Heikki Marjosola

What role for courts in protecting investors in Europe: a view from Finland

Article (Published version)
(Refereed)

Original citation:
Marjosola, Heikki (2014) *What role for courts in protecting investors in Europe: a view from Finland.* European Review of Contract Law, 10 (4). pp. 545-570. ISSN 1614-9920

DOI: 10.1515/ercl-2014-0024

Articles

Heikki Marjosola

What Role for Courts in Protecting Investors in Europe – A View from Finland

Abstract: Using Finnish case law on complex financial products as an example, this paper deals with the question of what role national courts could, and indeed should, have in the future disputes between investment firms and their clients, given that their private law relationship is embedded in an increasingly self-sufficient EU rulebook. Will there be room for principles deriving from national private law, or could the courts take a more active role in interpreting principles deriving from the MiFID itself? The paper argues that national courts should complement the 'administrative paradigm' of the European Union's financial services law, enhanced by the new MiFID regime, with a more principles-based enforcement.

Résumé: Utilisant à titre d'exemple la jurisprudence finlandaise sur les produits financiers complexes, cet article s'interroge sur le rôle des juridictions nationales pourraient et devraient avoir dans le règlement des différends futurs entre les sociétés d'investissement et leurs clients, étant donné que leur realtion de droit privé prend place dans un ensemble autonomisé de règles de l'Union européenne. Y aura-t-il de la place pour des principes provenant du droit privé national, ou les juridictions pourraient-elles jouer un rôle plus important dans l'interprétation des principes du MiFid? Cette contribution fait valoir que ces juridictions devraient compléter le paradigme administratif du droit des services financiers de l'Union européenne, amélioré par le nouveau régime Mifid, selon un régime plus systématique.

Zusammenfassung: Vor dem Hintergrund von finnischem Fallrecht zu komplexen Finanzprodukten widmet sich der Beitrag der Frage, welche Rolle Gerichte im Streit zwischen Anlegern und Finanzdienstleistern spielen sollten – dies namentlich vor dem Hintergrund, dass die privatrechtliche Beziehung eingebettet ist in ein sich zunehmend autark entwickelndes EU Rulebook. Lässt dies überhaupt Raum für ein autonom sich entwickelndes nationales Privatrecht, oder könnten

Heikki Marjosola: Doctoral candidate, University of Helsinki, Research associate, European University Institute, E-Mail: Heikki.Marjosola@EUI.eu

Gerichte eine aktivere Rolle spielen bei der Entwicklung von Prinzipien, die sich aus der MIFID selbst ableiten lassen? Der Beitrag argumentiert, Gerichte sollten in der Tat ein Gegengewicht zum „Verwaltungsparadigma" im Europäischen Finanzrecht bilden und dieses „komplementieren" – wobei das neue MIFID-Regime mit einer stärker prinzipienbasierten Durchsetzungsphilosophie dem entgegenkommen könnte.

DOI 10.1515/ercl-2014-0024

1 Introduction

Questions of securities law enforcement are timely. While retail investor protection is arguably a peacetime preoccupation of regulators,[1] its effectiveness is brought to a serious test only in times of crises. The fall of Lehman Brothers investment bank and the systemic effects it triggered globally caused, both directly and indirectly, losses for countless investors. Not surprisingly, abundant litigation ensued, with claimants ranging from non-professional retail investors and small or medium-sized businesses to public bodies such as municipalities.[2] This aftermath has partly lead EU legislator to rethink the level, scope and nature of available investor protection in the single market. In June 2014 the Markets in Financial Instruments Directive (MiFID)[3] was repealed by a new directive (MiFID II) and regulation (MiFIR).[4] The new package also updates many key investor protection provisions, but above all signals increasing Union activity with regard to supervision and enforcement of rules.

However, by emphasising public enforcement and providing for minimum harmonisation of national administrative sanctions regimes (see next section), the new MiFID regime has a strikingly public law character while the role of

1 N. Moloney, 'Regulating the retail markets: law, policy, and the financial crisis' (2010) 63 *Current legal problems* 375–447, 376.

2 For a succinct review of case law, see E. Wymeersch, 'Regulation and Case Law Relating to Financial Derivatives' *University of Ghent Financial Law Institute Working Paper* 2012–03 (2012).

3 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, *OJEC* 2004 L 145/14.

4 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, *OJEU* 2014 L 173/349 (MiFID II); Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, *OJEU* 2014 L 173/ 84 (MiFIR).

private enforcement has been overlooked.[5] This shift, while welcome in many respects from the perspective effective supervision, exacerbates the public-private asymmetry of the EU investment services law and leaves many private law questions unanswered.[6] The MiFID's private law effects, especially in civil liability context, remain its biggest blind spots.[7] For instance, it is not entirely clear to what extent civil courts can be stricter than MiFID in application of their private law principles and standards.[8] What is clear, however, is that the private law outcome of a breach of the MiFID-based rules continues to be dictated primarily by national law. This principle was underlined in the recent *Bankinter* case,[9] which was also the first CJEU case dealing with the MiFID's key investor protection provisions.[10] The Court confirmed that, subject to observance of the principles of equivalence and effectiveness, it is for the internal legal order of each Member State to determine the contractual consequences in the event that an investment service provider failed to comply with the MiFID's requirements.[11]

5 N. Moloney, 'Liability of Asset Managers: A Comment' (2012) 7 *Capital Markets Law Journal* 414, 416.

6 This is not to deny the MiFID's particular private law character. MiFID's rules of conduct as regulatory law indeed have a public law nature but they are transformed into contractual standards in the everyday relationships between intermediaries and their clients. See G. Ferrarini, 'Contract standards and the Markets in Financial Instruments Directive (MiFID): An assessment of the Lamfalussy regulatory architecture' (2005) 1 *European Review of Contract Law* 19. This could be perceived as reducing the scope of traditional contract law but it can also be symptomatic of the way European regulatory private law functions. For regulatory private law, party autonomy or freedom of contract does not provide a starting point, but the law is rather designed for the 'achieving, fostering or managing of particular markets or particular policy objectives.' See eg H.-W. Micklitz, 'Administrative Enforcement of Private Law', in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds), *Foundations of European Private Law* (Oxford: Hart Publishing, 2011).

7 See M. Tison, 'The civil law effects of MiFID in a comparative law perspective' *University of Ghent Financial Law Institute Working Paper* WP 2010–05, 13 (2010). A question to what extent a breach of the MiFID's conduct of business rules could or should form the basis for liability is by no means a new one. As noted by Tison (*ibid*, 2), this was debated already prior to the MiFID. See also D. Busch, 'Why MiFID matters to private law – the example of MiFID's impact on an asset manager's civil liability' (2012) 7 *Capital Markets Law Journal* 386.

8 European jurisdictions seem to have very different answers to these questions. See Busch, n 7 above, 394–398.

9 Case 604/11, *Genil 48, S L and Comercial Hostelera de Grandes Vinos, S L* v *Bankinter S A and Banco Bilbao Vizcaya Argentaria*, S A [2013] (CJEU) (not yet reported).

10 For an analysis of the case from private law perspective, see S. Grundmann, 'The Bankinter Case on MIFID Regulation and Contract Law' (2013) 9 *European Review of Contract Law* 267.

11 Case 604/11, n 9 above, para 58.

The question with which this article is concerned is what role the civil courts will, or should, have in adjudicating future disputes between financial firms and their clients, especially given that their legal relationship is increasingly dictated by a thickening European rulebook. The article focuses on Finland as a case study. In Finland, too, the financial crisis was followed by a significant increase in private enforcement activity. However, in a large majority of the cases investors chose to take their case to the Securities Complaints Board, an informal alternative dispute resolution scheme provided by the Finnish Financial Ombudsman. Therefore, the Finnish conduct of business regime remains largely untested in courts. Moreover, to the knowledge of the author, none of the cases initiated in Finnish courts concerning complex financial products involve investments made after the implementation of the MiFID in November 2007. However, the few 'outlier' cases, which ended up in courts instead of the Securities Complaints Board, represent well the function that courts can play in filling regulatory lacunae through enforcement of more value-charged legal principles.

The next section will underline the key changes brought about by the recently updated MiFID regime. Section 3 presents briefly the statutory framework of the Finnish system of investor protection, which is followed by examination of Finnish case law. Two cases will be presented in more detail, both dealing with complex financial instruments. One case was settled soon after the judgement of the district court, while the other, at the time of writing, is pending before the Supreme Court of Finland. In addition, two earlier Supreme Court decisions address the so-called unit-linked insurance plans and as these cases also concern alleged misselling of new financial products, they will be briefly touched upon. Section 4 addresses the more normative argument of which role the courts should play in protecting investors in Europe.

2 The updated MiFID Regime

The Investment Services Directive (ISD)[12] harmonized little and its underlying ideology was based on mutual recognition, free movement through 'passporting' of financial services, and home member state supervision. The ISD's conduct of business rules were framed in general terms, leaving substantial leeway for national authorities to implement and refine them.[13] The MiFID, on the other

12 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, *OJEC* 1993 L 197.

13 The ISD required Member States to draw up rules of conduct implementing at least the list of principles set out in the Directive. Member States were to make sure that investment firms observe hand, laid down an extensive conduct of business regime for investment firms, which was developed further with an implementing directive[14] as well as non-binding recommendations and opinions issued by the Committee of European Securities Regulators (since 2011, the European Securities Markets Authority, ESMA). Article 19 of the MiFID restates the general principle that investment firms must act honestly, fairly and professionally in accordance with the best interests of its clients when providing investment services,[15] but it also laid down a more extensive conduct of business framework, operationalizing the general duty of care principle into several informational and other duties.[16] In addition, the scope of protection was made dependent on a strict system of client classification.[17] Together with the Implementing Directive 2006/73/EC, which provided more

---

the rules of conduct at all times (Article 11(1)). See E. Wymeersch, 'Private Law Remedies Relating to Obligations Flowing from EU Directives on Securities', in M. Rudanko and P. Timonen (eds), *European Financial Area* (proceedings of closing seminar of the research project of KATTI). Publications of the Helsinki University Institute of International Economic Law 31 (1996) 177–205, 194–196.

14 Commission Implementing Directive 2006/73/EC of 10 August 2006 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, *OJEU* L 241/26. The other act implementing MiFID is the Commission Regulation 1287/EC/2006 of 10 August 2006 as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, *OJEU* L 241/1.

15 This 'loyalty principle' was included already in the ISD (art 11). On the background of MiFID's conduct of business principles, See O.O. Cherednychenko, 'European Securities Regulation, Private Law and the Investment Firm-Client Relationship' (2009) 5 *European Review of Private Law* 925, 929–930.

16 The principles forming the core of the MiFID's conduct of business regime, are laid down in arts 19(2) to (8) and include, inter alia, the following: the duty to provide fair, clear and not misleading information (art 19(2)); the duty to provide information in comprehensible form (eg about the investment firm and its services and proposed investment strategies and financial instruments, including appropriate guidance on and warnings of the risks associated with investments in those instruments) (art 19(3)); the duty to conduct a suitability test when providing investment advice or portfolio management (ie obtain certain necessary information regarding the client's or potential client's knowledge and experience in the investment field, his financial situation and his investment objectives) (art 19(4)); the duty to conduct an appropriateness test when providing other investment service than investment advice or portfolio management (art 19 (5)); the conditions for the provision on 'execution only' investment services (ie investment services that only consist of execution and/or the reception and transmission of client orders without the need to obtain the above stated information or the assessment of suitability or appropriateness) (art 19(6)). Art 21 also sets an important duty for an investment service provider to ensure 'best execution' of the client's order.

17 See M. Kruithof, 'A Differentiated Approach to Client Protection: The Example of MiFID', in S. Grundmann and Y.M. Atamer (eds), *Financial Services, Financial Crisis and General European* detail in the relatively flexible conduct provisions, the MiFID regime transformed the EU investment services and markets regulation from minimum harmonisation closer to maximum harmonisation.[18]

The new MiFID regime takes the development a step further. Echoing the unification movement, the MiFID II recites the Union's commitment to 'minimise discretions available to Member States across Union financial services law'.[19] The new framework, applicable starting January 2017, also entails updated organisational and conduct requirements. Noting the apparent shortcomings in the protections of 'non-retail' clients, the MiFID II regulation seeks to 'better calibrate the requirements applicable to different categories of clients.'[20] The updated conduct rules (Articles 24 and 25), try to make sure that intermediaries understand the products they recommend or offer (Article 24(2)) and that they are suitable taking into account the relevant client's risk tolerance and ability to bear losses (Article 25(2)). The rules also tackle the so-called 'independent' investment advice: for an investment advice to be independent, it must be based on an assessment of a sufficient range of sufficiently diverse financial instruments and the advisor cannot accept and retain fees, commissions or any monetary or non-monetary benefits in relation to the provision of the service (Article 24(7)).[21] Investment firms' internal remuneration or performance assessment practices must also not conflict with their duty to act in the best interests of its clients (Article 24(10)).

As the above provisions demonstrate, the MiFID II signals a move away from the process-based model of its predecessor towards a more consumer-focused, interventionist approach. Protection of retail investors seems to have become a part of the Union's consumerisation agenda, and retail investors are now being characterized, also with regard to types of protection measures available, more as *consumers* of financial products and services.[22] The MiFID II shrinks the autonomy of retail investors also by curtailing the range of investment products eligible for

Contract Law: Failure and Challenges of Contracting (The Netherlands: Kluwer Law International, 2011).

18 Basically, the notion of maximum harmonisation means limiting the Member States' possibilities to adopt measures that go beyond those adopted at EU level.

19 MiFID II, Rec 58. Art 24(12) of the Directive states that Member States may impose additional requirements on investment firms, in respect of the matters covered by the Article, only in exceptional cases and such requirements must be objectively justified and proportionate. This approach was already used in the MiFID I regime, see eg Implementing Directive 2006/73/EC, art 4.

20 Rec (104).

21 Restrictions on economic inducements also concern portfolio managers (art 24(8)).

22 N. Moloney, 'The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?' (2012) 13 *European Business Organization Law Review* 169, 172, suggesting that while the so-called execution-only sales (Article 25(4)) – the underlying rationale here is probably to push more investors into an investment advice relationship.[23] Perhaps the farthest reaching example of interventionist approach is the extensive product intervention powers given by the MiFIR to national supervisors and, as a last resort, to ESMA (in the case of structured deposits to the European Banking Authority). These powers, which are meant to address serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or commodities markets, or the stability of the whole or part of the financial system, allow the adoption of temporary prohibitions or restrictions in the Union on the marketing, distribution or sale of certain financial instruments or types of financial activity or practice (Articles 40 to 42).[24]

Finally, it is particularly noteworthy that, in line with the majority of EU's post-crisis financial markets legislation, the MiFID II/MiFIR package contains substantial amount of delegations of power to ESMA and the Commission to further refine its provisions as well as to update them where necessary.[25] In practice this also means that much of previous soft law guidance will in the future be served in a harder format.[26]

Beyond rules in books, the new MiFID regime seeks to enhance the effectiveness of its more consumer-friendly provisions through enhanced supervisory and enforcement powers on both EU and national level. The MiFID II introduces a common minimum set of supervisory and investigative powers for national regulators, coupled with a minimum level of administrative measures and sanctions for infringements.[27] Notably, the Directive does not seek to harmonise the effects it has on the Member States private law regimes with regard to assessment of civil

pre-crisis EU investor protection policy was based on the retail investor, the consumer type now seems to be the target of intervention.

23 For an early analysis, see Moloney, n 22 above, 179–180.

24 Such prohibitions or restrictions can be imposed on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients (eg art 39(2)(2)). However, the powers 'do not imply any requirement to introduce or apply a product approval or licensing by the competent authority, ESMA or EBA.' (MiFIR, Rec 29).

25 With regard to conduct of business rules, see the powers delegated to the Commission under art 24(13) and art 25(8).

26 By way of an example, while CESR provided non-binding guidelines for investment firms to distinguish between complex and non-complex financial instruments for the purposes of the MiFID's appropriateness requirements (3 November 2009, CESR/09-558) in the future the Commission is expected to hand a delegated act to determine the same. However, art 25(11) of MiFID II also states that ESMA may continue to develop guidelines for the assessment of financial instruments being classified as non-complex, but it must take into account the delegated acts adopted by the Commission.

27 MiFID II, arts 69 and 70.

liability.[28] This emphasis on public supervision and enforcement is symptomatic of much of EU's post-crisis reforms.[29] Therefore, it is within the discretion of the Member States to choose the appropriate methods of private enforcement, a principle recently underlined also by the Court of Justice of the European Union (CJEU).[30] The only exception is that the MiFID II, like its predecessor, promotes the use extra-judicial mechanism for handling consumer complaints and for that purpose requires Member States to set-up efficient and effective complaints and redress procedures for the out-of-court settlement of disputes. These procedures should not, however, prejudice the right to bring action before the courts.[31]

3 A view from Finland

3.1 Statutory context

The Finnish Investment Services Act (FI: *Sijoituspalvelulaki* 747/2012) lays down the conduct of business regime regulating the relationship between investment firms and their clients. In addition, the Finnish Securities Markets Act (FI: *Arvopaperimarkkinalaki* 746/2012) contains a general prohibition to give false or misleading information when marketing or acquiring securities (Chapter 1, Section 3) as well as lays down a general principle according to which it is prohibited to act contrary to 'good practice in the securities markets.' (Chapter 1, Section 2). In the absence of clear norm, the content of good securities markets practice evolves primarily in established market practices and industry self-regulation and it can guide procedures and decisions especially in the cases when there is no concrete rule available.[32]

Finnish law seems clear with respect to the consequences of non-compliance with the Investment Services Act's conduct of business rules. The general damages clause was amended and specified in the new Investment Services Act,

28 Interestingly, the Commission originally flirted with the idea of introducing 'a principle of civil liability' in the new MiFID: 'Introducing a principle of civil liability of investment services providers would be essential for ensuring an equal level of investor protection in the EU.' European Commission, Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID) 8 December 2010 http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/ consultation_paper_en.pdf <accessed September 2013>, at 63.

29 Moloney, n 5 above, 420–421.

30 Case 604/11, *Genil 48, S L and Comercial Hostelera de Grandes Vinos, S L* v *Bankinter S A and Banco Bilbao Vizcaya Argentaria*, S A [2013] (CJEU) (not yet reported).

31 MiFIR, Rec 151.

32 Government Bill 32/2012, 96.

which was introduced in the course of the 2011 overhaul of the Finnish financial markets legislation. The damages provision in its present form states that anyone who willfully or negligently causes damage to another person through conduct in violation of the Investment Services Act, the provisions or regulations issued thereunder or of the regulations or decisions of the European Commission issued under the MiFID, shall be liable to compensate the loss caused (Chapter 16, Section 1).[33] The substantive scope of the damages clause is thus as broad as possible. According to the Investment Services Act's *actes préparatoires*, the general damages rule covers liability stemming from both tort and breach of contract, and also covers pure economic losses.[34] The inclusion of pure economic losses within the provision's remit might seem redundant (for now, at least, financial products hardly cause personal injuries or damage to property), but it clarifies the special nature of financial services in the Finnish tort law. Under the Finnish Tort Liability Act (FI: *Vahingonkorvauslaki*, 412/1974), the damages may constitute compensation for economic loss, ie loss not connected to personal injury or damage to property, only where it has been caused by an act constituting a criminal offence, by exercise of public authority, or in other cases, where there are especially weighty reasons (Chapter 5, Section 1).

The general clause of the Customer Protection Act (FI: *Kuluttajansuojalaki* 38/1978) complements the special conduct of business regime. The Act provides that no conduct that is inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing and that the dissemination of false or misleading information in marketing is prohibited (Chapter 2, Sections 1 and 2). Moreover, the consumer protection ombudsman's mandate covers in part the FSMA's perimeter.

The Finnish Financial Services Authority (FIN-FSA) plays an important regulatory role, too, issuing both binding rules, when mandated to do so, and non-binding recommendations and opinions.

---

33 In addition to general damages provision in the Investment Services Act, several other acts such the FSMA, the Companies Act (osakeyhtiölaki) and the Act on Investment Funds (Sijoitusrahastolaki) contain special provisions on damages applicable within their respective scope. General principles of contract and tort law complement, where appropriate, the special damages provisions of Finnish securities markets legislation.

34 Government Bill 32/2012, 172.

3.2 Case Lehman

Background

The case concerned structured bonds, which were issued and guaranteed by separate Lehman Brothers entities.[35] These so-called collateralised debt obligations (CDO) combined an attractive 5 years maturity and yield with a capital guarantee, which suggested low risk for the invested amount. The spread of Lehman's structured products globally was aided by historically low interest rates and market volatility.[36] The former makes proper yield a rarity in debt markets, whereas the latter increases the appetite for capital guaranteed products with longer investment horizon.[37] That such an environment is ideal for financial innovation can be perceived on today's financial markets, too.[38]

Lehman's structured instruments were distributed in Finland via a complex scheme of banks, brokers and specialized agents. In our case, an investor had concluded a purchase commitment agreement with an independent dealer acting as an agent of the defendant bank. A third company had acted as the arranger of the issue while also taking care of the placements. The defendant nevertheless acted in close collaboration with the arranger, eg in preparing marketing materials and arranging certain marketing events.

The guarantor of the instruments, Lehman Brothers Holding Inc, filed for the United States Bankruptcy Code's Chapter 11 reorganization procedure in 15 December 2008. The issuing entity, Lehman Brothers Treasury Co BV, on the other hand was declared bankrupt in the Netherlands already in 8 December 2008.

The plaintiff sued the bank for damages for the amount of lost capital (c EUR 500.000), primarily on the basis that the bank was responsible for conveying false and misleading marketing information, eg on the scope and nature of the capital guarantee and issuer risk.

35 Structured products can be generally be defined as 'bonds issued by specialist vehicles and marketed by the banks which construct them, the return on which is derived from a range of underlying or embedded assets' Moloney, n 1 above, 405.

36 Moloney, n 1 above, 405.

37 As stated in FSA guidance on structured products: 'Consumers respond to volatility by seeking security, but face low yields on traditional savings and investment products. This leads consumers to be attracted by products that claim to offer a degree of security and also promise higher returns.' FSA, Finalised guidance Retail Product Development and Governance – Structured Product Review, March 2012, 3.

38 Nowadays especially pertinent are so-called contigent convertibles (or 'CoCos') which are spreading and finding their way even in the porfolios of non-professional investors.

The Judgement of the District Court

The District Court gave its judgment on 9 May 2011.[39] The plaintiff pleaded that the defendant had breached the FSMA provisions applicable at the time, which stated that securities shall not be marketed or acquired in business by giving false or misleading information or by using procedure that is contrary to good practice or otherwise unfair. Moreover, the Act provides that the information must be corrected or supplemented without delay, if it is found to have been misleading or false after its presentation, and if it may be of material importance to an investor (FSMA, Chapter 2, Section 1). At the time, the FSMA's general damages provision provided that anyone who causes damage through a procedure that is against the FSMA or against the provisions issued thereunder, shall be liable to compensate the damage caused (Chapter 9, Section 2).

The plaintiff also invoked the classic general provisions of the Finnish Contracts Act (FCA, 228/1929) claiming that the investment agreement should be held null and void. That Act provides that under certain circumstances 'a transaction into which a person has been fraudulently induced shall not bind him or her'(Section 30). Secondly, a transaction shall not be enforceable if it was entered into under circumstances that would make it 'incompatible with honour and good faith' (Section 33).

In its judgment, the Court gave priority to the following questions: 1) were the securities marketed by giving false or misleading information to the customer and 2) did the information disclosed influence the investment decision (causality)? Only in the event of affirmative answers to both questions, the Court would proceed to assess the claims on validity of the investment contract and the defendant's liability for damages.

The Court recognised that the marketing prospectus had stated that the product was capital guaranteed, and it implicitly provided that the guarantee protected against market risk. The marketing prospectus did not mention that the investor was not protected in the event of insolvency of the issuer or guarantor. Moreover, it provided an implicit guarantee that under normal market conditions there exists a relatively liquid secondary market where the position could be liquidated. However, the base prospectus that had been available (in English only) described risks accurately, including the risk of insolvency of the issuer and guarantor. Also, in the marketing prospectus it was clearly stated that investments should not be made without due regard to the bond documentation provided by Lehman Brother Treasury Co BV as an issuing party.[40]

39 Judgement of Pirkanmaa District Court No 1125, 9 May 2011, L 09/24701.
40 Judgement of Pirkanmaa District Court No 1125, 19–20, 22–23.

Against these findings, the court went on to assess whether the information provided had been false and misleading. As is customary, the court conducted both an objective and subjective analysis. The objective analysis relates to the accuracy and truthfulness of the marketing information, whereas the question of whether the material was misleading requires a subjective assessment. The court concluded that the marketing information was partly inaccurate but given the background of the investor and his investment experience, he should have exercised a duty of care. For instance, even if the plaintiff had received an oral confirmation on the absence of risk for the invested capital, he should have proactively clarified the contradicting information about the product's risk level, which was accurately enough depicted elsewhere. As to the claimant's argument that he had not understood that the product was in essence a loan to the issuing Lehman entity, the court interestingly described this fact as only underlining his duty of care of finding out about the product before making the investment.[41]

The court found in favour of the Bank. The court admitted that it was possible that the marketing information, both oral and written, was in part inaccurate and unclear. But given the plaintiff's experience and risk profile, the court found that these contradictions did not materially influence the investment decision.[42] Therefore, the court did not need to proceed further to assess the claims on validity of the contract and liability of the bank.

Judgement of the Court of Appeals

The Court of Appeals gave its judgement in 31 May 2013[43] adopting an entirely different line of reasoning and also reaching the opposite conclusion. First of all, the court addressed the plaintiff's claims in different order. Where the District Court did not even proceed to assess some issues, e.g. the question of validity of the contract, the Court of Appeals started from these fundamental private law questions. The plaintiff had in fact only concluded the investment commitment agreement with an independent agent of the defendant. Accordingly, the defendant argued that because no agreement had been made between the parties to the dispute, the claims on invalidity of the contract were without basis.[44] Therefore, before assessing the claims for damages, the court needed to address the fundamental question of the nature of private law relationship between the parties.

41 Judgement of Pirkanmaa District Court No 1125, 26–27.

42 Judgement of Pirkanmaa District Court No 1125, 27.

43 Judgement of Turku Court of Appeals No 1125, 31 May 2013, S 11/1410.

44 Judgement of Turku Court of Appeals No 1125, 3.

The court noted that the typical cases likely to fall under the general damages provision of the FSMA do not correspond well with the traditional dichotomy between contract and tort liabilities. In the view of the Court, such established private law categories should in general be treated critically in the context of securities markets damages claims. The Court stressed the importance of privity of contract as the overarching principle, stating that it should not be abandoned lightly in favour of more 'systematic' assessments.[45] But having regarded the fact that the defendant was in a contractual relationship with both the agent and the arranger of the securities issue, and *de facto* collaborated closely with both, the court interpreted the securities purchase commitment 'as a legal act that should be evaluated in light of contract law principles also in the relationship between the plaintiff and the defendant.'[46] However, the court also concluded that the purchase commitment was of such nature that it could not be characterised as a legal act within the meaning of the general provisions of the Finnish Contracts Act (FI: *Laki varallisuusoikeudellisista oikeustoimista* 228/1929). Thus the contract could not be held void on the basis of *mala fide* or fraudulent inducement.[47] Therefore, the plaintiff could only seek a remedy through and within the special legal framework set up by the FSMA.

The court then turned to assess the claim that the bonds had been marketed with false or misleading information, maintaining that this assessment must be made from the subjective perspective of the individual making the investment decision. Noting that the investment had been marketed as basically risk-free to the extent that the nominal value of invested capital was concerned, the court held that the marketing material had inadequately disclosed the level of risks involved. The marketing material's statement about the investor getting back the capital invested even in the 'worst case scenario', was clearly false.[48] With regard to the liability of the defendant, the Court's reasoned that despite the defendant had not been in charge of developing the relevant marketing material by explicitly approving and distributing the marketing material (which also contained the defendant's name and logo), the defendant had breached the FSMA's marketing provisions and caused damage to the plaintiff.[49]

Finally, the court assessed the conditions for issuing damages. The District Court had found that the claimant had himself contributed to the damages incurred, eg by not exercising sufficient duty of care. The Court of Appeals,

45 Judgement of Turku Court of Appeals No 1125, 4.
46 Judgement of Turku Court of Appeals No 1125, 7.
47 Judgement of Turku Court of Appeals No 1125, 8.
48 Judgement of Turku Court of Appeals No 1125, 11–12.
49 Judgement of Turku Court of Appeals No 1125, 12.

however, noted that the plaintiff was not a very experienced investor and the size of the investment (substantially leveraged by borrowed money) was disproportionate in relation to the plaintiff's investment history and financial position. The circumstances had also required making of the investment decision relatively quickly, forcing the plaintiff to rely on the marketing information that was misleading and partly false.[50]

Finally, the resulting damage consisted of the so-called 'pure economic loss' which, as noted above, under general Finnish tort law can become subject to remedy only if particularly compelling reasons require it. The Court nevertheless held that in the framework of securities markets law such compelling reasons were not necessary. Furthermore, despite the fact that the court had analysed the legal relationship between the parties through the lens of contract law principles, the award of damages could not be perceived as contractual. Interestingly, for the purposes of liability assessment, the court did not consider the dichotomy between contract and tort. The general damages clause in the FSMA therefore only required (a) establishing the breach of the Act's provisions; (b) ascertaining the losses caused; and (c) showing that there is a causal connection between the two.

The Court of Appeal overruled the judgment of the District Court and found the defendant liable for the loss of capital invested. At the time of writing, the case is still pending in front of the Supreme Court.

3.3 Case Mermaid

Background

In the aftermath of the financial crisis, the so-called 'mermaid bonds' became in Finland the prime example of risky financial instruments that had found their way into the portfolios of various non-professional retail investors. These structured bonds, which came in many varieties with different risk levels, were sold by one prominent Finnish bank to more than 1500 of its customers. The products were new and fairly complex, involving investors taking both the issuer risk and credit risk of the companies on whose performance the bonds were referenced to. Therefore, unlike the Lehman CDOs the mermaid bonds did not have a capital guarantee. As the financial crisis escalated in 2008, a number of the bond's

50 Judgement of Turku Court of Appeals No 1125, 12–13.

reference companies became insolvent, and many retail investors lost their investment entirely.

Judgment of the District Court

The Ahvenanmaa District Court gave its ruling on 29 June 2010. The plaintiff had invested in a medium-risk variant of the Mermaid bond in 2006. The bond's value was highly contingent on defaults of the referenced companies, and even a few defaults out of one hundred companies was enough to render the product worthless. However, in light of a 20-year historical analysis, the risk of significant defaults was perceived low, and thus the instrument was at least implicitly marketed as a 'low risk' product.

The issuer bank actively solicited the investment and the plaintiff made the investment in accordance with the bank's proposal. The plaintiff claimed that he had understood that the investment's capital was guaranteed by the issuer bank and sued the bank for damages on two primary grounds. First, like the plaintiff in the above *Lehman* case, he pleaded that the bank had breached the marketing requirements laid down in the FSMA as applicable at the time of investment ('prohibiting marketing of securities by giving false or misleading information or by using procedure that is contrary to good practice or otherwise unfair'). Secondly, the plaintiff pleaded that the bank had not fulfilled its obligation under the FSMA to obtain, prior to the provision of investment service, sufficient information on the client (eg financial situation, investment experience and investment objectives) (Chapter 4, Section 3a).[51]

The court nevertheless held that the defendant had fulfilled its duty, laid down in the FSMA in very general terms, to obtain sufficient information on the client's investment experience. The court nevertheless noted that the FSMA's general clause on marketing of investment products should be considered as well. The investments (made in 2006) preceded detailed statutory disclosure regulation. However, the recommendation by the Finnish Financial Supervisory Authority (FIN-FSA) stated, inter alia, that the financial intermediary is under obligation to notify the customer of any exceptional risks relating to the financial instrument in question.[52] The court concluded that the written marketing material was partly incomplete with regard to disclosure of risks involved, especially considering that

51 The plaintiff also invoked the MiFID's duty of disclosure requirements despite these had entered into force more than a year after the investment was made (1 November 2007) Judgement of Ahvenanmaa District Court 10/625, 2–6.
52 FIN-FSA recommendation 201.7, paragraph 5.1.4.

the product in question was new and complex. Oral representations had not corrected this deficiency.[53]

In the court's reasoning, however, these deficiencies had not materially influenced the plaintiff's investment decisions (causality). The plaintiff's other investment activities concerning similar financial instruments indicated that he was willing to speculate. Furthermore, in conducting a subjective assessment the court held that the claimant, a well-known and successful auditor and long-time managing director of a medium-size industrial company, had better than average capabilities to understand the instruments in question. Therefore he had a duty of care to actively request and acquire clarifying information on the investments.[54] Even though the marketing material had been partly misleading and inadequate, it did not have the required causal connection to the claimant's investment activity and the resulting losses. The court held in favour of the defendant.

The dispute was settled soon after the ruling. This is not particularly surprising given the court's findings on the shortcomings of the marketing material, as well as the emphasis on increased disclosure requirements due to the newness and complexity of the product. Given that there were more than one thousand investors affected, the bank probably did not want to risk further publicity and a possible precedent.

3.4 Cases relating to unit-linked insurance plans

In addition to the above *Lehman* and *Mermaid* cases, two important decisions by the Supreme Court of Finland have been issued in relation to so-called unit-linked insurance plans. Such insurance products became popular in Finland in the 1990s particularly because of their preferential treatment in applicable tax law. In comparison to structured financial products, unit-linked insurance plans are somewhat less complex. They differ from traditional life insurance products in that they entail an investment component and thus also include an investment risk, ie the risk of losing the invested capital. In short, the value and return of unit-linked insurance plans are linked to performance of the funds selected by the insurance takers themselves. The funds can consist of debt or equity instruments.

Both cases dealt with the extent of statutory disclosure obligation of the insurer in cases where the insured had opted for higher risk equity funds. The insurance policies were bought in the end of 1990s when neither the applicable

53 Judgement of Ahvenanmaa District Court 10/625, 19.

54 Judgement of Ahvenanmaa District Court 10/625, 20–21.

Finnish Insurance Contract Law (FI: *Vakuutussopimuslaki,* 543/1994) nor other regulatory guidance contained special provisions on unit-linked insurance plans.

In the first case the question was whether the plaintiff had been given misleading or inadequate information on the projected returns and premiums of the insurance policy.[55] The policy in question involved substantial costs mainly because the insurer collected fees for both the administration of the policy it sold to the policyholder as well as administration of the underlying funds. In effect, the client had to pay double administrative fees. The plaintiff pleaded that 1) the defendant's marketing material had included misleading and inaccurate information and thus breached the disclosure requirements of the applicable Insurance Contract Law (Section 5, paragraph 1) and that 2) the Court should accordingly order that the insurance contract is deemed to be valid with its content determined by the reasonable expectations of the policyholder at the time when the insurance policy was taken. The latter pleading is based on the explicit remedy provided by the Insurance Contract Act (Section 9, paragraph 1). That provision reflects a fundamental principle of Finnish contract and commercial law according to which the party to a contract has the right to trust the information submitted during the negotiations, and such information must be taken into account when interpreting the contract.[56]

In its judgment the (majority of the) Supreme Court found the case in favour of the plaintiff, ruling that the administrative fees of the unit link insurance policy should be reduced to match what the plaintiff had reason to believe at the time of concluding the agreement.[57] The Supreme Court's reasoning relied primarily on traditional contract law principles. In the court's view, like in *Lehman* and *Mermaid* cases, the insurer's disclosure obligation is substantively broader when the insurance product in question is complex and less well-known.[58] However, the court gave less weight on subjective considerations, applying in its reasoning a principle similar to the standard of care *bonus pater familias* (referring to 'ordinary insurance taker').

The other Supreme Court case also concerned the adequacy and correctness of information provided by the insurer, but the question was rather which party should bear the investment risk and the losses incurred.[59] The plaintiff claimed that the bank should be held liable for the losses caused by the decline in value of the chosen reference funds, because the risks were not adequately disclosed. The

55 Judgement by the Supreme Court of Finland No 641 (KKO 2010:25), 25 March 2010.
56 Judgement by the Supreme Court of Finland No 641 (KKO 2010:25), paragraphs 11, 12.
57 Judgement by the Supreme Court of Finland No 641 (KKO 2010:25), paragraph 22.
58 Judgement by the Supreme Court of Finland No 641 (KKO 2010:25), paragraph 9.
59 Judgement by the Supreme Court of Finland No 28 (KKO 2011:5), 17 January 2011.

plaintiff as the policyholder had believed that the capital of the investment was protected, amongst other things because the product was marketed as a 'savings life insurance plan'.[60]

The Supreme Court held that because of the nature of the unit link insurance plans, the insurer's duty of disclosure primarily involves the risks and expected returns of the funds, which in this case were equity funds with higher than moderate risk. The insurer therefore had an increased obligation to provide information on possible, including unfavourable, future scenarios. The court noted that the offer letter did not contain information on the possible loss of invested capital and that the return calculation was unusually optimistic, projecting 10 per cent returns. Accordingly, the written information provided by the insurer was insufficient and did not adequately disclose the level of risk involved.[61]

Nevertheless the Court found in favour of the defendant because a) it held that the defendant had showed that sufficient information had been given individually in private meetings where the investments were discussed and b) because the plaintiff had broad experience in equity markets and must have understood the risks involved.[62]

3.5 Assessment of the cases

At the time the above cases were tried, the MiFID-based rulebook was yet to emerge. Key provisions of the Finnish Securities Markets Act (FSMA) applicable in the cases examined date back to 1989[63] when the first legal rules for Finnish securities markets were adopted. These rules thus also predate the Investment Services Directive (93/22/EEC). The same applies to unit-linked insurance products: nowadays the regulation of insurance contracts entails special provisions on unit-linked insurance plans and other insurance products akin to investments.

In the absence of detailed regulatory guidance, the effectiveness of investor protection in the cases relied primarily on *ex post* assessment of flexible private law concepts and principles such as 'fairness' and 'duty of care'. The cases demonstrate well how the courts can, and must, fill regulatory voids with relevant civil law principles. Principles provide flexibility that highly detailed rules lack. However, the *Lehman* case also showed especially that traditional commercial

60 Judgement by the Supreme Court of Finland No 28, paragraph 15.
61 Judgement by the Supreme Court of Finland No 28, paragraphs 15–17.
62 Judgement by the Supreme Court of Finland No 28, paragraphs 17–18.
63 *Arvopaperimarkkinalaki* 495/1989, repealed by *Arvopaperimarkkinalaki* 746/2012.

principles and concepts are not always easily transferable to the context of financial markets. The fact that regulation of investment services and securities markets is becoming more detached from classic private law constructs is particularly true for the traditional separation in civil law between tort and contract based damages, and for the assessment of the validity of contracts. The special nature of damages claims on financial markets has now been expressly recognized in Finnish law (see above). Finally, as the *Lehman* case well depicted, intermediated financial markets with high-degree of specialisation can make discerning the relevant private law relationships, and their legal evaluation, cumbersome.

In the absence of a strict, the MiFID-based client classification regime, in the majority of the cases the court relied on highly subjective *ex post* assessments of the plaintiffs' experience and background.[64] In the examined cases the courts considered it relevant that the financial instruments or insurance products marketed and sold were relatively new. This emphasized the banks' duty of care in disclosing material investor information in their marketing material as well as in private negotiations with the clients. The Court of Appeals in *Lehman* also held that this fact should be taken into account in considering the circumstances under which the investment decision was made. Indeed, such *ex post* applications do not fall far from the regulatory regime in force today.[65]

The next section will ask what role national courts could, and should, have in the future disputes between investment firms and their clients, given that their private law relationship is embedded in an increasingly self-sufficient EU rulebook. Will there be room for principles deriving for national private law and if so, should these principles allow the courts to go beyond the maximum harmonisation regime of the MiFID, which explicitly targets minimising Member States' discretion across Union financial services law?[66] Finally, could the courts take a more active role in interpreting principles deriving from the MiFID itself?

64 In fact, such case-by-case assessment have been common in European courts without the objective client classification regime in place. See Kruithof, n 17 above, 154–157. On the importance of such subjective assessments in Finland in general, see O. Norros, *Damages in Financial Markets* (FI: *Vahingonkorvaus arvopaperimarkkinoilla*) (Helsinki: Talentum, 2009) 384–389.

65 This approach is actually in alignment with the disclosure requirements of the MiFID II, art 24(4) regarding appropriate information to be provided to clients. In determining what constitutes the provision of information 'in good time', an investment firm should have regard to the urgency of the situation and take into account the client's need for sufficient time to read and understand it before taking an investment decision. More time should be required to review information when dealing with a complex or unfamiliar product or service. See MiFID II, Rec 83.

66 MiFID II, Rec 58.

4 What role for courts in investment firm-client disputes?

4.1 Regulation by litigation?

It has been argued that the landscape of securities law enforcement in Europe is transforming. After the MiFID, it was anticipated that the Courts would be 'relegated to the sidelines' in shaping the legal framework for the provision of investment services,[67] but more recently, it has been argued that detailed mandatory requirements in the area of EU securities law – something that few Member States had prior to EU intervention – provide a clearer legal basis for investor claims, and thus the EU regime for securities and investment services is developing towards 'regulation by litigation'.[68] This would bring the EU closer to a United States style 'adversarial, judicialised approach to enforcement with an increasing emphasis on private enforcement'.[69]

There is no doubt that few corners of financial services and markets have remained untouched by EU regulation since the 'seismic shift' brought about by the MiFID.[70] The MiFID II and MiFIR introduced fundamental reorientations in regulatory style and shifted more weight to effective supervision and enforcement (see above), but the updated regime is unlikely to bring major changes to the nature of private law rights underlying the investment firm–client relationship or related liability mechanisms.[71] Therefore, the fate of private enforcement, and for that matter the *eurolegalism* thesis to the extent it concerns investment services, will continue to be at least partly contingent on specific national circumstances. Two observations from Finland will suffice here.

First, the system of private enforcement in Finland is heavily dominated by the alternative dispute resolution service of the Finnish Financial Ombudsman.

67 Peter O Mülbert, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective', in G. Ferrarini and E. Wymeersch (eds), *Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond* (Oxford: Oxford University Press, 2006) 300.

68 R.D. Kelemen, *Eurolegalism: The transformation of law and regulation in the European Union* (Cambridge/Mass: Harvard University Press, 2011) 115.

69 Kelemen, n 68 above, 96.

70 See N. Moloney, *EC Securities Regulation* (2ed, Oxford: Oxford University Press, 2008) 356–357. For a concise assessment of the 'revolutionary' impact of the MiFID on especially market structure, see J.-P. Casey, and K. Lannoo, *The MiFID Revolution* (Cambridge: Cambridge University Press, 2009) 6–25.

71 As anticipated by Moloney, n 5 above, 419.

The Securities Complaints Board provides an informal and highly popular alternative dispute resolution scheme. The Board arguably lowers the threshold for customers to seek remedies. Between 2002 and 2012, the Board handled in total 283 cases. In 20 per cent of the cases the Board recommended compensation for the complainant.[72] The Board received over 150 complaints relating to Mermaid bonds alone, which put significant strain on its resources. Out of this, more than one hundred were settled.[73] For the rest, the Board's non-binding recommendations proved effective: the bank followed each of them and none of the customers continued to court.[74] Looking at the scarce Finnish case law dealing with misconduct of financial firms and related damages claims, it seems to hold true also for Finland that 'the role of the courts has been marginalised by the dominance of the Financial Ombudsman in adjudication in the retail sector.'[75] The EU legislator is unlikely to object to this development, given that setting up of out-of-the-court dispute settlement procedures is explicitly required in the MiFID.[76]

Secondly, Finnish consumer protection in general, and investor protection in particular, lacks a culture of effective collective redress.[77] The Finnish Class Action Act (444/2007) did finally introduce in Finland a collective enforcement mechanism, but the regime has been subject to critique. The Act applies only within the limits of the competence of the Consumer Ombudsman who also acts as a gatekeeper, by having exclusive standing to bring a class action. With regard to investment services, the Class Action Act specifically carves out civil cases that concern the conduct of an issuer of securities (Section 1) but the procedure could be applied to civil cases concerning eg alleged misselling of financial instruments or unit linked insurance plans.[78] To this date, not a single class action case has been brought to court.

72 Finnish Financial Ombudsman's Service, Annual Report 2012, 15. Year 2013 was a peculiarity for the Securities Complaint Board as out of 14 cases it handled the Board did not issue one opinion finding compensation appropriate.

73 Finnish Financial Ombudman's Service, unpublished presentation, 20 March 2012 (on file with the author).

74 Finnish Financial Ombudman's Service, unpublished presentation, 20 March 2012 (on file with the author).

75 I. MacNeil, 'Editorial' (2013) 7 *Law and Financial Markets Review* 135.

76 See MiFID, art 53 and MiFID II art 75.

77 In Sweden a class action case involving more than two hundred retail investors was raised against a bank that allegedly missold similar Lehman bonds than in Finland. See 'HD ska pröva frågan om grovt rättegångsfel vid grupptalan mot kapitalförvaltare', Dagens Juridik, 8 April 2014, http://www.dagensjuridik.se/2014/.

78 Government Bill HE 154/2006, 33.

4.2 Courts and more formalized investor protection

Extensive EU regulation of financial services represents well the character of European regulatory private law as a self-sufficient legal order that is distinguishable from national private legal orders.[79] The effectiveness of the EU investor protection regime therefore depends not only on how it interacts with national systems of enforcement, but also on how it will interact with the plurality of national private legal orders.

The cases above demonstrated well how the Courts filled regulatory gaps with materially oriented private law concepts and principles. An important question thus is, whether a more detailed investor protection regime laid down by EU rules will actually make such material private law assessments redundant, replacing them with a more formalized compliance regime – in a way bringing the logic of supervisory law into the realm of private law.[80] Formalization of the law on investment services is naturally connected to the way the law is enforced. Wymeersch's following comment from 1997 summarizes well also the situation today:

> 'The EC directives dealing with securities matters are mainly a matter of administrative oversight. Although they reflect on private law relations, their first purpose is not to deal with relations among investors, but with the organization, oversight and, to a lesser extent, enforcement of the rules governing securities markets and transactions. This feature directly affects remedies: these have been conceived more in terms of administrative action, or by imposing penal sanctions, than by way of allowing enforcement through means of private law.'[81]

The Finnish law on the provision of investment services continues to state clearly that whoever breaches the Act's rules will be liable for the damage caused; but should this also mean that to be compliant means to be safe from private law claims?[82] It is here where European regulatory private law, the form, procedure

79 On self-sufficiency of EU regulatory private law, see H.-W. Micklitz, 'A self-Sufficient European Private Law – A viable Concept', in H.-W. Micklitz and Y. Svetiev (eds), *A self-Sufficient European Private Law – A viable Concept*, EUI Working Papers LAW 2012/31, European Regulatory Private Law Project (ERPL – 01) European Research Council (ERC) Grant.

80 Cherednychenko, while acknowledging that such clashes are possible, also notes that the tension between these different logics are mitigated by the 'radiating effect of supervision standards on private law'. Cherednychenko, n 15 above, 944–945.

81 Wymeersch, n 13 above, 204.

82 As noted by Cherednychenko (n 15 above, 933), 'the adoption of a comprehensive regulatory framework for investment services may give an impression that it contains all substantive rules that investment firms must comply with when providing their services to (potential) clients and that the firms duly observing regulatory standards should not be concerned about their potential and content of which becomes from its instrumentalisation for building and shaping markets,[83] is at risk of exhuming the less formal aspects of national private law.[84] This risk could be especially acute in private law regimes such as Finland's, where contract law traditionally distinguishes between material and formal (or procedural) regulation.[85] The purpose of material regulation is to favour the weaker party, eg by giving him or her 'an advantage concerning the contents of the contract, and taking into account the requirements of an "ideal" contract balance and a solidarity duty of the stronger party towards the weaker.'[86] There are examples of such tensions between specialised financial regulation and principles-based private law. In the UK, recent case law has dealt with the question of whether common law duties and remedies could complement the perceived shortcomings in the highly detailed statutory investor protection regime.[87] Lord Hodge in the case *Grant Estates Ltd (In Liquidation)* v *The Royal Bank of Scotland* adopted an approach based on a clear separation between these two domains:

> 'Looking to the policy of the FSMA one discovers that it provides protection to consumers of financial services through a self-contained regulatory code and statutory remedies for breach of its rules. As I have said, it needs no fortification by the parallel creation of common law duties and remedies.'[88]

Advocates for such systematic separation between national private law regimes and EU regulatory code can be found from academy as well. The 'separation' prescription can be based on at least two basic arguments. First, because the MiFID provides a well-developed and sophisticated investor protection system,

civil liability.' (However, noting that the impression is 'not entirely correct' and that both general and specific private law duties should be observed as well).

83 Micklitz, n 79 above, 16.

84 This risk is described by Svetiev in the following way: 'If indeed EU interventions, now also intruding deeply into horizontal private relationships, have a narrow mandate and a specific rationality and if such a rationality is now ensnaring national actors and institutions, this can have particularly deleterious consequences as it extinguishes the tools for the pursuit of a diversity of public policy objectives at the altar of liberalisation.' Y. Svetiev, 'Dimensions of Self-Sufficiency', EUI Working Paper, European Regulatory Private Law Project (ERC-ERPL – 05), LAW 2013/05, 3.

85 See eg M. Rudanko, 'Is there Scope for the Protection of the Weaker on Financial Markets?' *Tidskrift utgiven av Juridiska föreningen i Finland JFT*, 3–4/2009, 532–544, 544.

86 M. Rudanko, 'Is there Scope for the Protection of the Weaker on Financial Markets?' JFT 3–4/2009, 532–544, 544.

87 MacNeil, n 75 above, 135–137.

88 Judgement of the Court of Session of Scotland, *Grant Estates Ltd (In Liquidation)* v *The Royal Bank of Scotland*, 21 August 2012, paragraph 79.

the risk that the application of its *ex ante* rules would lead to unacceptable *ex post* solutions seems theoretical. Second, the general need for legal certainty argument speaks against unpredictable application of national private law principles which would add to already demanding MiFID duties.[89] On the other hand, the opposite argument against such strict separation holds that national private law provides an important safeguard, because despite *many* private law duties of care are represented in MiFID, not *all* of them are included.[90]

It would be an unnecessary bet to trust that the MiFID's self-sufficiency seeking conduct of business rules now provide an answer to every imaginable legal problem that can arise between investment firms and their clients. But rather than having each court digging into their intrinsic private law doctrines for answers, as a middle way approach we should concentrate first on the principles laid down in the MiFID itself – many of which actually have their basis in national private law frameworks.[91] Let us take the principle of duty of care (or loyalty principle) as an example. The duty to act honestly, fairly and professionally in the best interests of clients was already laid down in the ISD. This principle is different from many other conduct of business requirements, in that its application is not dependent on the MiFID's client classification system, but it has an overarching function applying to the relationship with any client. The same applies to the general obligation to be fair, clear and not misleading.[92] These principles indeed give further latitude to national courts,[93] but unfortunately they are useful only to a certain point. Given that such directive-based principles unavoidably lack direct effect, national courts must in any case take recourse to national law.

One can also ask why principles-based enforcement via courts is necessary in the first place? A pessimistic view is that there is a real risk that once fully operationalized in the everyday interaction between investment firms and their customers, EU investor/consumer protection regime can install a system that is more effective in terms of formal compliance than substantive, material investor protection. A carefully operationalized 'tick the box' compliance regime could, while emphasising informed choice and disclosure, reinforce the principle of *caveat emptor* rather than advance substantive protection of vulnerable investors. Therefore, the EU's investor protection regime, largely representing what has

89 Busch, n 7 above, 395–396.

90 Cherednychenko, n 15 above, 935–936.

91 See Cherednychenko, n 15 above, 931–932.

92 This is underlined in MiFID II, Rec 86.

93 Busch also remarks that MiFID's principles-based provisions should give national civil courts 'sufficient latitude to render justice in individual cases.' Busch, n 7 above, 396.

been called administrative paradigm,[94] should not foreclose more general principles-based enforcement action through civil courts. These two enforcement dimensions represent different paradigms of securities regulation and they should not only compete, but also coexist.[95] More intrusive administrative intervention to the private law relationship between investment firms and their clients, as envisaged by the updated MiFID regime, may make the administrative paradigm more complete but it does not make the private law dimension redundant. In the EU, however, the tension between the two competing paradigms has its own dynamics, as the administrative, rule-based paradigm is being more forcefully imposed from above as a supranational legal order, while principles-based enforcement action continues to stem from the plurality of national private law systems.

Finally, it should be acknowledged that out-of-the-court dispute settlement procedures can offer great help in checking compliance with the expanding investment services rulebook, and offer a more approachable, cheap and effective redress procedure. But bodies of that nature fall short of the authority vested in courts and may risk turning the process of adjudication into a managerial exercise. Compared to courts, most extra-judicial dispute resolution schemes must also cope with certain important procedural shortcomings. For instance, the Finnish Securities Complaints Board must rely solely on written evidence and it lacks procedural powers to gain essential evidence. Accordingly, closer attention should be paid to the procedural limits of such out-of-the courts dispute resolutions schemes.[96]

5 Concluding remarks

This paper tackles the broad issue of what role national civil courts should play in the enforcement of the EU's intensifying investor protection rulebook. A majority of European investors harmed in the 2007–2008 crisis were not protected by the MiFID regime and therefore the next crisis will probably be different. However, the Finnish cases examined demonstrate how the courts can fill regulatory gaps

94 J.J. Park, 'The Competing Paradigms of Securities Regulation' (2007) 57 *Duke Law Journal* 625.
95 Park, n 94 above.
96 In Finland, for example, a risk has been identified that too much procedural disparity between general courts and the Securities Complaints Board can materially affect the outcome of the disputes. S. Wuolijoki, 'Prosessioikeudelliset periaatteet Arvopaperilautakunnassa' (Procedural principles in the Securities Complaints Board), in L. Sisula-Tulokas, I. Luukkonen, E. Sirén and V. Raulos (eds), *Vakuutus- ja Rahoitusneuvonta 40 vuotta* (Helsinki: Julkaistu, 2011).

with material civil law principles. Principles provide flexibility, which highly detailed rules lack. The EU's investor protection regime, on the other hand, is representative of the administrative paradigm, which relies on an increasingly detailed rulebook and, after the MiFID II/MiFIR, more interventionist style of supervision and enforcement. This tendency is at risk of foreclosing more principles-based enforcement action via national courts, where national private law not only fills regulatory gaps, but also embodies the principles vested in the MiFID regime. Lastly, it should be emphasized that rather than advocating a principles-based enforcement system as a *superior* enforcement model over a more predictable and rules-based administrative paradigm, this paper tries to argue for their co-existence as complementary systems of enforcement. Investors will benefit if more effective ex ante rules protect them against taking unplanned, unwanted and even unsuitable risks in the first place.