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Where is the limit of *Mis-selling*?

Zofia Maria Mazur†

A B S T R A C T

Financial services are complex and sometimes can be difficult for even the most knowledgeable investors to understand, thus consumers are particularly susceptible to purchase the improper products which are often unethically offered by professionals. Consequently, should be avoided the situation in which professionals benefit from their inappropriate business behaviors. The serious cases of unfair conducts of financial market players have introduced and developed, for the first time in the United Kingdom, a new notion - Mis-selling, consisting of marketing and sales of financial, insurance, pension products and services to customers that do not meet their needs and financial profile. Gradually, such issue and the related legal regime was expanded and further developed in other countries. Mis-selling happens for several reasons, refers to every adult, assumes many forms, and as we could see, the financial crisis has exposed the failure of financial market regulators to identify and monitor systemic risk. The purposes of the paper are therefore to illustrate some of the professional misbehaviors, to present and compare different regulations on mis-selling and enforcement framework in Italy and in Poland and to assess their effectiveness.

Keywords: Financial Consumer Protection, Mis-selling, EU Polish and Italian legislations, investor protection

Ⅰ. Introduction

"It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance your home with a mortgage that has the same one-in-five chance of putting your family out on the street - and the mortgage would not even carry a disclosure of that fact. Similarly, it is impossible for the seller to change the price on a toaster once the customer has purchased it. But long after the credit card slip has been signed, the credit card company can triple the price of the credit used to finance your purchase." (Warren 2008, p. 452).

From bank accounts to mortgages, payday or long-term loans, credit/debit cards, financial investments, pensions and life insurances, in practice almost every adult, in some way, is a customer of financial services. Consumers are faced with a wide range of options and even more responsibilities about their savings, since the decisions they make have a great impact on their financial well-being. Access to information on the financial market becomes even more relevant for customers in the case of long-terms financial services (e.g., mortgage loans). Thus, fair treatment, clear and precise information about the product and service are fundamental to enabling consumers to make a conscious and informed choice. There are many reasons why consumers should be well-informed as there are many legal provisions governing this particular aspect. Unfortunately, a high number of different regulations lead to a very complex and confusing legislative architecture.

Almost every single relationship between a consumer

† Ph.D. Student of Law and Protection; Department of Law, University of Rome "Tor Vergata"; via Cracovia 50, 00173 Rome, Italy; zofiamaria.mazur@studio.unibo.it

and a professional is covered by the rules concerning transparency and disclosure. But does quantity also mean a good quality of those regulations? Have the institutions responsible for financial consumer protection fulfilled their obligations to act against unfair professional practices? Are these measures and supervision efficient and effective? These and other questions are posed by the author who tries to reassess the problem of mis-selling which occurs almost every single day and affects several commercial relationships.

Recent and less recent series of scandals, abuses and frauds have shown that, despite a huge number of various legislations, there is always room for some misbehaviors and unlawful practices. Such events significantly reduce investor's trust in this market, its regulators and financial institutions. It seems that the time when financial entities were treated as institutions of social trust has already passed away. As was noted by OECD, "the global financial crisis highlighted the need for more effective financial consumer protection measures as consumers face more sophisticated and complex financial markets. The availability of information has grown both in quantity and complexity and the pace of change, in terms of new products developments, product innovation, and technological advance, has increased dramatically".[1]

The phenomenon of mis-selling on the financial market, consisting of market abuse, frauds, aggressive and predatory selling techniques of inadequate products, biased advice, unequal practices and so on, has occurred repeatedly over the last decade. These systematic and widespread breaches of conduct by banks, brokers and non-financial institutions are taking place in many countries. Therefore, the problem is not new, but it is still present on the financial marketplaces, despite the existence of a huge number of EU and domestic legislations and regulations.

The issue becomes even more relevant when we take into consideration the ever-increasing number of new distribution methods, compared to the traditional ones, of financial, insurance and pension products and services, such as on-line or by telephone sales, trading on-line platforms, digital financial services[2], or robo-advisors[3], as well as the current critical situation due to the spread of COVID-19. In some cases, the aforementioned behaviors may seem like simple "misconduct" of a bank; however, an inadequate financial product could lead to wiped-out savings, over-indebtedness, lost homes, unexpected costs, anxiety, families' troubles and broken lives.

In order to anticipate possible problems, help consumers make sound investment decisions, and to avoid a dangerous spiral from which individuals may never recover, the author investigates whether existing regulations are sufficiently effective in banning professional misbehaviors that pose unreasonable risks detrimental to consumers and investors. In particular, the author attempts to identify and analyze the problem of mis-selling of financial and insurance products to retail and professional customers, and suggests some possible measures to prevent professional misconduct and remedies for violations of national and European legislation regarding the inappropriate sale and cross-selling of the mentioned products. Addressing the issue is not as easy as it may seem, because different kinds of products fall under different regulations, requiring different measures and levels of transparency and disclosure.

Therefore, the paper is divided into three parts, focusing on the following points: definitions and examples of mis-selling in the financial, banking and insurance sectors; analysis of European, Polish and Italian regulations and existing measures concerning the private and public enforcements provided by national competent authorities; and proposal (or re-proposal) of some new-old remedies.

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[1] https://www.oecd.org/daf/fin/financial-markets/financialconsumerprotection.html.

[2] "Digital financial services (DFS) can be defined as financial operations using digital technology including electronic money, mobile financial services, online financial services, i-teller and branchless banking, whether through bank or non-bank institutions. DFS can encompass various monetary transactions such as depositing, withdrawing, sending and receiving money, as well as other financial products and services including payment, credit, saving, pensions and insurance. DFS can also include non-transactional services, such as viewing personal financial information though digital devices." (OECD 2019a, p. 4).

[3] As defined by ESMA Guidelines on certain aspects of the MiFID II suitability requirements "robo-advise means the provision of investment advice or portfolio management services (in whole or in part) through an automated or semi-automated system used as a client-facing tool". For more detailed information *see* European Commission (2018), *Distribution system of retail investment products across the European Union.*

Ⅱ. The mis-selling definition

There is still no uniform definition of the term "mis-selling". Thus, the following notes present existing and possible meanings, and provide some examples of the phenomenon.

A. Definitions of Mis-selling

Most authors define mis-selling as the sale of unsuitable, inappropriate products and/or services. E. Wierzbicka[4] considers mis-selling as dangerous conducts for consumers, which means unfair sale questionable from a legal point of view or the use of unethical practices, such as intentional misleading. In the United Kingdom "mis-selling has been defined by the former Financial Services Authority as a «failure to deliver fair outcomes for consumers». This can include providing customers with misleading information or recommending that they purchase unsuitable products.".[5] According to Poland's amended Act on Competition and Consumer Protection[6] mis-selling is considered as a practice aimed at suggesting to consumers the purchase of financial services that do not meet their needs, taking into account the information available to professionals on the characteristics of the products, or aimed at proposing in inadequate manner the purchase of these services.[7] The author of this contribution shares all the definitions presented above. For the purpose of the paper, the mis-selling practices are consider as unethical and predatory selling of inappropriate and unsuitable financial products and services. More specifically, mis-selling may consist of:

- Inappropriate, unethical, unlawful behavior (e.g., requiring disproportionate collaterals for loan repayment, cash loans with very high interest rates such as small-dollar loans;
- High-pressure sales, especially of risky or questionable investments;
- Sale of products unsuited to consumers' needs[8] (i.e., credit or revolving cards, mixed funds);
- Unsecured investments or complex and/or unclear investment strategies;
- Inappropriate supply of financial products and services in terms of knowledge, experience in the investment field and the possibility to support the loss (risk) to the client of potential client (e.g., sales of very long-term obligations to older consumers, unnecessary insurance);
- Missing, unfair, unclear and/or misleading information for example about available alternatives, additional costs, the risks, the amount of the insurance premium, the specific coverages, the staring (or ending) date of the guarantee, the proportionate reduction of insurance costs in case of early repayment of a loan, instructions for withdrawal, etc.;
- Aggressive marketing;
- Predatory lending;[9]
- Slamming, an extreme and criminal form of mis-selling which "consists in forging a consumers' signature in order to conclude a contract or drawing up a contract in the form of an information questionnaire with a view to deceitfully obtaining a consumers' signature" (Czechowska & Waliszewski 2018, p. 23).

Mis-selling occurs frequently also by the combination of two (or more) products/services (so-called *cross-selling*)[10], such as combination of financial services and insurance (so-called insurance-linked investment products, i.e., the "Wells Fargo" account fraud scandal in the U.S.) or pension products offered by banks, insurance companies, brokers, car dealers, sellers of household appliances and electronics. This may also include their representation which induces a consumer to believe that the tied product is essential, mandatory or that it has some characteristics that it does

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4 In: „Misselling barierą rozwoju ubezpieczeń w Polsce", *Zeszyty Naukowe Wyższej Szkoły Humanitas. Zarządzanie*, n. 2, 2016.

5 https://www.nao.org.uk/report/financial-services-mis-selling-regulation-and-redress/.

6 Dz. U. z 2017 r., poz. 229.

7 "(…) proponowanie konsumentom nabycia usług finansowych w sposób nieadekwatny do ich charakteru".

8 Article 24 para. 2 point 4 of Act of 5th August 2015.

9 For more detailed information *see* Mazur Z. M. (2021). The Consumer Lending Protection. How to prevent the predatory lending and "debt slavery" on the small-dollar lending market during and after the COVID-19 emergency, manuscript submitted for publication.

10 According to the *EBA Consumer Trends Report 2017*, p. 22 - Cross-selling has been considered as a problematic selling practice in many European countries. For further information *see* Colaert, Veerle A. (2016), MiFID II in Relation to Other Investor Protection Regulation: Picking Up the Crumbs of a Piecemeal Approach, in D. Busch & G. Ferrarini, *Regulation of the EU Financial Markets: MiFID II and MiFIR,* Oxford University Press.

not actually have (e.g., granting loans together with a mortgage). They might be defined as operations of "financial engineering" that require a plurality of different contracts in order to maintain their structure. These practices consist of tying, "where two or more financial services are sold together in a package and at least one of those services is not available separately" (i.e., the obligatory opening of current account when a mortgage loan is provided); and bundling, "where two or more financial services are sold together in a package, but each of the services can also be purchased separately".[11]

B. Examples of Mis-selling

1. Examples of Mis-selling in Poland

In Poland, in 2010 through 2016 there were numerous cases of fraud, which consisted in transferring the borrower's property to the lender simultaneously with the conclusion of a consumer credit agreement, because such agreement contained provisions on the right to repurchase the property.[12] The transfer of the property was a condition for obtaining a loan.

Another very important and recent case was the "GetBack" case conducted by the Office of Competition and Consumers Protection (UOKiK) against the bank *Idea Bank*. The misconducts and infringements that violated the collective consumer interests consisted of misleading marketing and distribution of GetBack's corporate bonds by disseminating false information; and deceiving clients and potential clients about the safety level of the bonds and their relative profits by presenting false documents regarding the stable and guaranteed growth of interest rates. The products that had been sold to clients, were high-risk and unsuitable as many of them had lost their savings. Consumers had not been made aware of the detailed and additional costs involved. And obviously, the professional was not acting in the best interests of investors.

After a partial decision issued by the Office in August 2019, the Authority has recently confirmed further charges. The President of UOKiK said that "Corporate bonds were offered even to those clients who had never dealt with investment products and were not interested in them and kept their savings on bank deposits".[13] The decision imposes on the bank the obligation to compensate partially the damages suffered by the clients (20% of the invested funds). Such decision will help investors to pursue civil claims and demand repayment of all invested funds, because "the Authority's findings as to the use of the practice are binding on common courts when they consider individual cases involving consumers and practices questioned in the decision".[14]

In July 2020, the President of UOKiK issued four additional decisions against *Idea Bank*. "Three of them concern the violation of consumer rights in offering complex financial products: investment certificates, structured deposits and unit-linked life insurance plans (ufk). In his fourth decision, the President of UOKiK stated that the company had applied the clauses that are abusive and prohibited in bank agreements with respect to modification clauses".[15]

Despite some very serious and evident violations, many practices of mis-selling are "borderline', rather than real unlawful conduct. One of the most recent examples is the "warning communication" issued by the President of the Polish Competition Authority, who decided to issue a warning and file charges against the Yanko Mortgage Fund. The trader is accused of misleading consumers about the level of risk of the products offered, the safety of their invested money and the guarantee of profits.[16]

In conclusion, the main issue regarding the practices of mis-selling in Poland concerns the sale of financial products that are inappropriate and unsuitable to the consumers' needs. Such circumstances might be due to the still low level of financial literacy of Polish citizens.[17]

2. Examples of Mis-selling in Italy

In Italy, in recent years, there have been some relevant cases of the sale of the long-term loans for the immediate

[11] Recital 81 of MiFID II.

[12] https://pk.gov.pl/aktualnosci-prokuratury-krajowej/prokuratorskie-zarzuty-w-sprawie-tzw-mafii- mieszkaniowej.html#.WmXyjajiaUk.

[13] https://www.uokik.gov.pl/koncentracje.php?news_id=16203.

[14] https://www.uokik.gov.pl/news.php?news_id=16203.

[15] https://www.uokik.gov.pl/news.php?news_id=16620.

[16] For more detailed information *see* https://www.uokik.gov.pl/news.php?news_id=16647.

[17] For a recent and comprehensive report *see* Cwynar A. (2021), *Alfabetyzm finansowy na świecie i w Polsce*, Warszawa, PWE Polskie wydawnictwo Ekonomiczne.

purchase of some other financial instruments managed or issued by the same bank or its subsidiaries.[18] In the "My Way" and "4 You" cases, the banks and intermediaries used three different and apparently separate contracts with their clients, such as (i) an order for the purchase of financial products, generally self-placed (called "My Way", "4 You" and "Piano visione Europa"), (ii) a mortgage contract and, (iii) a pledge in relation to the financial products acquired. Such a bundle of financial transactions was presented as something completely different; the contracts were supposed to have a social security function which in fact they did not have. Moreover, the structure of these financial products and the related agreements were designed to secure profits only for their issuers.

The Italian judges qualified the contracts in question as the result of a single economic transaction, finding that there was a unique contractual consideration common to all the agreements. They were considered to be aimed at pursuing interests that were not worthy of protection, *ex* Article 1322 (2) of the Italian Civil Code, as they were incompatible with their social security purposes. Consequently, the contracts in question were considered void.

Ⅲ. Review of the Main Regulations of European, Polish and Italian Legal Orders

The purpose of regulations on mis-selling is to prevent unethical practices and misbehaviors of financial institutions that want to take advantage of consumer illiteracy and vulnerability to enforce the execution of a financial transaction which could be detrimental to the investor's interests. Nevertheless, *"*regulation does not operate in a vacuum; it must be operationalized through supervision, which is a «hands on» business*"* (Moloney 2014, p. 944).

In 2012 the European System of Financial Supervision was established, creating the three European Supervisory institutions: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA). However, the System includes also the European Systemic Risk Board (ESRB), the European Central Bank (ECB) and the National Competent Authorities (NCAs). ESMA plays a key role in the communication and imposition of strong supervisory practices and in urging national competent authorities to adopt a strong supervision and enforcement (Moloney 2014). In order to ensure the effective and efficient supervisory activities and the uniform application of EU law, ESMA adopts guidelines and recommendations. These documents prescribe that the domestic competent Authorities and market's participants shall respect them and the financial market actors shall report, in a comprehensive and detailed manner, whether they comply with that guideline. Similarly, other European Supervision Agencies elaborate and provide many technical standards and guidelines to complement European legislation and ensure uniform interpretation and implementation across all member States.

The present article discusses the most important regulations affecting professional misconduct in the banking and insurance sectors.

A. European Union Regulations

1. Market and Financial Instruments Directive - MiFID II[19]

The MiFID II is a revised Directive of MiFID, which lays down provisions regarding investment services in financial instruments by banks and investment firms. It has improved the transparency and oversight of financial markets and enhanced investor protection by introducing requirements on the organization and conduct of financial actors. For the purpose of the present contribution the author focuses on specific aspects of the Directive regarding potential practices of mis-selling.

One of the most relevant issues regulated by MiFID II is product distribution through investment advice and execution-only channels. Recital 71 states that financial instruments should be manufactured to meet the needs of investors or potential investors. Investment firms should provide assessment of appropriateness or suitability of

[18] *see* "*My Way*", "*For You*" and "*Piano visione Europa*" Cases - M. Franzoni, *La causa e l'interesse meritevole di tutela secondo l'ordinamento giuridico*, in *Juscivile*, 2017, 5, pp. 414; https://blog.ilcaso.it/news_586/04-07-16/«My_way» _ «For_you»_«Piano_visione_Europa»_e_Corte_di_Cassazione.

[19] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014.

their offered or recommended products. This assessment must be carried out over the lifetime of the contract on the basis of the personal needs, characteristics, and objectives of clients and they are performed to avoid mis-buying or mis-selling risks. The assessment of suitability is a particularly relevant requirement for investor protection under the MiFID II framework. It is applicable to any kind of investment advice and portfolio management. Financial firms should know their clients' preferences and take them into consideration when recommending their services.[20] Furthermore, a suitability report must be provided to a retail client when that client has transaction.[21] Additionally, it shall be provided even if the given advice is not to buy, hold or sell a financial instrument (Recital 87 of the MiFID II Delegated Regulation).

When professionals provide investment advice[22], they should explain the reason of this practice to clients in a written statement. Unfortunately, many investors do not even understand the difference between independent and non-independent advice. They do not comprehend the potential benefits and risks of the different types of investment advice. The ability to make this particular distinction depends on the financial literacy of the individual consumer. When an investment firm acts only as an executor of client orders[23], it is prohibited from joining the service with ancillary ones that could make the desired transaction more complex and the understanding of the associated risk more difficult.

As noted in Recital 81[24], the practices of cross-selling are very common which may "provide benefits to retail clients but can also represent practices where the interest of the client is not adequately considered". The consumer should be given sufficient time before the conclusion of the contract to read and understand all the information "on a complex or unfamiliar product or service, or a product or service a client has no experience with that a client considering a simpler or more familiar product or service" (Recital 83 of MiFID II).

Section 2 of the Directive lays down provisions to ensure investor protection. This Chapter provides some relevant measures, such as specific behavioral requirements and disclosure norms imposed on investment firms, rules on product development and usage, renumeration policy of employees. Article 24 states that investment firms shall act honestly, fairly and professionally[25] in order to reach the best result for their clients. Financial instruments should fulfill the customers' needs and should only be offered or recommended when it is in the clients' best interest (the so-called "know your customer rule"). All information must be clear, fair and not misleading. Therefore, the intermediary shall act with the specific professional diligence to ensure correct, complete and constant information, that is essential for investors to make sound and informed decisions about their savings. Article 25 concerns in detail the so-called "product governance" and prescribes further obligations incumbent on the professional regarding the assessment of the suitability and appropriateness of the financial instruments offered or demanded.

The disclosure system in relation to the distribution of financial instruments is quite fragmented. As noted in the study of the European Parliament, MiFID II "does not address standardization or format, or how retail-oriented summary disclosures should be designed" (European Parliament 2018, p. 20). And on the other side the same directive "uses too many rules and too many instruments to achieve identical goals and thereby generates excessive compliance costs. High compliance costs and low revenues would drive banks out of some segments of retail business" (Franke, Mosk & Schnebel 2016, p. 1). Despite some critics, the directive has become applicable in all Member States from January 2018, as well as ESMA Guidelines especially those on cross-selling practices[26] and on certain aspects of the MiFID II suitability requirements.[27]

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20 For more detailed information, *see* ESMA Guidelines on certain aspects of the MIFID II Suitability Requirements.

21 https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf.

22 Investment advice is defined as "the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments" (art. 4 (1) (4)) MiFID II.

23 "Execution of orders on behalf of clients means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance" (art. 4 (1) (5)) MiFID II.

24 In the same meaning Recital 53 of IDD.

25 See also Article 21 of Legislative Decree of 24 February 1998, n. 58 - "*Testo Unico della Finanza*".

26 https://www.esma.europa.eu/sites/default/files/library/2016-574_en_guidelines_on_cross-selling_practices.pdf.

27 https://www.esma.europa.eu/sites/default/files/library/esma35-43-1163_guidelines_on_certain_aspects_of_mifid_ii_suitability_requiremen

2. Insurance Distribution Directive - 2016/97

The Directive applies to professionals that advise on, or sell insurance policies, insurance-based investment products to retail customers, such as agents, brokers, bancassurance operators, insurance undertakings, travel agents, car rental companies. In the meaning of this European directive, consumers should benefit from the same level of protection despite the differences between distribution channels of insurance and reinsurance products (Recital 6).

All insurance market actors should "possess an appropriate level of knowledge and competence in relation to the distribution activity. The appropriateness of the level of knowledge and competence should be assured by the application of specific knowledge and professional requirements to those persons"[28] (so-called "know your merchandise rule"). In other words, the staff should have the right combination of capabilities and skills to identify and understand potential risks that may arise from the design and distribution of financial and insurance products. The financial illiteracy of investors and lack of appropriate level of competence of professionals can lead to dangerous and highly detrimental situations for a weaker contractual party.

Recital 44 of the Directive stresses that "in order to avoid cases of mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. Any insurance products proposed to the customer should always be consistent with the customers' demands and needs and be presented in a comprehensible form to allow the customer to make an informed decision". For this reason, Article 30 contains specific rules on the assessment of suitability and appropriateness of the offered products and services.

Article 20 provides standards on advice, and for sales where no advice is given. "Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customers and shall provide the customers with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision. Any contract proposed shall be consistent with the customer's insurance demands and needs. Where advice is provided prior to the conclusion of any specific contract, the insurance distributor shall provide the customer with a personalized recommendation explaining why a particular product would best meet the customer's demands and needs".

Article 23 of the Directive lays down detailed rules on cross-selling of insurance products. One of the biggest problems is "a tying practice of selling a financial product together with an insurance policy, often payment protection insurance (PPI). Other products tied very often to a credit product are car insurance and life insurance. In many cases, consumers do not need them or they are obliged to accept them in order to obtain a loan or to receive it under good conditions. There are very few financial products that require obligatory insurance; however, consumers are not aware of this important fact. Investors are forced or induced by professionals to purchase an insurance policy, or they may not even know that they have purchased an insurance product. Article 23 has introduced a more effective and simplified system for the management of registers and for the supervision of companies and intermediaries, strengthening the level of consumer protection and consolidating the rules and principles already existing in domestic legal systems.

3. Regulation n. 1286/2014 on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs)

In order to improve the transparency of PRIIPs offered to retail investors and to ensure common standards among Member States, the EU has introduced a specific instrument for disclosure, the so-called Key Information Documents (KIDs)[29] that shall accompany the sale of the products in question. Such a document should be drawn up in a standardized format, consist of maximum 3 pages and provide clear and detailed information about investment products and their distributors, with particular attention to the vocabulary used and the style of writing. In addition, the KID must be visibly separated and distinguishable from any other document. This is an important measure, as insurance-based investment products expose retail investors to the risk of capital loss because of the market

ts_0.pdf.

[28] Recital 31 of Directive 2016/97.

[29] See also the recent Consumer Testing Study, available at https://ec.europa.eu/info/publications/200227-study-key-information-document-priips_en.

fluctuations. In this context, Recital 22 states that every single retail investor should have an effective right to redress and the same right to seek compensation for damages. This Regulation is complementary to measures on distribution in MiFID II and those taken on the distribution of insurance products in IDD (Recital 5).

When it comes to national legal orders, we should take into consideration some specific domestic norms, including the regulations of National Competent Authorities.

B. Polish Regulations and Regulatory Actions

In Poland, the key regulation to combat misconduct of professionals is the Act on Competition and Consumer Protection[30] and, in particular its Section IV concerning prohibition of practices that violate collective consumer interests. The latest amendment to this regulation entered into force on 17 April 2016. The new provision concerns the prohibition of offering services and products that are inadequate to their nature. In other words, the intention of the provision is to prevent the distribution of complex financial products difficult to understand by customers and that do not meet their needs. Consequently, in the Polish legal order mis-selling is considered as a practice which harms collective interests of consumers and it is regulated and sanctioned by Article 24 (2) of the amended Act on Competition and Consumer Protection.[31] The amendments refer to high-risk investment financial instruments such as life insurance and endowment insurance with insurance capital fund, mortgage loans in foreign currency and payday loans.

As specified by the cited act, the products offered by professionals should be appropriate for consumers and should meet their needs. Therefore, lenders must take into account all the relevant personal information of their clients, such as financial situation, age, health, (financial) experience, literacy, risk tolerance and ability to bear losses. Nonetheless, the mentioned norms which shall essentially eliminate unfair commercial practices of mis-selling of financial instruments, seem to be formulated in too general terms, leaving room for free interpretation (Cichorska 2017). The professional should know the expectations of customers, by delineating their characteristics and investment purpose. Subsequently, the seller must select not only the most suitable product, but also the best form of its distribution in accordance with good commercial practices.

There are many other national legislative regulations, including The Act on Out-of-court settlement of consumer disputes[32], The Act on Insurance and pension supervisio n[33], The Act on Insurance activity[34], and The Act on Compulsory Insurance.[35] Through this set of legal rules, the Polish legislature has provided for several measures to combat unethical financial conducts consisting in mis-selling. One of them is the administrative proceeding carried out by the Office of Competition and Consumer Protection *Urząd Ochrony Konkurencji i Konsumentów* - UOKiK).[36] The President of the Office can issue the so-called provisional decisions that oblige the professionals to remove abusive clauses (if present) and their negative effects and inhibit the use of harmful malpractices. The administrative procedure can be initiated *ex officio* or can follow complaints submitted by consumers, the Consumer Ombudsman, the Financial Ombudsman (*Rzecznik Finansowy*) or a consumer organization. The decision of the President of the UOKiK may be appealed before the Court of the UOKiK.[37] In order to prove the professional's guilt, the President can conduct inspections, investigations, and make use of a so-called "mystery shopper".

From the beginning of 2014 to September 2018, the Office of the UOKiK conducted 35 proceedings regarding practices infringing collective consumer interests on the insurance market. The President of the Authority, in accordance with Art. 26, para. 1 and Art. 27, para. 1 and 2 in conjunction with Art. 24 of the Act on Competition and Consumer Protection, issued 10 decisions recognizing the practices violating the collective interests of consumers. These conducts consisted of misleading information, unilateral modification of contractual conditions, the use

30 Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, https://www.uokik.gov.pl/competition_protection.php.

31 Law of 5.08.2015, 2015, Dz. U. z 2015, poz. 1634.

32 Ustawa z dnia 23 września 2016 r. o pozasądowym rozwiazywaniu sporów konsumenckich (Dz. U. 2016 poz. 1823).

33 Ustawa z dnia 22 maja 2003 r., o nadzorze ubezpieczeniowym i emerytalnym (Dz. U. Z 2019 r. poz. 207).

34 Ustawa z dnia 11 września 2015 r. o działalności ubezpieczeniowej i reasekuracyjnej (Dz. U. Z 2019 r. poz. 381 ze zm.).

35 Ustawa z dnia 22 maja 2003 r. o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych (Dz. U. Z 2018 r. poz. 473, ze zm.).

36 Urząd Ochrony Konkurencji i Konsumenta.

37 Sąd Ochrony Konkurencji i Konsumenta (SOKiK).

of abusive clauses, lack of relevant information on professional, additional fees and/or possibilities of withdrawal.

The Polish Financial Ombudsman has published in recent years some special reports concerning financial education[38] (May 2020), consumer loans[39] (December 2018), "Forex Market"[40] (March 2018), corporate bonds[41] (November 2017), life insurance with an insurance capital fund[42] (March 2016), and other topics. The Ombudsman's annual report of 2018 showed that there were over 1.8 million complaints from consumers regarding irregularities in the financial market in that year, of which approximately 1.4 million were related to the banking and capital market and over 370 thousand related to the insurance and pension market.

Supervision of the financial and insurance market is also exercised by the Polish Financial Supervision Authority (KNF)[43] and the Financial Ombudsman. However, as noted in the report of NIK[44], the supervisors have never created any formal, comprehensive regulation to monitor the unfair practices that violate the interests of consumers in the insurance market. Moreover, the institutions have not cooperated sufficiently with each other. The proactive initiatives of the Competition Authority in relation to the activities of insurance companies in terms of violation of collective interests of consumers have been very limited. The supervision of the Antitrust Authority focused mainly on the practices concerning the conclusion and execution of unit-linked life insurance contracts. In other sectors, the UOKiK activities were undertaken primarily in response to signals received from consumers, the Financial Ombudsman and from the Polish Financial Supervision Authority (*Urząd Komisji Nadzoru Finansowego* - UKNF). Only professionals who were reported by these subjects have been sanctioned for violations which has reduced the effectiveness of investor protection on the insurance market.

With respect to the other categories of insurance, UOKiK has not carried out extensive monitoring activities. The Authority has assumed that information on potential irregularities must be obtained mainly from other supervisory authorities. However, this approach can be dangerous and lead to inertia of the UOKiK if other institutions fail to identify and/or report the violations.

Problems with the cooperation between the Office of the KNF, the Competition Authority and the Financial Ombudsman also depend on the access of these entities to information and documents which are indispensable for the conducts of their statutory duties, as the materials are protected and subject to Article 372 of the Act on Insurance and Reinsurance - Professional Secrecy of the members of the KNF and employees of the Office of the KNF *ex* art. 10a of the Banking Law. Therefore, the Office has provided limited information to the Financial Ombudsman on how to react to possible misconducts of the insurance companies. Furthermore, in Poland there is no legal provision that obliges insurance companies to prefer a pre-trial dispute resolution before appealing a court.

These specific rules (especially on professional secrecy) should be changed as soon as possible. As we know, the insured is in a weaker position than the insurance firms, and by taking advantage of this situation, they often do not accept any amicable settlement of the dispute forcing the consumers to pursue their claims in court. In this respect, it would be reasonable to increase the competences of e.g., Financial Ombudsman, which would be able to resolve minor cases (i.e., up to a certain amount) in a binding manner, as it occurs through the Arbiter Bankowy and the Italian Banking and Financial Ombudsman (ABF)[45] and ACF[46] proceedings.

It is worth mentioning that recently (on 18 July 2020) one of the consumer organizations in Warsaw won a 10-year collective proceeding against mBank regarding interest rates in foreign currency loans. After 10 years mBank admitted that it has violated the collective interests of consumers by charging loan installments which were based on an abusive clause. This victory is particularly important as it was the first Polish class action (consisting of

38 https://rf.gov.pl/wp-content/uploads/2020/05/Kierunki_Edukacji_Finansowej_Rzecznik_Finansowy_maj2020.pdf, which is inspirited on *Smarter Financial Education: Key Lessons from Behavioral Insights for Financial Literacy Initiatives*, OECD, 2019.

39 https://rf.gov.pl/wp-content/uploads/2020/05/Kredyty_konsumenckie_raport_2018.pdf.

40 https://rf.gov.pl/wp-content/uploads/2020/05/Forex_raport_RF_2018.pdf.

41 https://rf.gov.pl/wp-content/uploads/2020/05/obligacje_korporacyjne_analiza_RF_2017.pdf.

42 https://rf.gov.pl/wp-content/uploads/2020/05/UFK_raport_2016.pdf.

43 https://www.knf.gov.pl/en/.

44 https://www.nik.gov.pl/plik/id,21513,vp,24159.pdf.

45 https://www.arbitrobancariofinanziario.it.

46 https://www.acf.consob.it.

1247 consumers) to be won by a Consumer Organization.[47] However, another important problem of mis-selling in Poland concerns the distribution of saving insurance policies (*polisolokaty*) and the extremely unfavorable terms on which they were offered to consumers. The allocation of these products by their sellers often seems very questionable in legal and ethical terms. The dangerousness of the product lay in the methods of its marketing and distribution, the complex design, the misleading description, the unfair clauses and the unequal distribution of responsibility between the parties. Customers are not informed about the high management and administrative fees, the high penalties in the event of withdrawal, the long-term period with regular premium and the great possibilities of losing their funds.

C. Italian Regulations and Regulatory Actions

The Italian Securities and Financial Ombudsman (ACF)[48], in its decision n. 2658 of June 2020, has also highlighted that the appropriateness assessment represents one of the guarantees concerning the client's awareness of the investment choice. Therefore, it is indispensable and must be carried out before any financial transaction. Moreover, in the case in question, the questionnaire completed by the consumer and related to the level of his financial experience, was prepared using the self-assessment method, which is contrary to the ESMA guidelines. In conclusion, the Securities and Financial Ombudsman obliged the professional to compensate the damage caused to their client.

The Companies and Exchange Commission (CONSOB)[49] implements the Consolidated Law on Finance (T.U.F.)[50] which is the Italian fundamental law governing the financial markets. Then, there are also Regulation of CONSOB n. 20307/2018, which implements the provisions on intermediaries of T.U.F., and Regulation n. 20249/2018 implementing the provisions on markets of T.U.F. Furthermore, in order to combat misconducts in financial market CONSOB has introduced the internet system (DEPROF)[51] on share class level to handle passporting notification filings to allow the distribution of UCITS investment funds to retail investors, which adds considerable complexity and effort to what is a relatively straightforward process.[52]

The Italian Competition Authority - *Autorità Garante della Concorrenza e del Mercato* (AGCM) - very often takes action against misconducts in the financial market. Its competencies are defined by the Consumer Code. The recent cases published in March 2020[53] concerned unfair commercial practices throughout cross-selling of financial-insurance products. In February 2020, the Authority imposed fines on the four major Italian banks: Intesa Sanpaolo S.p.A., BNL S.p.A., UBI Banca S.p.A, Unicredit S.p.A., due to violations of Articles 20, 21 (3-*bis*), 24 and 25 of the Italian Consumer Code.

The Bank of Italy - *Banca d'Italia*[54] - implements the key banking and credit law in Italy constituted by the Consolidated Law on Banking (T.U.B.).[55] Tthe Insurance Supervisory Authority - *Istituto per la Vigilanza sulle Assicurazioni* (IVASS)[56] - enforces the Legislative Decree n. 209/2005 - The Code of Private Insurance.[57] The Code is a framework of principles and powers that establishes the fundamental rules and defines the competences of the IVASS. It regulates the power of IVASS to issue secondary legislation and adopt prudential measures. For the purposes of this paper, Chapter III of the Code becomes particularly relevant. Legal acts adopted by this Authority aim to achieve clear, informed and transparent regulatory interventions in the insurance sector. The most important IVASS Regulations regarding the subject in question are Reg. n. 40/2018[58] and Reg. n. 41/2018.[59]

47 https://konsument.um.warszawa.pl/aktualnosci/wygrana-konsument-w-w-pozwie-grupowym-z-mbankiem.

48 Arbitro per le Controversie Finanziarie (ACF).

49 It is a public authority responsible for regulating the Italian financial markets.

50 The Italian Legislative Decree of 24 February 1998, n. 58.

51 For further information *see* https://www.consob.it/documents/46180/46181/ManualeDeprof_EN_GEN+2021.pdf/73dcf3fd-ef55-4c3a-86eb-619687ea13a9.

52 European Commission (2018, p. 110).

53 https://www.agcm.it/dotcmsdoc/bollettini/2020/11-20.pdf.

54 For more details see https://www.bancaditalia.it/compiti/vigilanza/normativa/index.html?com.dotmarketing.htmlpage.language=1

55 Testo Unico Bancario, Legislative Decree 385/1993 (as amended) https://www.bancaditalia.it/compiti/vigilanza/intermediari/Testo-Unico-Bancario.pdf.

56 https://www.ivass.it/chi-siamo/index.html.

57 https://www.ivass.it/normativa/nazionale/primaria/CAP_EN.pdf?language_id=3.

58 https://www.ivass.it/normativa/nazionale/secondaria-ivass/regolamenti/2018/n40/Regolamento_IVASS_40_2018.pdf.

59 https://www.ivass.it/normativa/nazionale/secondaria-ivass/regolamenti/2018/n41/Regolamento_IVASS_41_2018_en.pdf?language_id=3.

The number of regulations is impressive and dispersive. It should not be surprising the confusion and uncertainty among consumers related to the applicable regulation and its relative competent body. "Differential treatment of substitutable products also generates incentives for products providers to design products which respond to arbitrage possibilities rather than to investor needs" (Moloney 2014, p. 780). The Bank of Italy has also rightly noted that "sectoriality is a further element of complication, and inevitably produces fragmentation and lack of coordination." (Banca d'Italia 2020, p. 56).

Ⅳ. Some Critiques and Possible Remedies

As we can see, there are many types of mis-selling in the financial and insurance sectors. The predatory, aggressive and unethical conduct of professionals should be monitored and punished. Supervisors should take into account the numerous guidelines provided by the European agencies to strengthen preventive tools, properly introduce or encourage whistleblowing, and apply suitability and appropriateness tests. All these elements are particularly relevant in order to ensure an effective enforcement regime.

A. Public Enforcement and Administrative Sanctions

In many cases, when mis-selling is revealed, the competent authorities impose administrative sanctions on[60] the financial and insurance institutions. Administrative provisions constitute very useful instrument for (individual and groups of) investors, as they provide many detailed information about infringements which can be used in the courts to claim damages. In some cases, the decisions of the authorities are binding for the civil judge. Some National Authorities try to eliminate unsuitable investment products. Belgium, France, the United Kingdom and the Netherlands have introduced laws "to limit the products that they have classified as toxic" (European Commission 2018, p. 113). In Denmark a particular system of product labeling has been introduced, which uses a traffic light technique and labels each financial product with a red, yellow or green color depending on its complexity or risk level.[61]

However, as we can see, there are many (if not too many) institutions engaged in the supervision of financial consumer protection. All these entities are usually independent with different competencies, cooperating on the basis of inter-institutional agreements (it. *Protocolli d'Intesa*), sometimes on a partnership basis. Therefore, their activities are partly ineffective and the results often unsatisfactory. This situation, a segmentation of financial legislation, is susceptible to creating confusion and legal uncertainty. It would be desirable to create a distinct and independent body responsible for the protection of consumers in the financial and insurance markets that adopts a risk-based approach focused on areas of the highest risk to consumers and invested with specific powers. These may include, for instance, *ex ante* supervision of contracts, inspections, and mystery shopping.

Some recommendations for existing supervisors should be to cooperate when developing and applying the legal, supervisory and regulatory frameworks in order to promote common supervisory approaches and practices. They should also interact with consumers and their representatives to ensure an adequate understanding of the issues and experiences from the consumer's point of view, and report publicly and regularly on the effectiveness of their actions in preventing, detecting and responding to mis-selling in the financial marketplace. The OECD has also proposed international cooperation between oversight bodies by paying specific attention "for consumer protection issues arising from international transactions and cross-border marketing and sales" (OECD 2019, p. 21).[62]

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60 i.e., Decision of CONSOB n. 19935, March 30, 2017 (*Banco Popolare di Vicenza S.p.A.*); Provvedimento n. 12437 *MPS Banca* - "My Way"; n. 26168 *Banca Popolare di Vicenza*; n. 26612 *Veneto Banca*; n. 28011 *Compass - Polizze Abbinate*, and others.

61 For more detailed information *see* https://www.danskebank.dk/PDF/PRISER-VILKAAR-FAKTAARK/Homepage-UK/Privat/Investment/ExecutiveOrderRiskLabelling-InvestmentProducts.pdf.

62 In the same meaning the Directive (EU) 2016/97 and Article 13 of IDD "the competent authorities of different Member States shall cooperate among themselves and exchange any relevant information on insurance and reinsurance distributors in order to ensure the proper application of this Directive".

B. Private enforcement - Extra-judicial Organs[63]

Arbitro Bancario Finanziario (ABF) - the Banking and Financial Ombudsman - is an independent and impartial organ instituted in 2009 by the Bank of Italy, which decides disputes raised between consumers and banks, intermediaries and other financial institutions. The decisions taken are based exclusively upon the documents and other proof provided by the litigants. The parties do not need the legal assistance of a lawyer. The final decision is issued by the panel composed of five members, and is not legally binding; however, the professional's non-compliance may be rendered public on the ABF's and intermediary's websites. If a party is not satisfied with the Ombudsman's decision, there is a possibility to submit that decision to the civil courts.

Arbitro per le Controversie Finanziarie (ACF)[64] - the Securities and Financial Ombudsman in Italy - is an arbitration system within the CONSOB, active since January 2017, which decides disputes concerning mainly investment services and activities. The competence of the ACF is limited to no more than EURO 500.000. The access to the ACF is free of charge for the investor. The final decision is based on the documentation submitted by the parties, is issued by the panel composed of five members, and is not legally binding. The non-fulfilment with the ACF's decision may be publicized on the ACF's and intermediary's website. The final decision may be appealed to the civil courts.

Rzecznik Finansowy[65] is the Financial Ombudsman in Poland. For the access to the Ombudsman are charged about EURO 12. The final decision, issued in form of a recommendation, is not legally binding and there is no measure which encourages the financial institutions to comply with the Ombudsman's decision. The organ is entitled to analyze and call evidence from both parties.

Sąd Polubowny przy Komisji Nadzoru Finansowego[66] is the Arbitration Court at the Polish Financial Authority. It is a stable and independent Arbitration Court established in 2006 which decides disputes raised between the actors of financial market. There are two different paths of dispute resolution: the first consist of Mediation which purpose is to reach a negotiated settlement between the parties; the secondo constitutes a form of arbitration proceedings. The final decisions have a binding effect on both the financial institution and the consumer.

Bankowy Arbitraż Konsumencki[67] is the Banking Ombudsman in Polan. The cases brought before the Ombudsman must involve individual consumers and members of the Polish Bank Association or other financial institution that provided voluntary submit to this model of dispute resolution. The final decision is binding only for the financial institution. If the decision does not satisfy a party, he/she may take an action before the state court.

Other organizations include consumer protection organizations[68]; the Polish free legal aid system for a particular group of individuals[69]; and FIN-NET[70], the financial dispute resolution network set up by the European Commission in 2001. All the above-mentioned bodies provide support to consumers in individual cases. In general, their actions are more efficient, quicker and more economical than traditional judicial trials. Moreover, Article 128-*bis* of T.U.B. (and Article 40 of Italian Legislative Decree n. 11/2010) oblige the banks and financial intermediaries to adhere to systems of extra-judiciary dispute resolution (ADR). Failure to adhere represents a source of administrative sanctions *ex* art. 144 (4) of T.U.B. (Cavalli & Callegari 2019, p. 84). As noted by M. Callegari (2019, p. 85) the ADRs have reached considerable success in the banking-financial sector consisting of valid instruments in order to prevent many judicial actions.[71]

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63 For more detailed information about Polish paralegal organs *see* https://www.uokik.gov.pl/sprawy_indywidualne.php.

64 Decisions regarding Mis-selling: n. 2144/2020; n. 1857/2019.

65 www.rf.gov.pl/polubowne.

66 www.knf.gov.pl/dla_konsumenta/sad_polubowny.

67 called also "Związek Banków Polskich Bankowy Arbitraż Konsumencki", https://zbp.pl/dla-klientow/arbiter-bankowy.

68 In accordance with Article 32-bis of T.U.F. "Consumer associations entered on the list pursuant to Article 137 of L. Decree no. 206 of 2005 shall be entitled to protect investors' collective undertakings, relating to the provision of investment services and activities, accessory services and collective asset management services, in the forms pursuant to Article 139 and 140 of the aforementioned Legislative Decree".

69 Ustawa z dnia 5 sierpnia 2015 r. o nieodpłatnej pomocy prawnej oraz edukacji prawnej (Dz. U. Z 2015 r., poz. 1255 z poz. zm.).

70 https://ec.europa.eu/info/fin-net.

71 There is about 1% of cases in which the question, already decided by an organ of ADR, are re-proposed before a civil court (Cavalli & Callegari 2019, p. 86).

C. Private enforcement - Judicial Actions

In accordance with Article 69 of MiFID II "The Member States shall ensure that mechanisms are in place to ensure that compensation may be paid, or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive". Actions may include damages or judicial review of the contract - adjust /correct the contract by virtue of the principles of good faith and fairness (*buona fede e equità*).

As has been suggested by Better Finance, there might be a possibility for creating a "Pan-European collective redress mechanism, modelled on the best practices in Europe as individuals are not equipped to assess their own detriment, and even less equipped to obtain redress in court on their own" (European Commission 2018, p. 118), because, in general, a judicial process is slow and very often disproportionally expensive.

D. Contractual remedies - Civil Law Provisions

To understand a possible fate of the contract affected by the mis-selling practice, we should suppose an application of provisions of the national civil and consumer codes and other legislative provisions. As mentioned previously, banking contracts are usually pre-formulated standard contracts with standardized terms and conditions, drafted in advance by the professional or its trade association, consequently the consumer is able only to accept or not the proposed contract, without the possibility of negotiating its clauses. In such a situation, the agreement in question could be subject to the regulatory framework regarding unfair terms in consumer contracts[72] and to the general provisions on standard contracts.[73]

Another useful part of legislation could be the norms on distance marketing of consumer financial services.[74] In addition to sectoral rules governing specific relationships, such as those between intermediaries and clients, especially "non-professional" ones, we could think of the general rules of national civil codes.

The common factors that may affect the contract or its validity are described in Articles 1427 *et seq*. of the Italian civil code (c.c.), and in Articles 82 *et seq*. of the Polish civil code (k.c.). They are: mistake, duress, negligence, fraud, misrepresentation, lack of mutual assent or other essential elements of the agreement and illegality (contrary to mandatory rules, public order or morality). The remedies available depend on the vitiating factor and the circumstances, which may be: termination of the contract and/or monetary damages or restitution; mutual dissent of the parties; withdrawal within 14 days from the date of conclusion of the contract; rescission of the contract under Articles 1447 and 1448 of the Italian c.c. (*rescissione*); correction-modification of the contract by the judge (*reductio ad aequitatem ex* Art. 1450 it. c.c.); or application of Article 1322 (2) c.c.[75] ("*meritevolezza degli interessi*").

There are also provisions that impose specific requirements for the validity of contracts. Art. 116 of Italian Consolidated Law on Banking (TUB) states that the bank and intermediaries should present all the relevant information to their clients in a clear and comprehensible manner.[76] Article 117 requires the written form of the contracts concluded with the clients[77], otherwise they are considered void.

In accordance with Article 720 (2) of the Polish Civil Code (k.c.) a loan agreement which exceeds 1000 PLN must be in a documentary form.[78] However, this specific new form of contract is required *ad probationem*. Article 806 k.c. affirms that the insurance contract is invalid if the accident described in the agreement is impossible. Article 45 of the Polish Consumer Credit Act[79] provides

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72 In accordance with the Council Directive 93/13/EEC; artt. 33 ff. of Italian Consumer Code; art. 385 Polish k.c.; artt. 23a, 23b and 23d of u.o.k.i.k.

73 In accordance with artt. 1341 and 1342 Italian c.c., and artt. 384 and 385 of Polish k.c.

74 *see* the Directive 2002/65/EC; artt. 67 *bis* ff. of Italian Consumer Code; artt. 39 ff. of the Polish Act of 30 May 2014 on Consumer Rights.

75 For more details *see* G.B. Ferri, Meritevolezza dell'interesse e utilità sociale, *Riv. dir. comm.* 1971, II, 81; Id., Ancora in tema di meritevolezza dell'interesse, *Riv. dir. comm.* 1979, I, p. 1 ss.; A. Guarnieri, Meritevolezza dell'interesse, (voce) in *Digesto delle disc. priv., Sez. Civ*., XI, Torino, 1994, p. 332; id., Meritevolezza dell'interesse e utilità sociale, *Riv. dir. civ*., 1994, p. 799 ss.; Supreme Court n. 22950 of 10.11.2015; n. 19559 of 30.09.2015; and n. 7776 of 3.04.2014.

76 s*ee also* artt. 123 and 124 T.U.B.

77 s*ee also* art. 125 *bis* T.U.B.

78 s*ee* artt. 77^2 and 77^3 k.c.

79 http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20111260715/U/D20110715Lj.pdf.

a so-called "free credit" sanction in relation to certain types of the financial contracts concluded with consumers. In case of the violation of specific norms regarding transparency and disclosure by lenders, consumers may repay the loan without interests and other costs. This particular sanction has been introduced in accordance with Art. 23 of the Directive 2008/48/EC.

Article 117 (8)[80] of the T.U.B. has strengthened the powers of the Bank of Italy to monitor, limit and restrict the distribution of some complex financial products offered to retail clients. Article 128-*ter* T.U.B. is about the power of the Bank of Italy to prohibit the unfair behaviors and to order the restitution of funds that professionals have unduly obtained. It should be emphasized, however, that in Italy the violation of rules of conduct concerning the principles of good faith does not usually lead to the automatic invalidity of the contract in question, but represents only a source of pre-contractual responsibility with compensatory consequences *ex* Art. 1337 c.c.[81]

E. Other Possible Solutions

The creation of a special reimbursed fund may be considered, as proposed by Conac (2018, p. 46). "When the compensation was not done by the acquiring bank (because it only acquired the assets of the falling bank) or the bank responsible for the mis-selling (because it has been resolved), Member States should be encouraged to establish funds to reimburse retail investors. These funds could be finances by a fee on the banking sector. Alternatively, the money could be paid by the deposit protection funds, like it occurred in Italy, or the resolution fund, like it occurred in Portugal".[82] In Italy this reimbursed fund is provided by the Ministry of Economy and Finance.[83]

Another possibility to regulate the financial market could be to implement solutions that already exist in other industries, such as an official certification of the quality of the products and serving process, which might be renewed regularly (Franke, Mosk & Schnebel 2016, p. 17). If products or services appear potentially dangerous to customers, leading to disproportionate risks, supervisors might prohibit its distribution. Similarly, damages caused by dangerous credit products could be considered, such as the Regulation on Liability for Dangerous Product. If we have a clear regulation on Liability for Dangerous Product, why can we not also have a regulation on dangerous credit products?

F. Financial Education

As discussed above, lack of financial literacy has, undoubtedly, a harmful impact on the rationality of the customer decisions. However, negative consequences may also affect the long-term stability of the financial and economic system. The results are both a lack of understanding of the offered products or services and the inability to recognize and enforcement investors' rights, which facilitates the use of unfair practices by the financial and non-financial institutions.

The mis-selling becomes particularly acute in relation to certain groups of customers, such as young people as well as the older ones and those who are less able to make informed decisions. Many consumers are not aware of their right to complain to the national Ombudsman, or that making a claim is straightforward and very often free. To increase the awareness of consumers and their ability to improve financial decision-making and selecting financial products that match their needs, financial education remains one of the most important elements (NIK 2019).

In its 2005 report on Improving Financial Literacy the OECD defines financial education as "the process by which financial consumers/investors improve their understanding of financial products and concepts and, through information, instruction and/or objective advice, develop the skills and confidence to become more aware of financial risks and opportunities, to make informed choices, to know where to go for help, and to take other effective actions to improve their financial well-being." (OECD 2005, p. 26). Both Poland and Italy share this definition.

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[80] Article 117 (8) of Legislative Decree 385/1993 "La Banca d'Italia può prescrivere che determinati contratti, individuati attraverso una particolare denominazione o sulla base di specifici criteri qualificativi, abbiano un contenuto tipico determinato. I contratti difformi sono nulli. Resta ferma la responsabilità della banca o dell'intermediario finanziario per la violazione delle prescrizioni della Banca d'Italia".

[81] For more details *see* the decisions of Italian Supreme Court n. 26724 of 19 December 2007 and n. 10568 of 7 May 2013.

[82] *see* the cases of Veneto Banca, Banca Popolare di Vicenza, Banca Etruria, ecc.

[83] For more details *see* http://www.dt.mef.gov.it/it/attivita_istituzionali/sistema_bancario_finanziario/fondo_indennizzo_risparmiatori/.

Despite many advertising and education campaigns[84], the NIK highlighted in its report of 2019 that the low financial competencies of Poles have an impact on financial decisions. According to OECD data, Poland has been included in the group of countries that have not yet fully implemented their national financial education strategy. To promote public understanding of the consumer financial service law through education, the Italian Ministry of Economy and Finance has announced October 2020 as the month of financial education in Italy. The 2020 edition of this initiative was focused on financial choices in the time of Covid-19.

The OECD recommends that "policy makers should monitor market trends and changes brought in retail financial services by digitalization with a view to ensure the legal and regulatory framework is up-to-date and appropriately protects consumers. Particular attention should be paid at looking at how changes in the market are impacting consumers' behavior." (OECD 2019, p. 8).

The severe behavioral risks to which retail investors are exposed in many sectors are generated by many different elements, such as:

- Misrepresentation of the products;
- Lack or insufficient disclosure related to a product, its marketing and distribution process;
- Self-placement of financial instruments;
- Trust in professional market actors and investment advice;
- Vulnerability and financial illiteracy of investors, which unfortunately does not seem to be improving over time in many countries;
- Limited decision-making skills;
- Poor or too complex design of products or services[85];
- Standardized or non-independent investment advices;
- Incomprehensible or misleading contractual provisions;
- Imbalance of bargain power;
- Information asymmetry;
- Conflicts of interests;
- Arduous (temporary) financial situation of (potential) investors.

Not infrequently, the clients are overwhelmed and confused about the typology of the product, its non-mandatory character and the associated risk. Some of them are induced to believe that they are buying non-risky investment product, which actually reveals high-risk corporate bonds. Very often, clients or potential clients are not warned about the inappropriateness of the product to their needs or investment profile. In most cases, the benefits of the acquisition of financial products are unclear or even disastrous.

The issue is becoming increasingly relevant, as highlighted in the Report of the European Banking Authority, which states that "consumer lending at EU level has been increasing in volume since September 2015. The growth rates reported are significantly higher than those for mortgage and household lending. Between September 2015 and September 2019, consumer lending grew by 14.1%". The growing appetite of banks to increase their incomes has been confirmed by the research of European Commission (2018) provided by experts, which showed that the vast majority of banks propose their own in-house actively-managed investment funds to their clients.

In collecting savings and in carrying out financial transactions, a professional may take advantage of the disparity in bargaining power and especially the inexperience of the consumer worried about social security issues. Another problem is widespread conflicts of interest within financial institutions and insurance companies, which lead to the violation of the general clause of "fairness in relationships with customers". EBA in its report in 2017[86] highlighted that sales incentives, both commission and remuneration in sales department, constitute still a serious problem in many European countries. Methods of allocation of products and services influence directly consumers' actions.

In this regard, the Authority in 2016 published guidelines on remuneration policy and sales practices in retail banking[87], "with a view to protecting consumers from undesirable detriment arising from the remuneration of sales staff". These policies and practices should ensure honest, fair, transparent and professional conducts, taking into account the rights and interests of consumers. According to the art. 1.6 "Institutions should not design remuneration policies and practices that: (a) solely link remuneration

[84] *See* for instance, https://www.zanim-podpiszesz.pl which informs consumers about every relevant information regarding financial products.

[85] As well as information overload, which can prevent the individual from making an evaluation and taking a good and sound decision.

[86] European Banking Authority (2017), *Consumer Trends Report 2017*.

[87] European Banking Authority (2016), Final report, Guidelines on remuneration policies and practices related to the sale and provision of retail banking products and services.

to a quantitative target for the offer or provision of banking products and services; or (b) promote the offer or provision of a specific product or category of products over other products, such as products which are more profitable for the institutions or for a relevant person, to the detriment of the consumer".

In Poland this specific issue is regulated by a regulation enacted by the Minister of Finance and Economic Development of 2017[88], which has implemented the Directive CRD IV[89] of 2013. And in Italy the IVASS Regulation n. 40/2018[90], in particular art. 55, and art 21, para. 3-*bis* of Consumer Code.

I. Conclusion

There are many different legal rules and principles associated with mis-selling of financial products. Their fragmentation and dispersion may lead to serious confusion, omission and a consequent lack of adequate protection. Moreover, some measures taken by the competent national authorities seem to be partially ineffective and the final results are often unsatisfactory. Such obstacles are susceptible to create confusion and legal uncertainty. It would be desirable to create a distinct and independent body responsible for consumer protection in the financial and insurance market that adopts a risk-based approach focused on the areas of the highest risk for consumers. For this reason, a unique and comprehensive regulation should be created.[91]

During the ongoing pandemic due to the spread of COVID-19, the already serious problem becomes even more serious. There is and there will be a growing trend in relation to the requests for personal loans, consumer credit, mortgages, and reverse mortgages due to loss of jobs or commissions, delays or reductions of wages and/or turnover as a result of forced closures of many companies. The critical issues may arise both in relation to the contractual terms and the methods of the presentation and distributions of the products and services (lack of transparency, rush, ambiguity, incomprehensibility, apparent lack of alternatives, and so forth). As a result of the impossibility or greater difficulties of visiting the bank or insurance company, professionals make frequent use of distance communication technology (i.e., telephone, e-mails) to present various offers and/or modifications to the conditions of the contracts in force. This situation may trigger inconsistencies between the terms of contracts offered verbally and accepted by the customer during a phone-call and those communicated via e-mail or regular mail. As regard to the traditional letters, a further problem may arise, that is, the non-delivery of the contract or its significant delay, which may preclude the exercise of the right of withdrawal. Consequently, it will be necessary to prevent unfair, abusive practices and misconducts which take advantage of the serious and difficult situation faced by many current and future consumers. Fortunately, many countries have already introduced some important measures, such as the postponement of tax duties, mandatory insurance, pension security payments, suspension of loan installments.[92]

Naturally we should be aware that mis-selling could never be eliminated completely, however it should be minimized as much as possible through effective public and private enforcement, regulatory penalties for misconducts and appropriate redress for consumers. The task is not easy, but the struggle is definitely worth it.

References

AGCM (2020). *Bollettino settimanale*. Anno XXX. n. 11.

Argentati A. (2018). Polizze assicurative abbinate al credito e tutela del cliente: Analisi critica dei più recenti sviluppi normativi. *ilcaso.it*.

88 Rozporządzenie Ministra Rozwoju i Finansów z dnia 6 marca 2017 r. w sprawie systemu zarządzania ryzykiem i systemu kontroli wewnętrznej, polityki wynagrodzeń oraz szczegółowego sposobu szacowania kapitału wewnętrznego w banku", Dz. U. RP., poz. 637.

89 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

90 Regulation laying down provisions on insurance and reinsurance distribution, G.U. n. 218 del 19 settembre 2018.

91 Such as the Korean model described by Dong Won Ko in Policy Framework for Financial Consumer Protection in Korea: Focusing on the Financial Consumer Protection Act of 2020, *The International Review of Financial Consumers*, Vol. 5, Issue 2, 2020, pp. 1-10.

92 For more details *see* the Italian Report available at https://rf.gov.pl/pdf/Italian%20Report_Consumer%20loans%20and%20Coronavirus.pdf; and he Polish Report available at https://rf.gov.pl/wp-content/uploads/2020/05/Odroczenie_rat_07maja.pdf.

Banca d'Italia (2020). *Quaderni di Ricerca giuridica della Consulenza Legale. Private and public enforcement of EU investor protection regulation*. Conference papers. n. 90.

Butor-Keler A. (2017). Misselling a ochrona konsumenta na rynku usług finansowych. *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach*. nr 326.

Cavalli G. & Callegari M. (2019). *Lezioni sui contratti bancari*. Torino. Zanichelli Editore. Ed. 3.

CESIA (2016). *Rapporto Annuale*.

Cichorska J. (2017). Misselling. czyli sprzedaż niepotrzebnych instrumentów finansowych i jej skutki. Stan prawny w Polsce i w Wielkiej Brytanii. *Rozprawy Ubezpieczeniowe. Konsument na runku usług finansowych*. nr 24.

Colaert. Veerle A. (2016). MiFID II in Relation to Other Investor Protection Regulation: Picking Up the Crumbs of a Piecemeal Approach. in D. Busch and G. Ferrarini. *Regulation of the EU Financial Markets: MiFID II and MiFIR*. Oxford University Press.

Conac P-H. (2018). *Mis-selling of Financial Products: Subordinated Debt and Self-placement*. European Think Tank.

Cwynar A. (2021). *Alfabetyzm finansowy na świecie i w Polsce*. Warszawa. PWE Polskie wydawnictwo Ekonomiczne.

Czechowska I. D. & Waliszewski K. (2018). Mis-selling in Finance as an effect of excessive concentration on Sales. *Przedsiębiorczość i Zarządzanie* 1.1:19-31.

European Banking Authority (2017). *EBA Consumer Trends Report 2017*. https://eba.europa.eu/sites/default/documents/files/documents/10180/1720738/a64f91a1-7222-4af7-8965-bcef2c793c2d/Consumer%20Trends%20Report%202017.pdf?retry=1.

European Banking Authority (2016). *Final report. Guidelines on remuneration policies and practices related to the sale and provision of retail banking products and services*. EBA/GL/2016/06.

European Commission (2018). *Distribution system of retail investment products across the European Union. Final report*.

European Parliament. Directorate General for internal policies (2018). *Mis-selling of Financial Products: Marketing. Sale and Distribution. Study*.

ESMA (2018). *Guidelines on certain aspects of the MiFID II suitability requirements*. https://www.esma.europa.eu/sites/default/files/library/esma35-43-1163_guidelines_on_certain_aspects_of_mifid_ii_suitability_requirements_0.pdf.

ESMA (2016). *Guidelines on cross-selling practices*. https://www.esma.europa.eu/sites/default/files/library/2016-574_en_guidelines_on_cross-selling_practices.pdf.

Ferri G.B. (1971). Meritevolezza dell'interesse e utilità sociale. *Rivista di diritto commerciale*. II. 81.

Financial Conduct Authority (2015). *Annual Report and Accounts 2015/16*. https://www.fca.org.uk/publication/corporate/annual-report-2015-16.pdf.

Fiorentini F. (2020). *Italian Report*. https://rf.gov.pl/wp-content/uploads/2020/05/Italian-Report_Consumer-loans-and-Coronavirus1.pdf.

Franke G.. Mosk T. & Schnebel E. (2016). Fair Retail Banking: How to Prevent Mis-selling by Banks. *SAFE White Paper Series 39. Leibniz Institute for Financial Research SAFE*.

Franzoni M. (2017). La causa e l'interesse meritevole di tutela secondo l'ordinamento giuridico. *Juscivile*. 5.

Guarnieri A. (1994). *Meritevolezza dell'interesse*. (voce) in *Digesto delle disc. priv*.. Sez. Civ.. XI. Torino.

House of Commons. Report of Committee of Public Accounts (2016). *Financial services mis-selling: regulation and redress*.

IVASS e Banca d'Italia (2020). *Comunicazione sull'offerta di prodotti abbinanti ai finanziamenti*. https://www.ivass.it/normativa/nazionale/secondaria-ivass/lettere/2020/17-03/Comunicazione_BI_IVASS_Polizze_abbinate_17.3.20.pdf.

Ko D. W. (2020). Policy Framework for Financial Consumer Protection in Korea: Focusing on the Financial Consumer Protection Act of 2020. *The International Review of Financial Consumers*. Vol. 5. Issue 2.

Massarotto G. (2017). Utilità dei provvedimenti dell'Autorità Garante della Concorrenza (AGCM) nel settore bancario. *Dirittobancario.it*; https://www.dirittobancario.it/approfondimenti/banche-e-intermediari-finanziari/utilita-dei-provvedimenti-dell-autorita-garante-della-concorrenza-e-del-mercato.

Mazur Z. M. (2021). *The Consumer Lending Protection. How to prevent the predatory lending and "debt slavery" on the small-dollar lending market during and after the COVID-19 emergency*. Manuscript

submitted for publication.

Moloney N. (2014). *EU Securities and Financial Markets Regulation*. Oxford University Press.

NIK (2019). *Ochrona Konsumentów na rynku ubezpieczeniowym*. Informacja o wynikach kontroli. nr 152/2019/P/17/010/KBF. https://www.nik.gov.pl/plik/id.21513.vp.24159.pdf.

OECD (2005). *Improving Financial Literacy: Analysis of Issues and Policies*.

OECD (2017). *Behavioral Economics and Financial Consumer* Protection. OECD Working Papers on Finance. Insurance and private pensions. n. 42.

OECD (2019). *Smarter Financial Education: Key Lessons from Behavioral Insights for Financial Literacy Initiatives*.

OECD (2019a). *Task Force on Financial Consumer Protection. Effective Approaches for Financial Consumer Protection in the Digital Age: FCP Principles 1. 2. 3. 4. 6 and 9*.

Raport Rzecznika Finansowego (2018). *Kredyty konsumenckie. Bieżące problemy*. https://rf.gov.pl/wp-content/uploads/2020/05/Kredyty_konsumenckie_raport_2018.pdf.

Raport Rzecznika Finansowego (2018a). *Problemy klientów na „rynku forex"*. https://rf.gov.pl/wp-content/uploads/2020/05/Forex_raport_RF_2018.pdf.

Raport Rzecznika Finansowego (2020). *Kierunki Edukacji Finansowej Rzecznika Finansowego. Założenia podstawowe*. https://rf.gov.pl/wp-content/uploads/2020/05/Kierunki_Edukacji_Finansowej_Rzecznik_Finansowy_maj2020.pdf.

Raport Rzecznika Finansowego (2020a). *Problemy Obligatariuszy Getback*. https://rf.gov.pl/wp-content/uploads/2020/05/GetBack_informacja_RF_maj2018.pdf.

Warren E. (2008). Product Safety Regulation as a Model for Financial Services Regulation. *The Journal of Consumer Affairs*. 42. 3.

Wierzbicka E. (2015). Ochrona klienta ubezpieczeń w Polsce. *Kwartalnik Nauka o Przedsiębiorstwie*. n. 2. 71.

Wierzbicka E. (2016). Misselling barierą rozwoju ubezpieczeń w Polsce. *Zeszyty Naukowe Wyższej Szkoły Humanitas. Zarządzanie*. n. 2. 315.

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