris, R. Stultz (edited by), Amsterdam, Elsevier Science, 2003; Veld , Veld-Merkoulova , *The Risk Perception of Individual Investors*, in Journal of Economic Psychology, 29, 2008, pp. 226-252.

[17] See LEMMA, *The Shadow Banking System. Creating Transparency in the Financial Markets,* Palgrave, 2016.

[18] These are services in which the high degree of information asymmetry does not allow the client to identify *ex ante* the type of service he/she needs, nor to evaluate *ex post* the goodness of the service received (e.g. the quality of medical services, health, education, legal advice). See Gottschalk, *What Characterizes Credence Goods? A Critical Look at the Literature*, 2008, https://ssrn.com/abstract=3114257.

[19] The categorization of assets on the basis of the information effort required to perceive their quality – and the consequent distinction between search goods, experience goods and credence goods – is by Nelson, *Information and consumer behavior*, in *Journal of Political Economy*, 1970, 78, p. 311; see also Wein, *Consumer information problems*. *Causes and consequences*, in *Party autonomy and the role of information in the internal market*, edited by Weatherill, Grundmann, and Kerber, De Gruyter, 2001, p. 80 ff.

[20] See Davola, *Bias cognitivi e contrattazione standardizzata: quali tutele per i consumatori?* in *Contratto e impresa*, 2017, no. 2, p. 637 ff.

[21] See ESMA, *Final Report Guidelines on certain aspects of the MiFID II appropriateness and execution only requirements*, January 3, 2022.

ESMA intends, through appropriate internal *policies* and procedures, to achieve an effective and efficient assessment of the client's knowledge and experience, in accordance with a documented and controlled process, even where investment companies use IT procedures and assessment algorithms. This process should not be regarded as a mere formality. In the event that the intermediary does not consider a particular transaction to be appropriate for the client, it must provide an effective warning, including a graphic warning, and explain the reasons why it is evaluated as inappropriate.

[22] See US COMMODITY FUTURES TRADING COMMISSION, *Bitcoin basics*, 2022, where it is confirmed that "virtual currencies, such as Bitcoin, have been determined to be commodities under the Commodity Exchange Act (CEA)."

[23] See *Il Progetto Carta degli investitori* January 2014, at *http://www.consob.it*. See also, on this topic, Rigoni, Cruciani, Gardenal, *Trust the Change? Trust and The Impact of Policy Making: The Case Of The Introduction Of The Mifid 2 Directive In The Financial Advisory Industry*, in *The Behavioral Finance Revolution. A New Approach to Financial Policies and Regulations*, Elgar, 2018. See also Linciano, *How Behavioral Finance Can Reshape Financial Consumer Protection: Consob's First Steps in The European Framework*, *ibidem*.

[24] See Lemma, *FinTech Regulation, Exploring New Challenges of the Capital Markets Union*, Springer, 2020.

[25] In the face of this reality there is the difficulty of protecting an investor from his/her own speculative ambitions.

[26] However, the presence – in the sector under examination – of non-negligible risks should be underlined (with accentuation of the danger of a market turbulence), as well as the prospect of disputes in relations with clients (due to the increasingly frequent research for compensation by

financial intermediaries for the losses incurred as a result of the depreciation of the asset being invested, as can be seen from the case law on the subject of "betrayed savings"; on this point, Pellegrini, *Le controversie in materia bancaria e finanziaria*, *mentioned*.

[27] The development of the Italian corporate bond market was essentially concentrated between 1999 and 2002, in an economic context characterized (at least since 2000) by a *sudden* downward correction of trading of shares and by a phase of economic stagnation which is still underway. The economic literature has ascertained that, in negative economic phases, the propensity of companies' directors in financial difficulty to adopt incorrect financial statements policies increases, in order to mask the real situation of the company; cf. Bruni, *L'attitudine segnaletica del bilancio consolidato per l'analisi del valore del gruppo di imprese,* in *Rivista italiana di ragioneria e di economia aziendale,* 2003, fasc. 1/2, p. 10 ff. Therefore, it is not surprising that corporate crises (including those linked to fraudulent behaviour) are more frequent in recessive economic phases and, in the case of Italy, in a particular phase of transition towards a more market-oriented financial system.

[28] For a look at data and indices see Minenna, *Criptovalute: perchè il 2022 sarà l'anno dei regulators*, in *IlSole24Ore*, October 11, 2021 according to which "in a sector where regulatory arbitrage of bans and divergent interpretations is extremely easy…it would be necessary to encourage as much as possible a coordination of the various authorities around shared principles and procedures: the EU has chosen the most correct path through the development of the Markets in Crypto-Assets (MiCA) Regulation, but the rhythm seems too slow".

[29] See Thedeen, Risinger, *Crypto-assets are a threat to the climate transition*, Swedish Financial Authority, Stockholm, 5 Nov. 2021.

[30] For the setting of the question according to which the market cannot be oriented exclusively to efficiency-allocation objectives (without, therefore, renouncing the prerogative of profitability) but also to social-distribution objectives, for which the exploitation of a development model responding to the canons of ethical and behavioral correctness has, therefore, imposed itself as the main operative solution; hence the coexistence of healthy macroeconomic policies, good rules, effective supervision and, last but not least, suitable models of *corporate governance,* see Aa.Vv., *Saggi sulla metodologia della ricerca in economia,* edited by Masera, Rome, 2010, where the critique of quantitative theories is a prerequisite for the identification of the ordering criteria necessary for a return to equilibrium on the basis of renewed methodologies of analysis.

[31] Cf. Pellegrini, *Etica e regole di condotta degli intermediari finanziari*, in AA.VV., *Banche ed etica*, edited by Sabbatelli, Padua, 2013. See also Capriglione, *Introduzione*, in AA.VV., *Banche ed etica*, mentioned, p. 11 ff.

[32] Implemented with the regulatory framework constituted by Directive 2004/39/EU, later implemented by the second level Directive 2006/73/EC.

[33] See Hearing of the General Officer of Consob, Mr. Antonio Rosati, during the "Investigation on the problems relating to the diffusion of derivative financial instruments", Rome, January 12, 2005, in *Banca borsa titoli cred.*, 2005, I, p. 213 ff.

[34] See Article 30 MiFID II.

[35] See Di Nella, *Le regole comportamentali nella distribuzione, di prodotti finanziari complessi*, in *La MiFID II, Rapporti con la clientela – regole di governance – mercati*, edited by Troiano and Motroni, Padua, 2016. See previously Gabrielli – Lener, *Mercati, strumenti finanziari e contratti di investimento,* in Aa.Vv. *I contratti del mercato finanziario*, edited by Gabrielli and Lener, book I, in *Trattato dei contratti*, directed by Rescigno and Gabrielli, Turin, 2004, p. 34 ff.

[36] See Criminal Court of Cassazione, section II, November 10, 2021, no. 44337.

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