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IL CONFLITTO DI INTERESSI NELLA GESTIONE COLLETTIVA DEL RISPARMIO

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ABSTRACT

Globalization and the evolution of markets, together with the recent financial scandals that have disrupted the American and European economies, require a serious reflection on the shortcomings of the control mechanisms in the financial markets. In this context, growing importance has been attributed to topics like transparency, corporate governance, information disclosure and rules of conduct, including those relating to conflict of interest.

The conflict of interest, from an economic point of view, entails a separation between an entity entrusted with the responsibility of taking a decision (the agent) and another facing the related risks (the principal). From a legal point of view, the interaction between the principal and the agent is a fiduciary relation, in which the agent acts in the interest of the principal and is entrusted with certain power of discretion. This relation entails a risk of opportunistic behaviour by the agent, who may pursue his own interest rather than that of the principal.

In financial markets, the conflict of interest assumes a particular importance as the risk of opportunistic behaviour, inherent in any fiduciary relation, increases exponentially. Investors' gains do not only depend on their behaviour and on that of their intermediaries, but also on causal factors out of their control. This lack of transparency may encourage the agent misconduct, as it can help him to hide his own responsibilities.

In particular, the management of investment funds can be strongly influenced by the interconnected relations between banks and companies. This interconnection can cause significant problems of independence in investment decisions and, consequently, harm the investors. The widespread diffusion of the conflicts of interest and its unavoidability have forced the legislator to introduce a new discipline. This discipline does not establish a general prohibition to act in situations of conflict of interest, as this option would risk to paralyze the market. The legislator has instead chosen to introduce *ad hoc* mechanisms designed to identify the conflicts of interest at an early stage in order to

avoid any negative repercussion on the investors. To this aim the new discipline requires the agent to act in a transparent way and in the best interest of his client.

The present work is intended to give a complete and thorough overview of the conflict of interest in the field of collective asset management, where it takes the form of a voluntary appropriation of wealth in violation of a fiduciary relation.

To this aim, this research identifies and critically analyses the primary and secondary legislation regulating the management of investment funds, taking into consideration the international context too. This analysis is meant to highlight the most problematic elements of the current legislative framework and to assess its effectiveness in ensuring an adequate level of protection for those investors relying on collective investment schemes.

This study is structured in four chapters. The first chapter presents a wide discussion of the concept of conflict of interest as a fiduciary relation in civil law. The second chapter gives an overview of the current regulatory regime and of the most relevant international standards in the field of collective asset management. The third chapter focuses on the mechanisms designed to prevent the occurrence of a conflict of interest, while the fourth chapter discusses the problematic aspects related to the mechanisms for the identification and management of conflicts.

The result of this research suggests that a legislative framework focused on prevention and management does not actually discourage opportunistic behaviour. On the contrary, stringent controls, dissuasive sanctions and effective enforcement can make the abuse of the fiduciary relation an anti-economic choice for the agent and represent therefore an effective deterrent.